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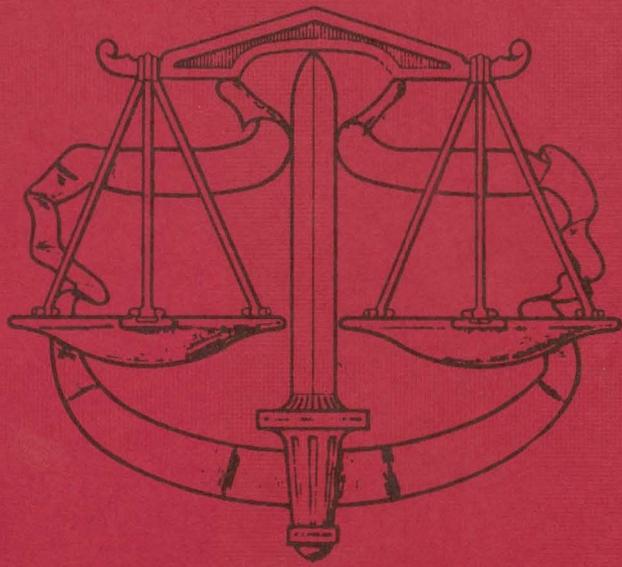
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EXTRAORDINARY WRITS IN MILITARY PRACTICE

Captain Thomas R. Pepler



EYEWITNESS IDENTIFICATION

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URINALYSIS: DEFENSE APPROACHES

United States Army Defense Appellate Division

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OPENING STATEMENTS

In our lead article, CPT Thomas Pepler discusses the extraordinary writ in military practice. This pragmatic article will serve as an indispensable guide to the preparation and filing of extraordinary writs. The article incorporates the new Rules of the Court of Military Appeals effective 15 July 1983. Our second article continues or concludes our series on the Army's new urinalysis program. The article discusses the scientific reliability of urinalysis testing and provides a basis for attacking the admissibility of such testing on the merits.

* * *

Due to the extraordinary press of cases before the U.S. Army Judiciary The Advocate is behind schedule. We apologize to our readers for this inconvenience.

* * *

Beginning with this issue, The Advocate begins its "Last Minute Developments" feature. Look for it just before "On the Record."

Staff Changes

CPT Peter. Huntsman and CPT Thomas Pepler are leaving the Army to enter private practice. The Advocate welcomes to the staff CPT Joel R. Maillie and CPT Peter L. Yee.

EXTRAORDINARY WRITS IN MILITARY PRACTICE

By Captain Thomas R. Pepler *

The power of a federal court to issue extraordinary writs has long been established by the All Writs Act¹ which provides that:

The Supreme Court and all courts established by act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This grant of authority extends to the Court of Military Appeals and the Courts of Military Review² and is an important tool which a defense counsel can use to ensure that his client does not suffer unnecessarily at the hands of the military justice system. It is an important means of testing the legality of adverse actions when no alternate judicial method of review exists.

In addition to those cases where there would be no review if a petition for extraordinary relief is not filed, there are also cases where an issue will arise that may be reviewable on appeal but for which an adequate remedy can only be achieved by use of an extraordinary writ. For instance, cases containing issues such as jurisdiction over the offense, double jeopardy, or illegal or improper action by a local commander or convening authority are sometimes reversed upon appeal because the case could not have legally gone to trial in the first instance.

If an issue exists that may be properly litigated by extraordinary writ, such review will often be preferable to litigating the question on appeal while the client is serving a sentence to confinement at hard labor. Common sense and hard appellate experience dictate that it is far easier to convince an appellate judge that a client has been the victim of a serious defect in the system if the judge is not distracted by a full record of trial that may amply demonstrate the culpability of the accused. In addition it is obviously easier for a judge to order that a trial be fairly litigated in the first instance than to inflict the expense of a new trial upon a convening authority where a different result in a new trial is only speculative.

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1. 28 U.S.C. § 1651(a).

2. *Noyd v. Bond*, 395 U.S. 683 (1969); *McPhail v. United States*, 1 M.J. 457 (CMA 1976); and *Dettinger v. United States*, 7 M.J. 216 (CMA 1979).

Occasionally the use of an extraordinary writ will benefit the client regardless of the ultimate success of the writ. In Bernard v. Commander,³ Richards v. Deuterman,⁴ and Pearson v. Cox,⁵ for example, the Courts addressed the various legal errors raised and gave definitive answers on the relevant law, but denied the requested relief. In each case the petitioner "lost the battle but won the war" because he returned from the appellate court with the law he needed to resolve his problem.

The case of United States v. Hagler⁶ is also instructive. There, the appellant had attacked his post-trial confinement by extraordinary writ and the writ was denied with leave to raise the issue on appeal. By the time the case returned on appeal the confinement had been served and the government argued that the issue was moot. The Court ruled that because the error did exist and the appellant had attempted to challenge it while still in confinement, the issue was not moot and relief was granted by reducing forfeitures. Had the petition for extraordinary relief never been filed relief would not have been possible.⁷

I. Types of Writs

Within the military justice system there are four writs that are used with regularity: mandamus, prohibition, error coram nobis, and habeas corpus.

The writ of mandamus may be issued by a court of competent jurisdiction to require the performance of a specified act by a court or official. In military practice, it is also used to challenge the authority of a respondent to do the act or issue the order being challenged via the writ. This usage is similar to the writ of prohibition.

A writ of prohibition is the logical converse of a writ of mandamus. It is used to prevent the commission of a specified act or issuance of a particular order. In criminal trials, it is typically used prior to trial to challenge the jurisdiction of a court either over an accused or a charged offense.

