6 October 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SCOTT M. DEASE, JR.
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. 2011-04
USCA Dkt. No. - /AF

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Appellee,	)	**FOR GRANT OF REVIEW**
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SCOTT M. DEASE, JR.,	)	
USAF,	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING APPELLANT HAD ABANDONED HIS URINE AND THUS HAD NO REASONABLE EXPECTATION OF PRIVACY WHERE APPELLANT CONSENTED TO THE SEIZURE OF HIS URINE AND THEN REVOKED CONSENT PRIOR TO THE SEARCH OF APPELLANT'S URINE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 62, UCMJ, 10 U.S.C. § 862. This Court has jurisdiction to review this case under Article 67, UCMJ, 10 U.S.C. § 867; *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008).

Statement of the Case

On 6 April 2011, charges were referred against Appellant. The charges consisted of the following: one charge with three specifications alleging violations of Article 92 for wrongful use of intoxicating substances other than alcohol; one charge

with one specification alleging a violation of Article 111 (operating a vehicle under the influence of cocaine); one charge with one specification in violation of Article 112a (use of cocaine); one additional charge with one specification alleging a violation of Article 92 (failure an order by wrongfully possessing an intoxicating substance); and a second additional charge alleging two specifications in violation of Article 107 (false official statements). *See* Charge Sheet, R. at 11.1-11.5.

On 13 April 2011, the defense filed a motion to suppress the results of the urinalysis test and derivative evidence. App. Ex. III. On 22-23 April 2011, the Military Judge conducted a preliminary hearing with respect to the motion to suppress. On 23 April 2011, the Military Judge granted the defense motion and suppressed the results of the urinalysis, Appellant's 26 August 2010 statement, and the evidenced seized on 26 August 2010. R. 316-17.

On 24 April 2011, the United States filed a motion to reconsider. App. Ex. VII. On 25 April 2011, the Military Judge considered additional testimony, reconsidered his ruling, and denied the government's request to reconsider his conclusions of law. R. 426. The government filed its notice of appeal the same day. R. 426; App. Ex. XVIII.

On 29 September 2011, the Air Force Court of Criminal Appeals (AFCCA) granted the government's appeal under Article 62

and vacated the ruling of the Military Judge. *United States v. Dease*, Misc. Dkt. No. 2011-04 (A.F. Ct. Crim. App. 29 September 2011) (unpub. op.) [Appendix A].

Statement of Facts

Background

On 21 May 2010, the Air Force Office of Special Investigations (AFOSI) approved the recruitment of Appellant as a confidential source (CS). App. Ex. XIX, para. 1.[1] AFOSI had previously determined that Appellant had access to a female British national (TARGET) who was suspected of dealing drugs. *Id.* Because Appellant was "clean," had a security forces background, and had a pre-existing relationship with TARGET, AFOSI wanted to use him to buy narcotics from TARGET. *Id.*.

On 28 May 2010, AFOSI's primary handling agent, Special Agent (SA) Slysz, met with Appellant. App. Ex. XIX, para. 2. SA Slysz tasked Appellant with engaging TARGET in a conversation about narcotics and the possibility of purchasing marijuana, cocaine, and ecstasy. *Id.*

On 30 May 2010, Appellant informed SA Slysz that TARGET was trying to purchase cocaine and that a shipment of cocaine and marijuana was expected soon. App. Ex. XIX, para. 3. The next day, Appellant informed SA Slysz that he met with TARGET and

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[1] The Military Judge's Findings of Fact are found in App. Ex. XIX, pages 1-7. Analysis, pages 7-18).

discussed buying marijuana. App. Ex. XIX, para. 4. SA Slysz tasked Appellant with contacting TARGET and establishing a time when she could get him a half-ounce of marijuana. *Id.*.

On 3 June 2010, SA Slysz instructed Appellant to contact TARGET to discuss purchasing marijuana and cocaine. App. Ex. XIX, para. 5. On 14 June 2010, Appellant called SA Slysz and they arranged to meet in person in two days to discuss TARGET. *Id.*

Circumstances Leading up to Appellant's Consent

On 15 June 2010, at approximately 1900 hours, Appellant's vehicle was observed by a British surveillance system that was set up in a known district for narcotic activity. App. Ex. XIX, para. 7. An unidentified passenger in the vehicle exited the vehicle, appeared to purchase narcotics, and then returned to the vehicle. *Id.* British law enforcement contacted RAF Lakenheath and requested a vehicle stop. App. Ex. XIX, para. 8. At 2142 hours, Appellant was stopped at the gate. App. Ex. XIX, para. 10. Both Appellant and his passenger, Mr. Clements (a British national), were searched. App. Ex. XIX, para. 11. Appellant's vehicle was searched as well. *Id.*.

No evidence of illegal drug use was discovered during the searches. *Id.* Nothing about the demeanor of Appellant or Mr. Clements suggested they were under the influence of narcotics. *Id.* A military working dog walked around the vehicle and did

not alert for drugs within the vehicle. *Id.*. After a failure to discover any incriminating evidence, the constables drove Mr. Clements home. App. Ex. XIX, para. 14. No charges were ever filed against Mr. Clements. *Id.*

An unused decorative pipe in sealed packing was found in the glove box. App. Ex. XIX, para. 12. The pipe was not identified as drug paraphernalia. *Id.* Appellant stated it was a souvenir from a deployed location and both Police Constable O'Brien, Ministry of Defence constabulary, and MSgt Ortega-LLarena, Security Forces Office of Invstigations (SFOI), both recognized the pipe as decorative and did not associate the pipe with drug use. *Id.* The government at trial attempted to argue the existence of a second pipe, but the Military Judge found that the government did not prove the existence of a second pipe by a preponderance of the evidence. App. Ex. XIX, para. 13.

Appellant was questioned by MSgt Ortega-Llarena. App. Ex. XIX, para. 16. Appellant told MSgt Ortega-Llarena that he worked for AFOSI, that he was driving to see a British National, and that he was doing so as part of the investigation. *Id.* He said the TARGET asked him to pick up Mr. Clements. *Id.* When Appellant called AFOSI to confirm Appellant's story, SA Slysz denied that Appellant was working for AFOSI. *Id.*. MSgt Ortega-Llarena believed that there was more to what was going on that what SA Slysz was stating. App. Ex. XIX, para. 17. MSgt

Ortega-Llarena testified that he believed Appellant's story that he was working for AFOSI was legitimate. R. 75.

Appellant stated to MSgt Ortega-Llarena that he picked up Mr. Clements as a favor for TARGET and as part of his work for AFOSI. App. Ex. XIX, para. 18. Appellant said Mr. Clements purchased crack cocaine and smoked it while Appellant drove around. *Id.* Appellant denied smoking the crack cocaine himself. *Id.* Appellant then voluntarily consented to a search of his dormitory room, his vehicle, and his urine. *Id.* The search of his dormitory room and vehicle were negative for evidence of drug use. *Id.*

SFOI did not pursue any further investigative leads. App. Ex. XIX, para. 20. The Military Judge found that SFOI's investigation consisted solely of waiting for the results of the urinalysis. *Id.* The Military Judge also found that if the drug test came back negative that SFOI would have formally closed Appellant's investigation. *Id.* SFOI had no intention of questioning Appellant further about the 15 June incident and did not intend to conduct any additional searches. *Id.* 20.

MSgt Ortega-Llarena testified that if he had realized Appellant revoked consent, he would have sought additional guidance from the legal office. App. Ex. XIX, para. 25. It is unclear whether SFOI would have conducted any additional investigation. *Id.*

Continued Relationship with AFOSI

The day after Appellant consented to have his urine searched, he again met with SA Slysz to discuss what happened the previous night. App. Ex. XIX, para. 19. Appellant told SA Slysz the same information he previously told MSgt Ortega-Llarena. *Id.* SA Slysz did not suspect Appellant used drugs that night and wanted Appellant to continue to meet with TARGET and emphasized he did not want Appellant to reveal his association with AFOSI to anyone. *Id.*

Appellant Revokes his Consent

On 21 June 2010, Appellant signed a notification of representation memorandum, stating in part:

> This is to inform you that I am currently represented by, and have an attorney-client relationship with Captain Joshua A. Goins pertaining to all potential military adverse actions. … I request that you not interview, interrogate, or question me and that you not ask me to make any statements, oral or written, unless and until you have contacted my attorney and he has given express written consent thereto. Furthermore, ***any prior consent for search, samples or any other procedure is hereby withdrawn.***

App. Ex. XIX, para. 21 (emphasis added in the original). This memorandum was sent to the Chief of Military Justice, the Security Forces Squadron Commander, the Security Forces Squadron First Sergeant, MSgt Ortega-Llarena, and to AFOSI. *Id.*.

Actions Taken After Consent was Revoked

In late July, Appellant's urine sample was sent to the Air Force Drug Testing Laboratory for analysis. App. Ex. XIX, para. 26. The sample tested positive for a metabolite of cocaine. *Id.* MSgt Ortega-Llarena set up a follow-up interview with Appellant. App. Ex. XIX, para. 28. MSgt Ortega-Llarena forgot that Appellant was represented by counsel. *Id.* Appellant initially claimed his sample was positive because he was in the same car with Mr. Clements, but eventually he admitted to smoking cocaine on the night of 15 June 2010. App. Ex. XIX, para. 33.

Additional facts relevant to the assigned errors are discussed in the arguments below.

Summary of Argument

AFCCA erroneously held that Appellant's consent to a seizure of his urine was the functional equivalent of Appellant abandoning his urine. Appellant never abandoned his urine; he consented to its seizure by the government for subsequent search via chemical testing for the presence of controlled substances. In so doing, Appellant retained a reasonable expectation of privacy such that the government was not permitted to search his urine beyond the scope of the consent. Before any such search occurred, Appellant validly withdrew his consent to a search of his urine.

AFCCA's opinion conflates two distinct legal principles: consent and abandonment. By erroneously treating a urine sample obtained by consent as if it had been obtained after it was abandoned, , AFCCA undermines the plain language of M.R.E. 314(e)(3), which states that consent "may be withdrawn at any time." By nullifying Appellant's ability to revoke his consent to a search of his urine, AFCCA's opinion effectively deems as reasonable the government's indefinite use and enjoyment of Appellant's urine for whatever purpose for as long as the government so chooses. AFCCA's opinion is inconsistent with the Supreme Court's holding in *Skinner* and the long recognized privacy interest in the collection and testing of bodily fluids because of the intimate details that can be revealed through their chemical analysis.

Once Appellant withdrew his consent to search his urine, the government had no authority to search his urine. Probable cause did not exist to justify a search authorization and, as the Military Judge found, SFOI would not have sought a search authorization; therefore, the Military Judge correctly determined that the inevitable discovery doctrine did not apply.

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING APPELLANT HAD ABANDONED HIS URINE AND THUS HAD NO REASONABLE EXPECTATION OF PRIVACY WHERE APPELLANT CONSENTED TO THE SEIZURE OF HIS URINE AND THEN REVOKED CONSENT PRIOR TO THE SEARCH OF APPELLANT'S URINE.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Clayton*, 68 M.J. 419, 423, 423 (C.A.A.F. 2010). An abuse of discretion occurs when this Court determines that the Military Judge's findings of fact are clearly erroneous or that the Military Judge misapprehended the law. *Id.*

Law and Analysis

Military Rule of Evidence (M.R.E.) 314(e)(1) states that "searches may be conducted of any person or property with lawful consent." M.R.E. 314(e)(3) states that "consent may be limited in any way by the person granting consent, including limitations in terms of time, place or property and may be withdrawn at any time." *See also United States v. Wallace*, 66 M.J. 5, 7 (C.A.A.F. 2008). AFCCA's opinion never references M.R.E. 314.

The collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable and these intrusions must be deemed searches under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). A chemical analysis of urine can reveal a host of private medical facts about an individual, including whether he or she is epileptic, pregnant, or diabetic. *Id.; see also Vernonia School Dist. 47J v. Acton*, 515 U.S. 646,

658 (1995)("The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested.")

Because a chemical analysis of urine, a urinalysis, intrudes upon a reasonable expectation of privacy, a person maintains a privacy interest in the urine after the urine has left the person's body. Therefore, a person may revoke consent to an analysis (search) of the person's urine after it has left the body in order to avoid a further invasion into the person's privacy interests as described in *Skinner*. Under a plain reading of M.R.E. 314(e)(3), the Military Judge correctly determined that Appellant could revoke his consent to a search of his urine after providing a sample because of the privacy interest Appellant retained in his urine. *See* App. Ex. XIX, para. 50 ("An accused that consents to provide a urine sample for testing maintains a significant privacy interest in the urine sample.").

Plain Language of M.R.E. 314(e)(3)

A plain reading of the phrase "at any time" means the Appellant could revoke consent prior to the urinalysis (search) of his urine. The Government at trial conceded that a literal reading of M.R.E. 314(e)(3) prevents law enforcement from testing a urine sample after consent is withdrawn. App. Ex. IV at 5, para. 19. "It is a well established rule that principles

of statutory construction are used in construing the Manual for Courts-Martial in general and *the Military Rules of Evidence in particular*." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007)(emphasis added). The most basic canon of statutory construction is that language is to be applied according to its plain terms. "[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and quotation marks omitted)). Because a person may withdraw consent at any time, M.R.E. 314(e)(3) also implicitly states through its plain language that the consenting person retains a privacy (and/or possessory) interest in the item being seized or searched.

Appellant does not contest that the extraction of urine was by consent; however, law enforcement violated Appellant's Fourth Amendment rights and M.R.E. 314(e)(3) when they searched that sample through the urinalysis process after consent had been withdrawn. Both the seizure and the subsequent search after Appellant's revocation require separate analyses under the Fourth Amendment. *Wallace*, 66 M.J. at 8. An extraction of bodily fluids will not in and of itself provide evidence of the

use of controlled substances. It is the later chemical analysis of the urine that constitutes the search.

AFCCA's Analysis of Appellant's Case

As stated above, surprisingly, AFCCA never references M.R.E. 314(e)(3) or its application to Appellant's case. If the lower court had interpreted M.R.E. 314(e)(3) based upon its plain language, then it would be clear that Appellant had the right to revoke his consent. Instead, AFCCA bypassed the plain language of M.R.E. 314(e)(3) and the plain language of Appellant's revocation of consent and instead based its ruling on whether the government's search of Appellant's urine via chemical analysis was reasonable. The only way such a search could be deemed reasonable under the circumstances would be if Appellant's privacy interest in the urine were somehow lost – abandoned - prior to Appellant's revocation of consent. In concluding that Appellant had abandoned his privacy interest in the urine at the time of seizure, AFCCA conflated two distinct legal concepts – abandonment and consent – and treated Appellant's consent to a seizure of his urine as the functional equivalent of Appellant abandoning his urine.