3. 9 M.J. 820 (NCOMR 1980).

4. 13 M.J. 990 (NCOMR 1982).

5. 10 M.J. 317 (CMA 1981).

6. 7 M.J. 944 (NCOMR 1979).

7. It should be noted in regard to challenges to denials of deferment of confinement that Judge Perry wrote an eloquent dissent in Corley v. Thurman, 3 M.J. 192 (CMA 1977), arguing that the issue should be resolved by writ and not by appeal. This dissent was cited with approval in Pearson v. Cox, 10 M.J. 317 (CMA 1981).

The writ of error coram nobis is used to bring before a judge a judgment previously rendered by the same court for the purpose of reviewing an error of fact or retroactive change in the law which affects the validity of the prior proceeding. It is similar to a motion for reconsideration or petition for a new trial, and good cause must be shown why a motion for new trial or motion for reconsideration could not be used.

The writ of habeas corpus is generally used to challenge either the legal basis for or the manner of confinement.

II. How to File

Rule 21 of the Courts of Military Review Rules of Practice and Procedure and Rule 27 of the Court of Military Appeals' Rules of Practice and Procedure have the same requirements for the contents of a petition for extraordinary relief. Both require that the petition contain six separate sections: (1) a procedural history of the case; (2) a statement of facts necessary to understand the issue; (3) a statement of the issue; (4) the specific relief sought; (5) the jurisdictional basis for the relief sought and the reasons why the relief cannot be obtained during the ordinary course of appellate review; and (6) the reason why the writ should be granted. In addition, each petition must be accompanied by a separate brief, with its own independent format and heading, addressing all legal issues raised by the petition.⁸ The petition must be filed within 20 days after the petitioner learns of the action complained of.⁹

In addition to these requirements the United States Army Trial Defense Service (USATDS) has strongly recommended that USATDS counsel include the following as a final paragraph in all petitions for extraordinary relief, regardless of the court to which it is submitted:

8. Each court has specific rules governing the format of briefs filed with that court and these rules apply to briefs which accompany the petition for extraordinary relief. Sample pleadings are included in the Appendix to this article.

9. Rule 19(e) Court of Military Appeals Rules of Practice and Procedure.

Petitioner further requests that pursuant to Article 70, UCMJ, The Judge Advocate General appoint appellate defense counsel to represent (him) (her) in any proceedings concerning this petition before either the U.S. Army Court of Military Review or the Court of Military Appeals or both.¹⁰

Service of the petition and the separate brief will normally be by mail on the Clerk of the Court to which the petition is submitted. However, due to the obvious delays in mail delivery from areas outside the continental United States, USATDS counsel may use electronic messages to expedite the filing of their petitions. This procedure requires that an electronic message be sent to USATDS headquarters or the Army Defense Appellate Division in Washington D.C.

The message should clearly instruct the addressee that the message contains a petition for extraordinary relief and the separate supporting brief and request the addressee's assistance in filing the two pleadings. The next portion of the electronic message must contain the complete petition in the complete format required for the hard copy pleading, to include court headings and signature blocks indicating that the original hard copy has been signed. The electronically transmitted petition must also include a statement assuring the court that the original hard copies of the petition and brief have been placed in the mail. Counsel should only transmit petitions electronically when absolutely necessary. The legibility of the message is sometimes so poor that the courts will not act upon it because it is unreadable.¹¹

10. USATDS, SOP paragraph 3-13. Petitions for Extraordinary Relief. Without formal appointment, counsel at the Defense Appellate Division have no authority to do more than perform ministerial acts such as delivering the petition to the appropriate court. Rule 17 of the Court of Military Appeals Rules of practice and procedure now provides that the Judge Advocate General shall designate appellate military counsel to represent the parties.

11. Rule 27(a)(6) Court of Military Appeals Rules of Practice and Procedure.

III. Where to File

The All Writs Act applies equally to the Courts of Military Review and the Court of Military Appeals, and a petition for extraordinary relief may therefore be filed at either level. Indeed, there is no legal reason in most cases why petitions could not be filed in both courts. However, the Court of Military Appeals' Rules of Practice and Procedure provides for appeals from actions on writs filed with the Courts of Military Review. The Court of Military Appeals has indicated that while writs may be filed with it in the first instance, the judges have the discretion to remand the case to the appropriate Court of Military Review and wait to review the lower court's decision on appeal.¹²

The decision as to which court should be petitioned is one that must be based upon the particular circumstances of each case. In practice it appears that as many writs are filed with the Court of Military Appeals as are filed with the Courts of Military Review. Assuming that both courts would rule the same way on any given issue, it would appear to make little difference where the petition for extraordinary relief is filed. But as a practical matter, when the writ is filed before the lower court the government has the right to appeal the decision.¹³ Therefore, where delay in the final disposition of the writ would be contrary to the client's interests, filing with the Court of Military Appeals avoids the delay of a possible government appeal. On the other hand, where delay is not a factor that harms the client, initial filing with the lower court allows for review of the issue a second time by appeal should the petition be dismissed or denied. Also the proximity of the Defense Appellate Division to the Army Court allows for local counsel to more easily appear on behalf of the petitioner should there be a need for argument over a temporary restraining order or some other immediate action before that Court.