Appellant never abandoned his urine, nor did he communicate anything to SFOI that could be construed as such. Appellant consented to a search of his vehicle, his quarters, and his bodily fluids for the express purpose of finding or testing for

the presence of controlled substances. Consent for Search and Seizure Form, App. Ex. III, p. 13. Nothing on the face of the Form indicates that Appellant was conveying ownership to the government or relinquishing his privacy (or possessory) rights in his car, his quarters, or his bodily fluids. As stated previously, under M.R.E. 314(e)(3), one aspect of consent is the right to revoke that consent before a further search is made. By providing Appellant with a right to revoke consent to further searches, the President expressly provided Appellant with some measure of ongoing control (i.e., retention of the privacy/possessory interest) over his urine sample, which is inconsistent with an abandonment rationale. AFCCA's abandonment rationale, therefore, is inconsistent not only with M.R.E. 314(e)(3)'s literal text (as the Government conceded at trial), but also with necessary implications arising from M.R.E. 314(e)(3).

AFCCA's erroneous application of the concept of abandoned property to Appellant's consent/revocation case is based upon AFCCA's determination that "urine is by definition a waste product which will ultimately be destroyed and in which no continuing reasonable expectation of privacy exists." *Dease*, slip. op. at 4. This holding is inconsistent with both *Skinner* and this Court's holding in *Wallace*.

Application of Skinner and Wallace

As stated previously, the Supreme Court in *Skinner* held that a chemical analysis intrudes upon a reasonable expectation of privacy; it follows that a person maintains a privacy interest in the urine after the urine has left the person's body. Appellant's consent to the search of his urine did not destroy his privacy interest in his urine as AFCCA erroneously concludes. The Military Judge was correct in stating that a person who provides a urine specimen has "a reasonable expectation that the government will properly secure his sample and prevent unauthorized access, tampering, or testing of that sample." *Dease*, slip op. at 4 (quoting App. Ex. XIX, para. 50); (*see also* App. Ex. XIX, para. 50, where the Military Judge correctly concludes that the Military Rules of Evidence treat abandoned property and consent searches as separate and distinct legal concepts.)

When Appellant consented to a chemical search of his urine, Appellant was consenting to an intrusion into his privacy interest in his urine by the government. As the Military Judge noted, Appellant was not relinquishing his privacy interest in his urine, because Appellant still had a privacy interest insofar as the government would not do anything with his urine beyond the scope of the consent. To say that Appellant completely abandoned his privacy interest in his urine when he

consented to its seizure by the government exposes Appellant to numerous intrusions into his privacy while leaving him with no recourse for redress. The government could run a battery of tests on his urine to check for conditions such as epilepsy or diabetes. If Appellant were female, the government could check to see if Appellant was pregnant. The government could obtain a DNA profile from the urine and hold the DNA until such time as it becomes practicable to genetically clone Appellant's DNA. Or, perhaps, the government could transfer or sell the urine to other entities to carry out any of the above scenarios.

Based upon AFCCA's ruling conflating abandonment with consent, Appellant would have no recourse to challenge any of the above actions by the government - despite the above actions being outside the scope of the original consent - because, as AFCCA puts it, Appellant has no privacy interest in his urine because it is waste and AFCCA assumes, without any basis for doing so, that the government will simply destroy the urine and not exceed the scope of the search.

AFCCA's opinion is also inconsistent with this Court's holding in *Wallace*. This Court stated that when the appellant in *Wallace* revoked consent to the seizure of his computer, he was not revoking his original consent to the search of his premises. *Wallace*, 66 M.J. at 8 ("Appellant may have revoked his consent to seize the computer, but disapproval of the

seizure cannot, without more, affect the consent to search in the first place.”). This Court went on to say that “while Appellant consented to both a search and any attendant seizures, his pleas to investigators to leave the computer revoked his consent to that particular seizure, but not to the search.” *Id.* at 8. *Wallace* further stated that searches and seizures “necessitate separate analyses under the Fourth Amendment.” *Id.* at 8. The *Wallace* Court cited *Skinner* and noted “that the warrantless seizure of blood from railroad employees and the subsequent chemical analysis of the blood constituted separate invasions of the employees’ privacy interests.” *Id.*

In deciding *Wallace*, a case involving the search of electronic media for illegal material, this Court drew an analogy to *Skinner*, which involved bodily fluids. AFCCA, however, did not find the analogy persuasive based upon its determination that urine is waste and declined to extend its two-part (seizure then search) analysis to Appellant’s case, despite *Skinner*, *Wallace*, and its own decision doing so in *United States v. Cote*, Misc. Dkt. No. 2009-15 (6 April 2010) (unpub. op.) [Appendix B.]. In *Cote*, AFCCA construed the warrant “with the view that computer searches are a ‘two-step process’ of first seizing devices and media and then later searching the data.” *Cote*, slip op. at 3. Yet, in Appellant’s case, AFCCA declines to use this analysis because AFCCA believed

that Appellant had no "possessory or privacy interest [in the urine] after voluntarily providing it to the government for analysis." *Dease*, slip op. at 4.

AFCCA has no basis to draw a distinction between bodily fluids and cases involving electronic media or other forms of property and this Court should find that AFCCA's distinction is erroneous. Such a distinction erroneously led to AFCCA's incorrectly dismissing Appellant's revocation out of hand when AFCCA stated that "a revocation of consent to seize a urine specimen does not revive an expectation of privacy in a urine sample surrendered to the government." *Dease*, slip op. at 4. First, AFCCA is implicitly acknowledging that Appellant sought to revoke consent under M.R.E. 314(e)(3) and that this revocation of consent was clear and unambiguous. Second, there is no need to "revive" such an expectation of privacy because – consistent with *Skinner* and M.R.E. 314(e)(3) – Appellant always maintained a privacy interest in the urine itself.[2]

[2] AFCCA also states that its holding in *United States v. Pond*, 36 M.J. 1050 (recon)(A.F.C.M.R. 1993) "did not state that the expectation of privacy in the normal action of urination survives after *voluntarily* providing a urine specimen to the government" (emphasis in original). This misses the point entirely; first, AFCCA is bound by *Skinner* which states that a person retains a privacy interest in the urine once it leaves the body. Second, Appellant's consent to search his urine allowed for an intrusion into his privacy interest. As stated above, allowing an intrusion into Appellant's privacy interest did not relinquish the privacy interest in its entirety. Doing so not only thwarts any subsequent revocation of consent, but would also eliminate Appellant's ability to seek redress against the possibility of intrusions beyond the scope of the consent, leaving Appellant vulnerable to warrantless, unreasonable searches and seizures by the government.

Inapplicability of Venner and Dodd

AFCCA's reliance on non-military cases such as *Venner* and *Dodd* is equally unpersuasive as neither of these cases arise in a context with a rule equivalent to M.R.E. 314(e)(3). *See Venner v. State*, 367 A.2d 949 (Md. 1977); *Dodd v. Jones*, 623 F.3d 563 (8th Cir. 2010). Nor are the Maryland Court of Appeals or the United States Court of Appeals for the Eighth Circuit bound by this Court's *Wallace* opinion as AFCCA was.

In *Venner*, Venner was admitted to a Baltimore hospital in a semiconscious condition. *Venner*, 367 A.2d at 950. The attending physician concluded, based on his own observations and information from Venner's friends, that Venner was suffering from a narcotic overdose caused by the leakage of hashish oil from balloons in Venner's stomach. *Id.* X-ray examination revealed the presence of 12 to 15 balloons. *Id.* The police were notified and subsequently seized the balloons once excreted and analyzed them for the presence of drugs. *Id.* The Maryland Court of Appeals held that the balloons were abandoned once excreted from Venner's body. *Id.* at 949.