12. United States v. Redding, 11 M.J. 100 (CMA 1981).

13. Id.

IV. Prerequisites to Filing

The nature of a petition for extraordinary relief requires that the circumstances in fact be extraordinary in order to justify court intervention outside of the normal channels of appellate review. In addition the remedy sought must be to correct an injury that the petitioner is actually suffering or will certainly suffer if relief is not granted. When these two prerequisites are not met, the Court will dismiss the petition with no indication of its opinion on the legal issue raised.

In McPhail v. United States¹⁴ the Court noted that the petitioner had initially sought a writ of prohibition to prevent the convening authority from considering whether to accept or reject the military judge's decision to dismiss charges for lack of jurisdiction. Although the Court ultimately held, on a subsequent writ, that the convening authority could not direct the military judge to change his ruling on a matter of law, the Court dismissed the initial petition because the convening authority had not yet made a decision and could have decided to accept the military judge's ruling. Likewise in Rodriguez v. Brown,¹⁵ the Court denied the petition for extraordinary relief with leave to renew it "if an inadequate remedy is provided where witnesses in fact decline to testify."

This rule that the injury complained of must be real also applies to those cases in which the action challenged has taken place but the injury is only speculative. Thus, in Powis v. Coakley¹⁶ the Court denied a petition for extraordinary relief which alleged that the excessive delay in post-trial review and action merited a dismissal of the charge because the petitioner had lost his right for early parole. The Court ruled that the question of parole was too speculative to merit extraordinary relief. In addition, courts will not discuss applicable law in cases where the factual questions still have to be litigated.¹⁷ Petitions

14. 1 M.J. 457 (CMA 1976).

15. 14 M.J. 104 (CMA 1982) (summary disposition).

16. 10 M.J. 649 (NCOMR 1980).

17. Rule 27(a)(4) of the Court of Military Appeals Rules of Practice and Procedure now provides that the court may appoint a special master "to make further investigation, to take evidence, and to make such recommendation to the Court as are deemed appropriate." Caution dictates that this rule should not be relied upon where local opportunities to resolve factual issues are available.

for extraordinary writs have often been denied with leave to raise the issue after the motion for appropriate relief has been litigated before the military judge.¹⁸

Where the action challenged and injury alleged grows out of matters integral to a court-martial, there appears to be no requirement to exhaust purely administrative remedies. In Ward v. Carey,¹⁹ the Court reversed the Navy Court of Military Review's dismissal of a petition challenging the legality of vacation proceedings. The Navy Court had ruled that exhaustion of administrative remedies was required. The Court of Military Appeals pointed out that the vacation proceedings were an integral part of a court-martial sentence and ordered the Navy Court to exercise its extraordinary writ jurisdiction.

The use of a special writ is not a substitute for appellate remedies and petitioner must therefore be able to demonstrate why adequate relief cannot or could not have been granted through the regular appellate process. In United States v. Sylva,²⁰ the Army Court refused to entertain a petition for writ of error coram nobis alleging lack of jurisdiction based on a void enlistment contract. The Court rejected the petitioner's assertions of fact forming the basis of his jurisdictional argument as unworthy of belief. The Court also rejected arguments that the petitioner should have been given the opportunity to establish an evidentiary basis for his assertions, noting, inter alia, that the petitioner had been on notice of the possible defect in enlistment before his trial and original appeal and did not attempt to litigate the issue when he had the opportunity. A similar result was later reached by the Court of Military Appeals in Krause v. United States.²¹

That there is no basis in law for filing a petition on behalf of a class of petitioners was suggested in In Re Tommins.²² In that case pretrial confinement was being challenged by a class of petitioners. However, the Court did not reject the petition for mandamus in that case

18. E.g. Moyer v. Fawcett, 10 M.J. 838 (NCOMR 1981) (facts forming the basis of relief in dispute); Richards v. Deuteran, 13 M.J. 990 (NCOMR 1982) (Article 39a session ordered to allow the military judge to rule on the issue).

19. 14 M.J. 104 (CMA 1982)(summary disposition).

20. 5 M.J. 753 (ACMR 1978).

21. 7 M.J. 427 (CMA 1979).

22. 1 M.J. 33 (CMA 1979).

solely because it was on behalf of a class. Rather, the Court pointed out that the petition did not establish the jurisdictional basis for each petitioner in the class nor did it allege that the respondent military judge was the judge responsible for reviewing the pre-trial confinement of each petitioner in the class. The decision in Tommins therefore does not negate the possibility of filing a petition on behalf of more than one petitioner if the necessary prerequisites are established for each individual petitioner.

In some cases the most notable prerequisite will be evidence that the petitioner does in fact want to have the petition filed and that the counsel do in fact represent the petitioner. In United States v. Foxworth²³ a petition for writ of error coram nobis was denied where Foxworth's conviction was final, he had declined to petition the Court of Military Appeals for review under Article 67, and he was not shown to have joined in the petition for extraordinary relief. The Court pointed out that when the purpose of appellate counsel's initial appointment lapsed so did the attorney-client relationship. However a different panel of the same Court disagreed with that result in United States v. Montcalm.²⁴

V. Jurisdiction to Grant Extraordinary Relief

Article 66(b), UCMJ, gives the Courts of Military Review jurisdiction to review cases

. . . in which the sentence as approved, effects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement at hard labor for one year or more.

Article 67, UCMJ, effectively limits the appellate jurisdiction of the Court of Military Appeals to those cases reviewed by a Court of Military Review. If a case does not meet the jurisdictional criteria of Article 66, the case is only reviewable under the provisions of Article 68, UCMJ. The authority of the military appellate courts to issue a writ is tied to the statutory structure described above. This is because the All Writs Act only authorizes writs to issue "in aid of jurisdiction and agreeable to the usages and principles of law."