Venner has no relevance to Appellant's case. The seizure and search of the balloons was not done after obtaining consent from Venner. Moreover, *Venner's* holding is also irrelevant given the presence of probable cause from the outset and the establishment of the inevitable discovery doctrine in *Nix v.*

Williams, 467 U.S. 431 (1984) and the fact that Appellant's case is controlled by M.R.E. 311(b)(2).[3]

Dodd was a 42 U.S.C. § 1983 suit that arose from a unique set of circumstances, one of which was the police's seizure and analysis of Dodd's blood under exigent circumstances. *Dodd*, 623 F.3d at 564. Summary judgment was granted for the police officers and the 8th Circuit affirmed. The Court dismissed this particular cause of action based upon the fact that the police obtained Dodd's blood under exigent circumstances, thus there was no need for subsequent justification for the chemical analysis of the seized blood. *Dodd*, 623 F.3d at 569.

Dodd's analysis is consistent with *Schmerber v. California*, 384 U.S. 757 (1966), and its progeny setting forth the 4th Amendment exigent circumstances exception to the warrant requirement. In *Dodd*, probable cause existed and exigent circumstances to preserve evidence necessitated seizing the evidence immediately and not before receiving a warrant to do so. And, as such, *Dodd* has no relevance to Appellant's case. Once again, Appellant's case involved consent to search and Appellant's subsequent revocation of consent under M.R.E. 314(e)(3). Exigent circumstances did not exist in Appellant's case.

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[3] For reasons set forth below, the inevitable discovery doctrine does not apply in Appellant's case for lack of probable cause.

Conclusion on Issue Presented

The government seized Appellant's urine pursuant to lawfully given consent. But the government did not test the sample right away. Instead, the government let the sample sit in an office for nearly two months. Within six days of giving consent, Appellant revoked his consent. The government could retain the seized urine, but once consent to search was revoked, the government was prohibited from conducting further intrusions into Appellant's privacy based on a consent rationale. Therefore, given the Supreme Court's recognition of a privacy interest in the information disclosed from a urine sample and the plain meaning of M.R.E. 314(e)(3), AFCCA erred by overturning the Military Judge's correct determination that Appellant's revocation of consent was valid and the search of his urine was an unlawful search. App Ex. XIX, para. 51. Absent probable cause, which the government lacked, the government had no lawful basis upon which to perform an analysis of Appellant's urine.

AFCCA's opinion erroneously conflates two distinct legal concepts, abandonment and consent, fails to apply the plain meaning of M.R.E. 314(e)(3) to Appellant's case, and draws a legally unjustifiable distinction between bodily fluids and other forms of property. Appellant never abandoned his privacy interest in his urine, the President authorized Appellant to

withdraw his consent at any time, Appellant did so, and the search subsequent to Appellant's revocation of consent was a violation of Appellant's Fourth Amendment protection against unreasonable searches by the government.

This Court should grant review to determine whether AFCCA erred in reversing the Military Judge's ruling. In this Article 62 context, if this Court grants review, there would be no additional briefing on the merits. See C.A.A.F. R. 19(a)(7)(A). Accordingly, Appellant now addresses the proper remedy if this Court were to grant review.

Additional Issue of Inevitable Discovery

Congress favors the speedy resolution of Article 62 appeal cases. *See* Art. 62(b), 10 U.S.C. § 862(b) (2006). If this Court were to grant review and agree with Appellant that AFCCA erred in reversing the military judge's ruling that testing of Appellant's sample was an impermissible search, it would be faced with two choices: (1) this Court could itself proceed to decide whether the evidence would have been inevitably discovered – an issue not addressed by AFCCA; or (2) this Court could remand to AFCCA for an inevitable discovery determination. The first course is by far the more expeditious. Therefore, in keeping with Congress's preference for the speedy disposition of Article 62 appeals, this Court should proceed to address the inevitable discovery issue itself and affirm the military

judge’s well-reasoned holding that the government did not meet its burden to demonstrate that the evidence derived from the testing of Appellant’s urine sample would inevitably have been discovered.

Inevitable Discovery Standard of Review

Where, as here, the issue was litigated at trial, the standard of review for an inevitable discovery issue is abuse of discretion. *United States v. Kaliski*, 37 M.J. 105, 109 (C.M.A. 1993).

Inevitable Discovery Law and Argument

Probable cause to search is established when information leads a reasonably prudent person to conclude that items properly the subject of a search are located in the place to be searched. M.R.E. 315(f)(2); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Chick*, 30 M.J. 658, 662 (A.F.C.M.R. 1990)(“mere suspicion is an insufficient basis”).

M.R.E. 311(b)(2) states “Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.” *See also United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982); *Nix v. Williams*, 467 U.S. at 444. The language of *Kozak* makes clear that appellate courts should apply inevitable discovery doctrine of inevitable discovery should be applied “carefully and narrowly.” *United States v.*

Haye, 25 M.J. 849 (A.F.C.M.R. 1988), *rev'd on other grounds*, 29 M.J. 213 (C.M.A. 1989); *see also United States v. Butner*, 15 M.J. 139, 143 (C.M.A. 1983). As the AFCMR stated in *Chick*:

> "The inevitable discovery rule is legal dynamite. Improperly used, it can blow the Fourth Amendment to smithereens. Judiciously applied, it can implement the rationale behind the exclusionary rule. The difficulty lies in applying the rule with sufficient discretion so as to satisfy both the rights of the individual and those of military society."

30 M.J. at 659. Before applying the inevitable discovery rule, an appellate court "must be convinced by a preponderance of the evidence that the same evidence would have been obtained by some lawful means." *United States v. Williams*, 54 M.J. 626, 633 (A.F. Ct. Crim. App. 2000). In other words, this Court must be convinced that there was sufficient probable cause to order a search authorization of Appellant's urine and that a search authorization would have been requested. The Military Judge correctly determined there was no probable cause:

> "There was nothing in this case to suggest that there would be evidence of [Appellant's] use of drugs in his urine. There is nothing to suggest that the probable cause, if there was any, would extend beyond the vehicle to [Appellant's] urine. When one factors in that [Appellant] had a plausible explanation as to why he was near a potential drug transaction and use of drug, the evidence was insufficient to support a probable cause search of [Appellant's] urine.

App. Ex. XIX, para. 66. In coming to this conclusion, the Military Judge correctly found that SFOI did not possess nor was SFOI actively pursuing leads that would inevitably lead to the

discovery of the evidence. App. Ex. XIX, para. 62. The government nonetheless argued at the court below that it was inevitable that the urine sample would have been tested pursuant to a probable cause search warrant, because MSgt Ortega-Llarena would have sought a warrant.

MSgt Ortega-Llarena would not have Sought a Warrant

During motion hearings, MSgt Ortega-Llarena stated that he would have sought a warrant if he had known consent had been revoked. However, the Military Judge at trial was not convinced and thought "there is a legitimate question whether the investigator would have even pursued a request for search authorization." App. Ex. XIX, para. 62. The Military Judge noted that MSgt Ortega-Llarena failed to file Appellant's notice of representation, failed to follow up with the status of the urine specimen, and took no other investigative steps. *Id.* The Military Judge stated that the reason SFOI did not investigate further was because "They didn't suspect [Appellant] was under the influence of illegal drugs on 15 June 2010 and AFOSI was actively engaged – in some capacity – with [Appellant]." App. Ex. XIX, para. 61.

The Military Judge further stated that SFOI's lack of further investigation was reasonable given the circumstances. The search of Appellant's vehicle and dormitory were negative as to drugs, Appellant had a plausible explanation for his actions,

and AFOSI was reluctant to explain the full extent of their relationship with Appellant. App. Ex. XIX, para. 60. Furthermore, MSgt Ortega-Llarena testified that Appellant did not appear to be exhibiting any unusual characteristics that he would have associated with someone under the influence of narcotics. Additionally, MSgt Ortega-Llarena thought Appellant's explanation of what happened sounded legitimate. App. Ex. XIX, para. 64. The Military Judge correctly noted that this was a case that promised little chance of uncovering criminal conduct. *Id.*

Against this backdrop, the Military Judge's finding that MSgt Ortega-Llarena would not have sought a search authorization was not clearly erroneous. Therefore the Military Judge's finding that the inevitable discovery doctrine should not apply was well within the Military Judge's discretion. Furthermore, even if MSgt Ortega-Llarena had sought a warrant, there would not have been probable cause.

There was No Probable Cause

The government at trial and at the court below attempted to use hindsight to establish probable cause; however, no information presented at trial would lead a reasonably prudent person to conclude that drugs would be detected through an analysis of Appellant's urine. In challenging the Military Judge's inevitable discovery ruling below, the government first

attempted to rely on the fact that Appellant's vehicle was seen in a known drug neighborhood and that his passenger was smoking marijuana and crack-cocaine. However, being in a neighborhood that has crime in it cannot establish probable cause. Such a rationale would be the basis to intrude upon the privacy of high-crime neighborhood residents at random, which is unreasonable and the very thing the Fourth Amendment was enacted to protect against. Second, Appellant asserted to MSgt Ortega-Llarena that he was working as a confidential source for AFOSI. This assertion was reinforced when Appellant confirmed that he knew SA Slysz and during a telephone conversation with SA Slysz, it appeared that the two were familiar. App. Ex. XIX, para. 17. That suggested that Appellant had a legitimate law enforcement reason to be where he was. Third, Appellant's limited association with Mr. Clements was insufficient because guilt by association is not enough to establish probable cause. *See United States v. Di Re*, 332 U.S. 581, 593 (1948)(mere presence at the scene of a crime does not give probable cause for apprehension).

When all the facts are considered, this is a case of nothing more than mere guilt by association, which barely rises even to the level of mere suspicion. Put another away, the government's argument at trial for probable cause is nothing more than starting with the positive urinalysis in August and

working backwards to the events of 15 June 2010 and attempting to find probable cause for a search authorization to prosecute Appellant. The best the government could offer was the military magistrate's hypothetical search authorization testimony, which exemplifies this point. The military magistrate articulated a basis for probable cause based on three things: (1) the CCTV footage, (2) Appellant admitting Mr. Clements smoked crack, and (3) the presence of two pipes found in the vehicle, one of which Mr. Clements smoked marijuana from. R. 207. First, neither the military magistrate, nor MSgt Ortega-Llarena (the likely affiant for any search authorization request) ever saw the CCTV footage, nor did they even think to collect a copy for evidence preservation. Second, when Appellant stated Mr. Clements smoked crack, Appellant also denied using drugs and stated he was working for AFOSI, which the military magistrate seems to fail to factor in to her retrospective analysis, although the military magistrate did state during cross examination that if Appellant was working as a confidential informant, the military magistrate did not even think she would be testifying. R. 215. Third, the Military Judge found that there was only one unused, decorative pipe found and here is where the military magistrate's testimony best illuminates the deficiency of the government's probable cause theory.

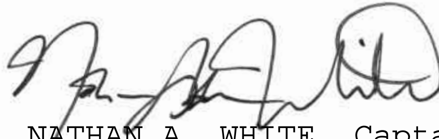
When trial counsel asked the military magistrate to disregard whether there was any evidence of two pipes or even one pipe found in the car, the military magistrate stated: "You know, if there was no evidence in the vehicle we still had the evidence of a drug transaction, *or a transaction occurring in a typical area known for drugs*" (emphasis added). R. 208. Later, when pressed on cross-examination regarding the souvenir pipe, the military magistrate stated, "I'm just making the assumption that if you're carrying around *drug paraphernalia*, and you have two of them, regardless of who they belong to there's a *suspicion*, that's the assumption I'm making" (emphasis added). R. 214. The military magistrate further testified that the "drug paraphernalia" being found in a sealed bag would not have changed the military magistrate's opinion. *Id.* Unarticulated hunches are insufficient to support a finding of probable cause. *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1977).

The military magistrate hypothetically would have issued a search authorization based upon mere suspicion of a drug transaction, without seeing the video footage, and on the assumption that a decorative pipe in a sealed bag is drug paraphernalia without seeing the item in question, which shows a complete ignorance of the concept of probable cause and the requirements for issuing a search authorization. More importantly, the military magistrate's hypothetical "let me tell

you what I would have done 10 months ago if I was asked" testimony was the best the government could produce to support a showing of probable cause and why a search authorization would have issued based upon that probable cause. The government could not produce the CCTV footage, could not show that MSgt Ortega-Llarena attempted to get a copy of the CCTV footage or that SFOI took any other investigative steps to show that the presence of drugs in Appellant's urine would have been inevitably discovered, and the government could not show the presence of a second pipe, or anything else that would establish sufficient probable cause to authorize a search of Appellant's urine on 15 June 2010. The Military Judge did not abuse his discretion when he concluded that the discovery of drug use within Appellant's urine was not inevitable. The Military Judge further did not abuse his discretion when he suppressed evidence derived from the search of Appellant's urine, the 26 August 2010 statement of Appellant and the items seized on 26 August 2010.

WHEREFORE, Appellant respectfully requests this Honorable Court grant review of this issue.

Respectfully submitted,



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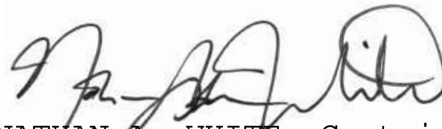

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APPENDIX A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, **Appellant**	)	**Misc. Dkt. No. 2011-04**
v.	)	**ORDER**
Airman First Class (E-3) **SCOTT M. DEASE, JR.,** **USAF,** **Appellee**	)	**Special Panel**

The appellee consented to the search and seizure of his urine for testing on 15 June 2010. He provided a urine specimen pursuant to that consent on 16 June 2010, and the specimen was stored in the base hospital laboratory until it was shipped to the Air Force Drug Testing Laboratory (AFDTL) on 27 July 2010. On 21 June 2010, before AFDTL tested the specimen, the appellee revoked "any prior consent for search, samples or any other procedure." AFDTL reported that the specimen tested positive for cocaine on 25 August 2010.

The appellee moved to suppress the urinalysis testing results as a search in violation of the Fourth Amendment, U.S. CONST. amend. IV, arguing that his revocation of consent after he provided the urine specimen prohibited testing the specimen. Concluding the appellee maintained a reasonable expectation of privacy in the urine specimen, the military judge determined that analysis of the urine specimen after revocation of consent violated the Fourth Amendment and that the evidence obtained from testing would not have been inevitably discovered. Based on this conclusion he excluded the results of the testing as well as all derivative evidence to include the appellee's confession. The government appeals that ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862, which we find confers jurisdiction to hear this interlocutory matter.

Standard of Review

We review de novo matters of law in appeals under Article 62, UCMJ. On factual determinations, we are bound by those of the military judge unless they are unsupported by the record or are clearly erroneous. "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law we ask whether the decision is *correct*." *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008) (quoting *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)).

Discussion

We agree with the military judge's conclusion that the analysis of the appellee's urine constituted a search subject to Fourth Amendment analysis, but we disagree with his conclusion that the search violated the Fourth Amendment. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. But the Fourth Amendment prohibits only those searches which are unreasonable, and whether a search is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989) (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

In *Skinner*, the Court acknowledged the long recognized expectation of privacy in the collection and testing of urine and found that such intrusions by the government are searches under the Fourth Amendment. *Skinner*, 489 U.S. at 617. But the Court found the searches at issue were not unreasonable and upheld federally mandated blood and urine testing of covered railroad employees who were involved in accidents and other safety violations based on the special governmental need to ensure the safety of the traveling public. *Id*. at 621. Relying on *Skinner*, the military judge correctly concluded the testing of the appellee's urine sample was a search subject to Fourth Amendment analysis. We find, however, he erred in concluding that testing the sample in this case was an *unreasonable* search in violation of the Fourth Amendment.