23. 2 M.J. 508 (ACMR 1976).

24. 2 M.J. 787 (ACMR 1976).

The military appellate courts have not issued a definitive opinion on the extent of their jurisdiction to act pursuant to the All Writs Act. In practice it appears that if a case has been referred to a special court-martial empowered to adjudge a punitive discharge or to a general court martial, then the military appellate courts will have jurisdiction to intervene unless or until a sentence is adjudged that does not meet the criteria of Article 66. The current status of the case law appears to suggest the conclusion that the military appellate courts do not have jurisdiction to act in any other case unless the respondent has been shown to have acted in a manner or made a ruling that exceeds his authority or jurisdiction. There is also dicta indicating that the courts retain jurisdiction to intervene in a case where the adjudged sentence meets the criteria of Article 66 but the Convening Authority has converted the sentence, under paragraph 88 and 127, Manual for Courts-Martial, United 1969, (Revised edition), [hereinafter cited as MCM, 1969], to a form not encompassed by Article 66. For instance when a bad conduct discharge is converted to confinement of less than one year or the jurisdictional limits of the court.

In any case arising out of the Uniform Code where the respondent's jurisdiction or authority to act is being challenged, regardless of the jurisdictional limits of Article 66, it should be the position of the military defense bar that the appellate courts have jurisdiction to issue writs. Although a definitive resolution of this important question has not been rendered by The Court of Military Appeals, the following analysis explains and supports this assertion of jurisdiction.

The Court of Military Appeals has asserted that:

[T]his Court is the supreme court of the military judicial system. to deny that it has authority to relieve a person subject to the Uniform Code of the burdens of a judgment by an inferior court that has acted contrary to constitutional command and decisions of this Court is to destroy the "integrated" nature of the military court system and to defeat the high purpose Congress intended this Court to serve. . . . [W]e are convinced that our authority to issue a writ in "aid" of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67.

[A]s to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority. ²⁵

Notwithstanding the fact that no bad-conduct discharge had been adjudged by the special court-martial in McPhail, the military judge's special findings had established that the offenses of which the petitioner was convicted could not have been constitutionally tried by court-martial. The Court ruled that the conviction was void and that the petitioner was entitled to relief under the All Writs Act.

The above quoted assertion of a supervisory authority exceeding the scope of its appellate jurisdiction was not universally accepted as a proper assertion of the jurisdiction of military appellate courts under the All Writs Act. In Barnett v. Persons,²⁶ the Army Court of Military Review questioned the Court of Military Appeals' assertion of supervisory authority in McPhail and stated that it did not understand such power to vest in the Courts of Military Review. The Army Court therefore dismissed a petition for a writ of mandamus because the petitioner had been convicted at a special court-martial not empowered to adjudge a bad-conduct discharge. The Court stated that the sole review authorized in cases not normally reviewable under Article 66 was by application for relief to The Judge Advocate General under Article 69. The Court reasoned that if Congress had intended the Court to possess the power asserted in McPhail, it would have so indicated when it wrote the 1969 amendments to the UCMJ.

This rationale was reaffirmed by the Army Court in United States v. Williams.²⁷ The Court had reviewed the petitioner's conviction at a special court-martial authorized to adjudge a bad-conduct discharge and remanded the case for rehearing on sentence or reassessment of the sentence by the convening authority. The convening authority reassessed the sentence and, inter alia, changed the adjudged bad-conduct discharge to three months confinement. The petitioner sought extraordinary relief by a motion for reconsideration which the Court dismissed for lack of jurisdiction. The Court ruled that the case was no longer reviewable under Article 66 because the sentence as approved no longer included a

25. McPhail v. United States, 1 M.J. 457, 462-463 (CMA 1976). This language has not been used in Rule 5 of the Court of Military Appeals Rules of Practice and Procedure.

26. 4 M.J. 934 (ACMR 1978).

27. 5 M.J. 779 (ACMR 1978).

punitive discharge. The Court relied on Robison v. Abbott,²⁸ for its ruling that the bad-conduct discharge was no longer inherent in the sentence and that no jurisdiction to consider the writ remained. The Court distinguished Jones v. Ignatius,²⁹ where the total confinement existing after the convening authority converted the bad-conduct discharge to additional confinement had exceeded the length of confinement the trial court could have legally adjudged.³⁰

The Navy Court of Military Review in Rogers v. George³¹ continued to recognize that the supervisory jurisdiction asserted in McPhail applied to the Court of Military Appeals as the highest civilian court but agreed with the Army Court that such power did not vest in the Courts of Military Review.

The Air Force Court of Military Review, in its opinion in United States v. Dettinger,³² recognized the validity of the higher Court's broad jurisdiction as a supervisory authority as claimed in McPhail, and also asserted that:

As the highest Air Force Court, through our reviews we exercise supervisory authority over the actions of Air Force trial judges, and where as here, an injustice has been done, we have the inherent power to correct it.³³

On appeal from that Court's decision the Court of Military Appeals reversed the case on its merits but agreed that the Air Force Court of Military Review did have supervisory authority "over the actions of trial judges in cases that may potentially reach the appellate court."³⁴

The Army Court's analysis of the role of Article 69 as limiting the authority of military appellate courts to review cases through grants of extraordinary relief found some support in the opinion of one judge on

28. 23 USCMA 219, 49 CMR 8 (1974).

29. 18 USCMA 7, 39 CMR (1968).