A threshold requirement for Fourth Amendment protection against unreasonable searches is a subjective expectation of privacy in the item or area to be searched that society recognizes as objectively reasonable. *California v. Greenwood*, 486 U.S. 35, 39-40 (1988); Mil. R. Evid. 311(a)(2) (A search is not unlawful absent a reasonable expectation of privacy in the person, place or property searched.). In *Greenwood*, the Court rejected a claim of a reasonable expectation of privacy in waste contained in opaque garbage bags delivered to the curb for collection but which was instead searched by the police: "It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 U.S. at 39-40.

In rejecting the application of *Greenwood*, the military judge relied on *United States v. Pond*, 36 M.J. 1050 (recon) (A.F.C.M.R. 1993), to conclude that one who consents to the seizure of a urine specimen for testing "maintains a significant privacy interest in the urine sample." But his reliance on *Pond* is misplaced. In *Pond*, we recognized a reasonable expectation of privacy subject to Fourth Amendment protection in both the act of urination and the urine excreted under *normal* circumstances. *Id*. at

1054 (citing *Capua v. Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) ("Urine . . . is *normally* discharged and disposed of under circumstances that merit protection from arbitrary interference.") (emphasis added)). The act of urination is traditionally private, and facilities both at home and in the public accommodate this privacy tradition. *Capua*, 643 F. Supp. at 1514. Because of the normally private nature of this act, *Pond* recognized that "a person *engaging* in the act of urination has a reasonable expectation of privacy for that act and the urine excreted." *Pond*, 36 M.J. at 1054 (emphasis added); *see also Skinner*.

But we expressly noted that the Fourth Amendment preference for a warrant did not apply "in cases of *consent* or exigent circumstances." *Pond*, 36 M.J. at 1054 (emphasis added). Clearly showing our focus on the circumstances surrounding the taking of the sample as the critical point for Fourth Amendment analysis, *Pond* holds that to be admissible in a criminal prosecution a urine sample "has to be *obtained*" either by consent, by a warrant, or under exigent circumstances supported by probable cause. *Id*. at 1058 (citing *Schmerber v. California*, 384 U.S. 757 (1966); *Cupp v. Murphy*, 412 U.S. 291 (1973)). We did not state that the expectation of privacy in the normal act of urination survives after *voluntarily* providing a urine specimen to the government.

In the case sub judice, the appellee did not provide his urine sample under *normal* circumstances: he consensually provided the sample under direct observation of another person, in a public setting, with the understanding that the sample would later be tested for the presence of drugs and would then be destroyed at some point. In this situation, "the same privacy did not exist as would have existed in a lavatory in [the appellant's] own home." *Venner v. State*, 367 A.2d 949, 955 (Md. 1977), *cert. denied*, 431 U.S. 932 (1977). In *Venner*, the appellant argued an expectation of privacy in his excrement wherein police discovered balloons filled with heroin. In determining whether the accused had a "reasonable" expectation of privacy in his human waste, the court in *Venner* considered: (1) where he eliminated his waste—in a bedpan in the hospital; (2) that in the normal course of hospital procedure, someone would remove the bedpan with waste in it; and (3) the fact that the accused did not "protest to the removal of his excreta." *Id*. at 955-56. The court "deemed [the appellant] abandoned the balloons which his body passed [through excreta], so that their subsequent retrieval on behalf of the police was lawful despite defendant's Fourth Amendment objection." *Id*. at 949.

Of course, the legality of the initial seizure of the specimen impacts the legality of later analysis of the specimen since each involves an invasion of privacy interests. *Skinner*, 489 U.S. at 616 (warrantless seizure of blood and later chemical analysis constitute separate invasions of privacy interests). That is not to say, however, that each requires a separate justification. In *Dodd v. Jones*, 623 F.3d 563 (8th Cir. 2010), the appellant argued that the analysis of a blood specimen a month after it was lawfully seized required a warrant because the exigent circumstances under which it was obtained had expired. Rejecting the argument that the later testing required independent justification, the court held that "the testing of [the appellant's] blood required no

justification beyond that which was necessary to draw the blood on the night of the accident." *Id*. at 569. Clearly, such an independent justification would have been required if a reasonable expectation of privacy had survived the lawful seizure of the blood sample. Just as the lapse in exigent circumstances does not revive an expectation of privacy in a blood sample taken by the government, a revocation of consent to seize a urine specimen does not revive an expectation of privacy in a urine sample surrendered to the government.

In finding that a reasonable expectation of privacy in a urine sample continues after it has been provided to the government for testing, the military judge states that one who provides a urine specimen has "a reasonable expectation that the government will properly secure his sample and prevent unauthorized access, tampering, or testing of that sample." In support of this conclusion the military judge analogizes the privacy interest in a bottle of urine to that in a computer. But we find the analogy incorrect. Unlike a computer hard drive in which one might reasonably retain some possessory and privacy interest after voluntarily providing it to the government for analysis, urine is by definition a waste product which will ultimately be destroyed and in which no continuing reasonable expectation of privacy exists. *See Venner*, 367 A.2d at 956 (The accused could "not have had an 'expectation . . . that society [would be] prepared to recognize as 'reasonable' a property right in human excreta for the simple reason that human experience is to abandon it immediately.").

While society recognizes a reasonable expectation of privacy in the act of urination and the urine excreted under normal circumstances, we find that this reasonable expectation does not survive voluntary surrender of urine waste to government control for analysis. We agree with the military judge that at the time he provided the sample the appellee could reasonably expect his urine sample to be secured against unauthorized access. But this alone is insufficient to maintain a reasonable expectation of privacy subject to Fourth Amendment protection: the appellee should also have reasonably expected the sample to be tested at any time, to be incrementally destroyed during testing, and to be ultimately discarded.

Under the circumstances of this case, we find no continuing reasonable expectation of privacy in the sample and, therefore, no continuing Fourth Amendment protection which the appellee's revocation of consent could reclaim. As stated above, a threshold requirement for Fourth Amendment protection against unreasonable searches is a subjective expectation of privacy in the item or area to be searched that society recognizes as objectively reasonable. In the case of waste urine provided to the government for testing, we find that this threshold requirement is not met. Like delivering garbage to the curb, the appellee voluntarily abandoned any reasonable expectation of privacy in his waste urine when he delivered it to the government for analysis. *See Greenwood*, 486 U.S. at 39-40; *Venner*, 367 A.2d at 956.

Having determined that the analysis of the appellee's urine did not violate the Fourth Amendment, we need not address the remaining issues of inevitable discovery and derivative evidence.

On consideration of the interlocutory appeal by the United States under Article 62, UCMJ, it is by the Court on this 29th day of September, 2011,

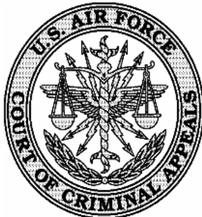
ORDERED:

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.

Judges BRAND, GREGORY, and SARAGOSA concur.

FOR THE COURT

OFFICIAL



STEVEN LUCAS
Clerk of the Court

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**Misc. Dkt. No. 2009-15**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
ADAM G. COTE,	)	
USAF,	)	
Appellee	)	**Special Panel**

GREGORY, Judge

On 22 December 2009, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure, asserting that the military judge erred as a matter of law in suppressing the evidence discovered through forensic review of the appellee's computer devices occurring after the 90-day search warrant "deadline" because the delay in completing forensic review was reasonable under the Fourth Amendment.[1]

Background

While conducting an internet peer-to-peer child pornography investigation in May 2008, Special Agent (SA) SH of the North Dakota Bureau of Criminal Investigation (NDBCI) discovered nine files of suspected child pornography on a computer with a specific internet protocol (IP) address. He contacted SA BN of Immigrations and Customs Enforcement (ICE) to subpoena the name and address of the subscriber. The internet service provider identified the subscriber as the appellee and his location as Minot Air Force Base, North Dakota.