30. The Army Court also applied this rationale to a general court-martial where no discharge or confinement in excess of one year had been adjudged. The Court ruled it had no jurisdiction to review a case after The Judge Advocate General had performed his review under Article 69 and found the findings and sentence supported by law. Littleton v. Persons, 7 M.J. 582 (ACMR 1979).

31. 6 M.J. 558 (NCOMR 1978).

32. 6 M.J. 505 (AFCMR 1978).

33. Id. at 511.

34. 7 M.J. 216, 220 (CMA 1979).

the Court of Military Appeals. In Stewart v. Stevens,³⁵ the Court dismissed a petition for extraordinary relief without opinion, however, Judge Cook wrote in a special concurrence that he believed that his assertion of supervisory authority had been too broad in McPhail:

[C]onceding this Court's general authority to grant relief to a person aggrieved by official action purporting to be pursuant to, but in fact void under, the Uniform Code in proceedings other than those provided by Article 67, by explicitly investing the Judge Advocates General with corrective authority for the instances set out in Article 69, Congress effectively withdrew such authority from this Court.³⁶

Judge Cook appears to have suggested that the Article 69 remedies apply to any case that is not encompassed by Article 66, to include the imposition of punishment under Article 15, UCMJ. His discussion of the limits on the Court's powers has not been subsequently construed as limiting the Court's supervisory jurisdiction to the extent of abrogating the decision in McPhail. Nevertheless, the results in Barnett v. Persons and Stewart v. Stevens are often cited by government counsel as limiting the jurisdiction of the military appellate courts to those cases encompassed by Articles 66 and 67, UCMJ.

The question of whether the appellant courts can intervene in cases that would not otherwise be reviewed under Article 66 was reopened in Bernard v. Commander.³⁷ In Bernard the petitioner challenged the convening authority's actions where an adjudged bad-conduct discharge [hereinafter BCD] had been converted to forfeitures and reduction in pay grade. The petitioner asserted that he was entitled to the benefit of his pretrial agreement under which any adjudged discharge or reduction would be suspended. The Navy Court of Military Review stated that it had potential jurisdiction over the case because the BCD would be reinstated if this action of the convening authority were illegal, and the reinstated BCD would bring the case back within the Court's Article 66 jurisdiction. The Court therefore addressed the merits of the petition and pointed out that the convening authority's action was in fact illegal. The Navy Court then denied the petition without prejudice to the right of the petitioner to raise the same issue in a petition to The Judge Advocate General pursuant to his Article 69 remedies. This ruling would appear to be consistent with the rationale in Barnett v. Persons and Stewart v. Stevens. But

35. 5 M.J. 220 (CMA 1978) (petition for extraordinary relief dismissed).

36. 5 M.J. 221 (Cook, J., concurring) (footnote omitted).

37. 9. M.J. 820 (NCMR 1980).

instead of filing a petition under Article 69, the petitioner appealed the Navy Court ruling and the Court of Military Appeals reversed and remanded for Article 66 review, citing Jones v. Ignatius.³⁸ On remand the Navy Court construed the cite to Jones as a ruling that the convening authority's action converting the BCD was a nullity. The Court therefore reinstated the suspended BCD, as was contemplated by the original pretrial agreement.

While the Bernard writ was making its way through the courts, the case of Soriano v. Hosken³⁹ was decided. There the Court of Military Appeals agreed that it had jurisdiction to address a petition for extraordinary relief which contested a military judge's ruling that a Philippine attorney could not represent his client before a special court-martial at Subic Bay, Republic of the Philippines. The Court denied the petition on its merits, however, in a concurring opinion Chief Judge Everett pointed out that the petition had raised the "real possibility" that the military judge may not have recognized that he had discretion in the matter and had therefore improperly applied a per se rule for excluding foreign counsel. Judge Everett therefore considered it appropriate for the Court to consider the petition on its merits.

Judge Cook, although he dissented on the merits, nevertheless agreed that the Court had jurisdiction to rule on the petition. Citing both McPhail v. United States and Barnett v. Persons, he acknowledged that the "Court's authority to grant extraordinary relief is not limitless. . . . Whatever the limitations, however, extraordinary relief can be invoked to rectify a trial ruling that it is not within the power of the judge or the court-martial."⁴⁰ He went on to define the issue as a question of whether the military judge had the power to disqualify the Philippine attorney from representing the accused at court-martial:

If the judge lacks that power, his exclusion of counsel was not merely a mistake in judgment, but a void act. Review of such a ruling is a proper subject of an application for extraordinary relief.⁴¹

38. 11 M.J. 143 (CMA 1981) (summary disposition). Although the Court did not require the petitioner to seek an Article 69 remedy, in Baldwin v. Fountain, 11 M.J. 340 (CMA 1981) the Court dismissed a petition as moot where TJAG had already granted the request for relief pursuant to Article 69. The difference between the two cases may be explained by the difference between the void act in Bernard and the merely incorrect ruling in Baldwin.

39. 9 M.J. 221 (CMA 1980).

40. 9 M.J. at 224.

41. 9 M.J. at 226.

Soriano is significant in that no mention is made whether the special court-martial was authorized to adjudge a BCD. It is clear that the Court would have been in the exercise of its potential jurisdiction under Article 67 if the petitioner was in fact facing the possibility of a punitive discharge.⁴² Although Judge Cook felt it necessary to give a careful explanation of the Court's jurisdiction, he did not include in his justification the question of whether or not the case was potentially reviewable under Articles 66 or 67.

If the court-martial in Soriano was one which would not have been subject to appellate review under Articles 66 or 67 it would appear that the Court of Military Appeals' disposition of the Soriano and Bernard cases signals that the Court continues to recognize its supervisory authority as asserted in McPhail. Indeed, in United States v. Redding,⁴³ Judge Cook's lead opinion noted Soriano and McPhail as examples of cases where "persons have sought extraordinary relief from court-martial actions at the trial level that are unreachable through the regular channels of review"⁴⁴ [emphasis supplied].

It is at best difficult, and maybe impossible, to reconcile the various statements by the military appellate courts regarding their power to grant extraordinary relief in cases not otherwise reviewable under Article 66. However, the distinction between those cases where a petitioner is limited to the remedies available under Article 69 and those cases where the appellate courts will step in and exercise their supervisory powers appears to lie in the nature of the action to be challenged.

In deciding whether they have jurisdiction to grant relief on petitions for extraordinary relief, the military appellate courts have apparently recognized two classes of cases: those cases in which the respondent made a ruling or took an action outside the scope of his authority, and those cases in which the challenged ruling was legally questionable but within the respondent's authority. The former have been held subject to review under the Courts' supervisory powers; the latter have been held reviewable only when they fit within the traditional limits on jurisdiction recognized in Barnett v. Persons and by Judge Cook in Stewart v. Stevens.

42. See In re Tammins, 1 M.J. 33 (CMA 1975).

43. 11 M.J. 100 (per Cook, J., with one judge concurring in the result).

44. 11 M.J. at 103.

This distinction most explicitly arises in those cases where the government is seeking to challenge via petition for extraordinary relief a military judge's pro-defense ruling. All of the military courts have consistently recognized that in such cases petitions for extraordinary relief will not lie for any reversible error but may only be used to confine the trial court to the sphere of its discretionary power.⁴⁵ As pointed out by the Air Force Court in United States v. Pereira:

In the exercise of our extraordinary writ powers we are not at liberty to substitute our legal judgment for that of the trial judge, although we may do so in the normal course of appellate review.⁴⁶

If viewed with the above distinction in mind, the rationales in United States v. Redding, Soriano v. Hoskens, Bernard v. Commander, and McPhail v. United States are all strikingly similar: In each case the action challenged was alleged or held to be a legal nullity.

In McPhail, the accused had been convicted of a charge over which the court-martial did not have jurisdiction and the Court ruled the conviction void. In Bernard the Navy Court understood the remand to exercise Article 66 review to mean that the convening authority's action in converting a bad-conduct discharge to confinement was a nullity. In Soriano it was pointed out that if the military judge did not have the power to exclude foreign counsel, his actions would have been void and subject to countermand under the All Writs Act.

It therefore appears that the military appellate courts will issue writs in aid of their appellate jurisdiction in any otherwise appropriate case ultimately reviewable under Articles 66 and 67. Where the case would not otherwise be reviewable under Article 66 and the petitioner is challenging the respondent's application of the law, only the remedies under Article 69 appear to apply. However, in any case where the petitioner is "aggrieved by official action purporting to be pursuant to, but in fact void under the Uniform Code"⁴⁷ the military appellate courts have the power to issue writs in aid of their supervisory responsibility.

45. Dettinger v. United States 7 M.J. 216 (CMA 1979); United States v. Redding, 11 M.J. 100 (CMA 1981); United States v. Bogan, 13 M.J. 768 (ACMR 1982); United States v. Periera, 11 M.J. 632 (AFCMR 1982); United States v. Strow, 10 M.J. 647 (NOMR 1980).

46. 13 M.J. 632, 635 n.7 (AFCMR 1982).

47. Stewart v. Stevens, 5. M.J. 220, 221 (CMA 1978) (emphasis added).

In addition to the above bases for jurisdiction, there is one other category of cases that may be reached under the All Writs Act: Those cases where the action challenged has the effect of depriving the courts of their statutory appellate jurisdiction. As pointed out above, the case of Robison v. Abbott⁴⁸ has been relied upon for the rule that the military appellate courts lose their jurisdiction to review a court-martial when a punitive discharge has been converted to confinement and no other jurisdictional prerequisites exist. In United States v. Bullington,⁴⁹ the Court of Military Appeals questioned, in dicta, the validity of the conclusion in Robison that the otherwise lawful conversion of a bad-conduct discharge to confinement by a Convening Authority deprived the military courts of their jurisdiction to review a case:

Perhaps Robison v. Abbott . . . deserves reexamination in light of the literal wording of Article 66, for if approval of a punitive discharge provides the basis for conversion of the sentence, in a very real sense, the sentence should be viewed as extending to a bad-conduct discharge. Unlike the power to commute a sentence which is expressly conferred upon the President and the Secretary, Under Secretary or the Assistant Secretary of a military department, see Article 71, UCMJ, 10 U.S.C. § 871, a convening authority's power to convert a sentence from a punitive discharge to confinement has no express statutory basis. Assuming arguendo that, in the proper exercise of his Article 36, UCMJ, 10 U.S.C. § 836, powers, the President has enabled convening authorities to commute sentences, we question whether commutation can be used as a means to circumscribe appellate review that otherwise would take place under Articles 66 and 67.⁵⁰

Most recently the Court has issued a show cause order in Dobzynski v. Green.⁵¹ That case challenges the actions of a military judge and convening authority where the government motion to withdraw the charge

48. 23 CMR 219, 49 CMR 8 (1974).

49. 13 M.J. 184 (CMA 1982).