SA BN received search authorization for the appellee's Minot Air Force Base dormitory room in a written warrant issued by the Federal Magistrate, United States District Court for the District of North Dakota, on 1 July 2008. The warrant commanded that the search of the dormitory room be completed by 10 July 2008, and authorized the seizure of any items listed in an attachment to the warrant to include electronic devices and storage media. SA SH and SA BN executed the warrant on 2 July 2008 and seized, among other items, a Sony laptop computer, a Hewlett-Packard (HP) laptop computer, and a Western Digital (WD) external hard drive. During an on-site forensic preview of

[1] U.S. CONST. amend. IV.

the devices, SA SH found "one or two" files believed to be child pornography on the Sony but was unable to preview the HP or WD drives.

The addendum to the warrant directed that the search of any electronic device or storage media seized during the search be completed within 90 days. Notably, this clause does not apply to electronic data or documents – only the electronic devices and storage media themselves. On 18 August 2008, within the 90-day time limit specified in the warrant, SA SH made forensic copies of the data on the Sony and HP laptop hard drives and stored the copies on clean NDBCI hard drives. He found two suspected child pornography videos on the copy of the Sony drive but the data on the copy of the HP drive was scrambled. SA SH was unable to copy or analyze the data on the WD drive.

In July 2009, almost a year later, government counsel requested that SA SH conduct additional analysis of the Sony and HP drives. He conducted all such subsequent analysis of the data found on these two drives using the forensic copies he had made the previous year. On the copy of the HP drive he found three suspected child pornography videos that appeared to match three of the nine he had initially observed in May 2008. On the Sony he found internet search histories relevant to the charged possession offense.

In September 2009 the Air Force Office of Special Investigations sent the WD drive, which had been in their custody for the past year, to the Defense Computer Forensics Laboratory (DCFL) for possible repair. DCFL repaired the drive, made a forensic copy of the data, and sent both to SA SH. In October 2009, SA SH analyzed the forensic copy of the WD drive and found 22 video files of suspected child pornography.

Charged with three specifications of possessing child pornography and one specification of distributing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934, the appellee moved to suppress all evidence obtained from the searches of the three computer drives and the forensic copies of those drives that occurred after 28 September 2008, the 90-day deadline imposed by the search warrant for searches of devices or media seized pursuant to the warrant. The military judge granted the motion, essentially finding that any analysis of the drives, data in drives, or copies of data in drives after the warrant's 90-day limit violated the warrant and was, therefore, unlawful. Although she expressly found "good cause" for getting an extension of time from the magistrate if the government had requested it, she nevertheless held that the evidence must be suppressed.

On 6 November 2009, the trial counsel filed a notice of government appeal of the ruling by the military judge with this Court. On 22 December 2009, the government submitted its appeal pursuant to Article 62, UCMJ. We find jurisdiction to hear the appeal since the ruling excluded substantial evidence material to the proceedings: specifically 25 child pornography video files (three on the HP and 22 on the WD) and the internet search history. We review rulings on the admission or exclusion of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

We are bound by the military judge's factual findings unless they are clearly erroneous, and we consider conclusions of law de novo. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008).

The Sony and HP Drives

We find the military judge erred in excluding data from the Sony and HP drives because (1) the 90-day time limit in the warrant only applies to devices and media, not data and (2) no reasonable expectation of privacy exists in government copies of lawfully seized data. For his July 2009 analysis, SA SH used forensic copies lawfully in possession of the government rather than the original devices or media seized from the appellee. In finding this search of the forensic copies a violation the warrant's 90-day time limit to search devices or media, the military judge apparently equated data contained in the government's forensic copies with the original devices and media.[2] The facts do not support this conclusion.

The warrant clearly distinguishes three types of material: electronic devices, storage media, and electronic data. As stated in the addendum to the warrant, the 90-day time limit for searches clearly applies only to seized devices and media, not the data on such devices and media: "The search of any *Electronic Device* or *Storage Media* authorized by this warrant shall be completed within 90 days from the date of the warrant unless, for good cause demonstrated, such date is extended by an order of the Court." Emphasis added. Highlighting this distinction between devices, media, and data, the warrant later authorizes *retention of devices and media* that contain contraband but directs the return of *copies of data* on such devices and media that do not contain contraband.

This construction of the warrant is consistent with the view that computer searches are a "two-step process" of first seizing devices and media and then later searching the data. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 4.7 (4th ed. supp. 2009-10) (citing Kerr, *Search Warrants in an Era of Digital Evidence*, 75 MISS. L.J. 85, 86 (2005)). Indeed, in her ruling the military judge recognized the routine practice of law enforcement to make forensic copies of computer data for later analysis, but then mistakenly applied the 90-day restriction to that copied data. Consistent with routine practice, SA SH lawfully copied and stored the electronic data from the Sony and HP storage media onto government servers within the time specified in the warrant. His later analysis of that data in the forensic copies did not violate the warrant's 90-day time limit for searches of electronic devices or media seized from the appellee.

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[2] In ruling on a motion for reconsideration, the military judge rejected any distinction between data, copies of data, and the devices themselves and appears to confuse the terms in discussing the 90-day search time limit: "The warrant . . . doesn't state that the government can continue to search that *data* after the 90 days has expired." Emphasis added. The 90-day limit expressly applies only to electronic devices and storage media, not data.

This construction is also consistent with the settled view that, contrary to the military judge's conclusion, no reasonable expectation of privacy exists in copies made of lawfully seized data. The Fourth Amendment requires a warrant to search only those areas in which a reasonable expectation of privacy exists. *Rakas v. Illinois*, 439 U.S. 128 (1978). In *Vaughn v. Baldwin*, 950 F.2d 331 (6th Cir. 1991), a case involving the analogous situation of paper copies of seized documents, the court recognized the government's right to copy records lawfully in its possession and "to keep the copies after the plaintiff regained possession of the originals." *Vaughn*, 950 F.2d at 333. Extending this rationale to computer data, the court in *United States v. Megahed*, 2009 WL 722481, slip op. at 3 (M.D. Fla. Mar. 18, 2009), found no reasonable expectation of privacy in a mirror image copy of a hard drive that FBI agents obtained by consent despite later revocation of consent.

Here, the warrant itself excludes data from the 90-day time limit for searches and thereby implicitly recognizes both the standard two-step practice of searching computer data after seizure of computer devices as well as the lack of any reasonable expectation of privacy in copies of such data that is lawfully seized. The appellee correctly argues a privacy interest in personal computer files, devices, and data, citing *United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F. 2006). However, his privacy interest was lawfully breached by a warrant based on probable cause, and later examination of the data seized pursuant to that warrant violates neither the Fourth Amendment nor the warrant. *See United States v. Habershaw*, 2002 WL 33003434 (D. Mass. May 13, 2002) (forensic analysis of imaged hard drive seized pursuant to warrant does not constitute a second execution of the warrant "any more than would a review of a file cabinet's worth of seized documents.") The appellee had no reasonable expectation of privacy in lawfully seized copies of data, and the subsequent search of that data did not violate the Fourth Amendment. Therefore, the military judge abused her discretion in suppressing the data from the Sony and HP devices contained on forensic copies of lawfully seized material made within the 90-day time limit for searching the devices.