50. 13 M.J. at 187 n.4 (emphasis supplied).

51. 14 M.J. 166 (CMA 1982). If a petition for extraordinary relief is in correct form and states a basis for relief and jurisdiction, the court will order the respondent to "show cause" why the relief should not be granted. This is the first favorable step in most writ cases unless the relief is granted ex parte.

from a bad conduct discharge special court-martial was granted after the defense had won a key suppression motion. This occurred aboard a Navy vessel and the convening authority proceeded to impose non-judicial punishment for the same offense. Under Article 15(a), UCMJ, personnel assigned to Navy vessels do not have the right to demand trial by court-martial when offered non-judicial punishment. The petitioner has challenged the mandatory imposition of punishment for an offense for which he could not have been convicted at a trial by court-martial. The Court has not, as of this writing, issued an opinion in Dobzynski but the issuance of a show cause order in that case and the footnote in Bullington, quoted above, provide a basis for jurisdiction that counsel should not ignore: That the Court's jurisdiction resides in the originally adjudged sentence, or level of court, and subsequent actions by the convening authority may not defeat that jurisdiction.

A proper explanation of the court's jurisdiction is a critical element of any petition for extraordinary relief because principles of judicial economy dictate that appellate courts will not intervene in a case unless they believe a clear mandate exists to justify their action. A petition for extraordinary relief that fails to adequately establish its jurisdictional prerequisite will run a real risk that an error or abuse not otherwise reviewable in the appellate process will never be corrected.

VI. Conclusion

A petition for extraordinary relief can be an important tool which a defense counsel can use to supplement the more common procedures available to represent a client before the military justice system. In some cases it may be the only adequate means available to obtain review of an action which a defense counsel believes to be contrary to law. Without some familiarity with the basis and extent of the military appellate courts' power to grant extraordinary relief, counsel may overlook a major vehicle to ensure favorable results for their clients.

APPENDIX

FORMS FOR PETITIONS FOR EXTRAORDINARY
RELIEF AND SUPPORTING BRIEF

IN THE UNITED STATES
COURT OF MILITARY APPEALS/COURT OF MILITARY REVIEW

_____ ,	Petitioner)	PETITION FOR EXTRAOR-
)	DINARY RELIEF IN THE
)	NATURE OF
)	(Type of writ sought)
v.)	
_____ ,	Respondents)	
)	_____
(Military Judge, Convening)	Miscellaneous Docket No.
Authority, Confinement)	_____ [For Court use only]
Commander etc.) and The)	
United States of America)	

Preamble

The petitioner hereby prays for an order directing the respondent to:

[Specify in this preamble a very brief indication of the nature of the relief sought sufficient to alert the Court to the problem]

I

History of the Case

II

Statement of Facts

III

Statement of Issue

[Do not include citations of authority or discussion of principles. Set forth no more than the full question of law involved.]

IV

The Relief Sought

[State with particularity the relief which the petitioner seeks to have the Court order.]

V

Reasons for Granting the Writ

VI

Jurisdictional Statement

PETITIONER

ATTORNEY

ADDRESS & PHONE
NUMBER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed or delivered to the Court and to the respondent on _____.
(Date)

NAME

ADDRESS & PHONE
NUMBER

Conclusion

[State briefly the extraordinary relief sought. No particular form of language is required, so long as the brief concludes with a clear prayer for specific Court action.]

Appendix

[The appendix, if required by court rules or otherwise deemed appropriate by counsel, will be separately bound and will be filed with the brief. The petitioner shall prepare and file an appendix containing any Court of Military Review decision and relevant portions of the record of trial or exhibits therein necessary to dispose of issues presented.]

[If resolution of the issue or issues presented requires the study or application of a rule, regulation or unpublished opinion (other than that of the Court of Military Review in the case in which the brief is submitted) or relevant parts thereof, such items will be reproduced in an appendix to the brief.]

(Attorney)

(Address & Phone)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed or delivered to the Court and to opposing counsel (respondent) on _____ (Date)

(Attorney)

(Address)

EYEWITNESS IDENTIFICATION

by Robert G. Fierer*

I. Introduction

Every lawyer in America who has even modest contact with an active criminal practitioner has some awareness of the unreliability of eyewitness identification. Therefore, the fundamentals of this paper lean heavily on others (with due credit). Then (in the spirit of adventure) it makes some suggestions of exploratory paths to try which, depending upon jurisdiction and judge, may be useful (or create frustration, potential contempt citations, and contemplations of abandoning the practice altogether). The discussion begins with a comment upon the unreliable nature of eyewitness testimony, continues with the criminal process delineated by its own peculiar progression and includes a practical bibliography.

II. Unreliability of Eyewitness Testimony

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. United States v. Wade.¹

After explicitly identifying the problems inherent in eyewitness identification testimony and boldly grappling with solutions in the now not-so-famous trilogy of Wade-Gilbert-Stovall,² the Supreme Court emasculated those solutions in Kirby v. Illinois,³ and then decapitated them

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1. 338 U.S. 218, 228 (1967).

2. United States v. Wade, *id.*; Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

3. 406 U.S. 682 (1972).

in ruling "that reliability is the linchpin in determining the admissibility of identification testimony."⁴ Thus, the due process evaluation of the identification procedures used by the police moved from the suggestiveness (and reasons therefore) of the identification procedure to "whether under the 'totality of circumstances' the identification was reliable even though the confrontation procedure [may have been] suggestive."⁵ Among the critical factors to be included in the evaluation, as spelled out by the Court, are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witnesses at the confrontation and the length of time between the crime and the confrontation.