The WD Drive

Unlike the forensic copies of the data on the Sony and HP devices, the data on the WD device was not copied within the 90-day time limit specified for searches of electronic devices. DCFL made the WD forensic copy after repairing the device over a year after the 90 days expired, and SA SH searched the data on this forensic copy shortly thereafter. We agree with the military judge's finding that the DCFL search of the WD device and the derivative search of the data violated the 90-day time limit in the warrant for searches of devices and media, but we find the military judge erred in concluding that the violation in this case required suppression of the evidence.

"The Fourth Amendment by its terms prohibits 'unreasonable' searches and seizures." *New York v. Class*, 475 U.S. 106, 116 (1986). "The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the

seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts." *Coolidge v. New Hampshire*, 403 U.S. 443, 509-10 (1971) (Black, J., concurring and dissenting). "[T]he Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

The Fourth Amendment requires specificity as to the property to be searched, and searches that exceed the scope permitted by the warrant are invalid absent some exception. *United States v. Osario*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008) (law enforcement agents went beyond the scope of the subject matter described in the warrant). However, unlike the specificity required for the place to be searched, the Fourth Amendment does not require expiration dates in search warrants and, in fact, "contains no requirements about *when* the search or seizure is to occur or the *duration*." *United States v. Gerber*, 994 F.2d 1556, 1559 (11th Cir. 1993). Consequently, violations of time requirements in a warrant do not per se equate to a constitutional violation. When a warrant or procedural rule imposes a time requirement on execution, admissibility of evidence obtained depends on whether the failure to search within the specified time violates the fundamental requirements of the Fourth Amendment. *Id*. at 1560; *see* Mil. R. Evid. 315(h)(4) (errors in execution of warrant affect admissibility only where constitutionally required).

Several considerations impact the constitutional analysis necessary to determine admissibility of evidence obtained after expiration of time requirements imposed by rule or warrant. First, and most obvious, violation of time requirements imposed by rule or warrant results in a constitutional violation when probable cause lapses during the delay. *United States v. Brewer*, 588 F.3d 1165, 1173 (8th Cir. 2009). Analyzing a violation of a federal rule requirement that search warrants be executed within a specified number of days,[3] the court in *Brewer* upheld the search of a computer several months after it was seized pursuant to a warrant since probable cause continued to exist: "[O]ur analysis of the delay in executing the warrants considers only whether the delay rendered the warrants stale." *Id*. In the present case, the military judge expressly found "good cause" for extending the time permitted in the warrant and the evidence supports that finding. The delay had absolutely no impact on probable cause since, as in *Brewer*, the computer device had been in the continuous custody of law enforcement since it was seized. Also, probable cause to believe that contraband images existed on the WD device was even greater since only a couple of the images originally observed had been located on the Sony and HP devices. Thus, violation of the time requirement in the warrant did not result in a constitutional violation based on the lapse of probable cause.

Second, the policy underlying the time requirement assists in determining whether a violation rises to a constitutional level. Where the policy is intended to implement the

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[3] At the time of *United States v. Brewer*, 588 F.3d 1165 (8th Cir. 2009), Fed. R. Crim. P. 41(e)(2)(A) required that warrants direct execution "within a specified time no longer than 10 days;" however, the 2009 amendments to the Rules revised this to 14 days.

Fourth Amendment's probable cause requirement, the appropriate constitutional analysis is whether violation of the policy actually resulted in a lapse of probable cause. *Id.* In the present case, the language in the warrant clearly shows that the policy behind the warrant's time requirement is the return of seized property or data that does not contain contraband rather than implementation of some Fourth Amendment requirement. The warrant directs return of seized devices and media only if contraband is not found on them and directs return of *copies* of data files that have either (1) been already searched and not seized or (2) not searched because they are beyond the scope of the warrant. Because the WD drive was inoperable the government could not comply with the warrant's requirement to return non-contraband items until it could be repaired and searched.[4] The warrant's recognition of the personal utility of computer devices, media, and data files by requiring the search to be completed within 90 days so that non-contraband items could be returned to the owner does not implement any constitutional requirement such that violation requires suppression of the evidence.

By focusing on constitutional requirements, the court in *Brewer* rejects a mechanistic approach to the exclusion of evidence based on violation of time requirements in a rule or warrant. Relying on *United States v. Brunette*, 76 F. Supp. 2d 30 (D. Me. 1999), the appellee argues for such an approach. In *Brunette*, the court suppressed the results of a search that occurred only a few days after the expiration of a time requirement in the warrant. Though the court did not discuss whether this equated to a Fourth Amendment violation, the discussion of precedent in the opinion appears to focus on the Fourth Amendment's probable cause requirement by highlighting that the "element of time can admittedly affect the validity of a search warrant" and that "a search pursuant to a stale warrant is invalid." *Brunette*, 76 F. Supp. 2d at 42 (internal citations omitted). To the extent that *Brunette* stands for de facto exclusion of evidence based on violation of time requirements in a rule or warrant, the *Brewer* court implicitly rejects that view in favor of a constitutional analysis to determine the admissibility of evidence. *Brewer*, 588 F.3d at 1172 (citing *United States v. Syphers*, 426 F.3d 461 (1st Cir. 2005)).

Like *Brewer*, the court in *Syphers* looks to the policy underlying a particular time requirement to determine whether a constitutional violation occurred such that the evidence seized must be suppressed: where the policy is intended to ensure probable cause, violations of time requirements will result in suppression of evidence where probable cause lapses as a result of the violation. Analyzing a warrant's one-year time

[4] We find error in the military judge's conclusion that the evidence would not have been inevitably discovered. Assuming, arguendo, that the delayed search of the WD drive rose to the level of a constitutional violation, we find that the evidence would have been inevitably discovered in the normal course of processing seized evidence. Mil. R. Evid. 311(b)(2). As discussed above, the warrant directed the return of only those devices and media that did not contain contraband. Although agents could not access the inoperable WD drive, probable cause to believe that child pornography would be found on it continued to exist. Therefore, the drive could not be returned to the owner without analyzing it for contraband. To ultimately dispose of the property as directed by the warrant, agents would have had to either repair it and analyze it for contraband or destroy it. A demand for the return of the property by the appellee would trigger further efforts to analyze the device for contraband, but the record contains no evidence that such a demand had been made at the time of trial.

limit to conduct a computer search that violated a federal requirement to execute search warrants within ten days, the court in *Syphers* found the delayed search constitutional because (1) probable cause had not lapsed, (2) the delay did not prejudice the defendant, and (3) law enforcement officers did not act in bad faith. *Syphers*, 426 F.3d at 469.

Application of the *Sypher's* constitutional analysis to the facts of the present case shows that the evidence obtained from the delayed search should not have been suppressed. First, as already discussed, probable cause did not lapse as a result of the delay since the data on the WD drive remained as it was on the date it was seized. Second, for reasons similar to those supporting continued probable cause, the evidence shows no prejudice in the sense that either (1) evidence was discovered after the delay that would not have been discovered had the search taken place before the delay or (2) the appellee's property rights were adversely affected. As with the continuing probable cause, the data remained unchanged and the appellee's property interest did not change from when the item was first seized. Third, the record shows no evidence of bad faith. The military judge's summary finding of "good cause" to get an extension not only recognizes the continued existence of probable cause but also implicitly finds no prejudice or bad faith, and we agree with that finding. Where we find error is in the military judge's conclusion that a violation of a time requirement in a rule or warrant requires suppression of the evidence where the delay did not rise to the level of a constitutional violation. Therefore, the military judge abused her discretion in suppressing the evidence obtained from the WD drive.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 6th day of April, 2010,

ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **GRANTED.**

The ruling of the military judge is vacated and the record is remanded for further proceedings consistent with this opinion.

(BRAND, Chief Judge and THOMPSON, Judge participating)

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court