If reliability is the linchpin, how may the lawyer demonstrate a lack of reliability to the trier of fact? Cases are legion where mistaken identification has caused the conviction and punishment of an innocent man. Recall the gentleman bank-robber case. Most recently, in Ohio, it was discovered that an innocent man served more than five years for multiple rapes that he steadfastly denied and, in fact, did not commit. He was convicted by the testimony of four eyewitnesses, some of whom were "absolutely certain" that he was the man. The Pennsylvania priest robbery case is another notable example.

As the lawyer seeks to impress upon the Court the importance of this issue and the sincerity of his purpose in seeking to demonstrate the inherent unreliability in eyewitness testimony, it is very helpful to be able to call up specific examples of such miscarriages of justice. There are many fine sources in which such examples are cited.⁶ Every motion should have a visual exhibit of injustice.

Additionally, it is essential from the very beginning that counsel understand the processes of observation and recall and the factors which contribute to the unreliability phenomenon. These factors include those set out in Neil v. Biggers,⁷ and further include the suggestiveness of any

4. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

5. Neil v. Biggers, 409 U.S. 188, 199 (1972).

6. See United States v. Wade, 388 U.S. 218; Bibliography, Section V, infra.

7. 409 U.S. 188.

pretrial identification procedure. Psychological studies have shown that additional factors, such as stress, bias, and racial characteristics, to name but a few, may also contribute to the unreliability of an identification. Elizabeth Loftus' book Eyewitness Testimony⁸ is an excellent source book from which to learn of these factors and phenomena.

There is no magic here, merely suggestions on presenting evidence and argument pertaining to the unreliability of eyewitness testimony throughout pretrial proceedings and trial. Obviously, the feasibility of many of these suggestions depends on the scope of voir dire, cross-examination and submission of evidence allowed by the particular judge trying the case. Thus, many of the suggestions are also intended to educate the judge so that he might be inclined to exercise his discretion in broader strokes, vis-a-vis this issue. It is hoped that these suggestions prove useful and, more importantly, lead practitioners to their own ideas and vehicles in response to the peculiar facts of their cases.

III. The Process

A. Preliminary or Commitment Stage

There is only one rule: Nail down the circumstances of the crime/opportunity to observe and the circumstances of any identification procedure!

As an example, in a case where the writer was counsel, the preliminary hearing revealed among other things:

A police officer had been charged with rape while he was on duty and in uniform in the rear seat of his marked car. The defense was, that if a rape occurred at all this officer did not do it.

The alleged victim had been shown pictures of the police officer (in uniform) on duty that night in that zone. The important factors were:

1. She had been told that these were the officers on duty that night in the zone. (Therefore any pick was "safe" for a lying or mistaken witness).
2. She had been asked to mark her initials on the back of the picture she chose before her boyfriend/corroborating witness viewed the same spread (thus he had an opportunity to see the initials and be influenced). The type of questions to be asked in this example are included in the cross-examination section infra.

8. (Harvard University Press, 1979).

B. Pretrial Motions

The first opportunity to litigate the unreliability issue is at the pretrial motion stage. There are as many pretrial motions as there are potential fact situations. However, a few are listed below which touch upon the different problem areas and have served this author modestly well in the past.

Under certain circumstances, counsel may wish to challenge the identification by requesting the line-up himself. This often is done prior to a preliminary hearing, by motion, particularly when there is a decent chance that the case will be dismissed at the hearing. There are great risks in doing this, of course, including reinforcing the witness' feeling of certainty prior to testifying at the preliminary hearing and providing another piece of out-of-court identification evidence. Under the right circumstances and with the right result, it can be the quickest way to get a case dismissed.

Should a case contain even the hint of an eyewitness identification issue, then a discovery request pertaining to those issues and the facts surrounding them should be filed. Most prosecutors usually interpret any "favorable evidence" very narrowly, so requests regarding identification need to be made specifically. For example,

Any and all evidence involving a line-up held at the City of Atlanta Police Headquarters on or about June 23, 1982, including but not limited to the names, addresses and telephone numbers of all of those participating in the line-up, and those viewing said line-up; photographs taken of said line-up; and, any notes, records or memoranda regarding any statements or conversations between viewers of the line-up and any law enforcement officers.

It is doubtful that a broad discovery request "pursuant to Brady⁹ and its progeny" would ferret out from the files of the prosecutor any equivocation on the part of any eyewitness or suggestibility of the procedures. Thus, this kind of request, as is the case with all discovery requests, needs to be as specific as possible.

9. Brady v. Maryland, 373 U.S. 83 (1963).

If not so suggestive as to be suppressible, the ID process is arguably Brady/Giles¹⁰ material which will bear on confrontation and impeachment. Pretrial non-disclosure creates the potential of sound mistrial arguments. At a minimum a short investigatory continuance might be appropriate. Additionally, a motion to compel psychological testing of an alleged eyewitness might be considered. It is very unlikely that courts will grant this motion in most cases. But where something can be alleged which indicates that this particular witness has certain psychological disabilities--i.e. alcoholism, low I.Q.--and these disabilities can be related to a lack of ability to perceive, retain, and retrieve eyewitness information, then there is a very real possibility that testing will be ordered. Such a motion also serves the additional valuable purpose of educating the trial judge as to the merits of this particular issue of the case. Obviously, such a motion will only be entertained by the relatively sensitive judge. Every lawyer knows of certain judges who would not give this type of motion second thought prior to denying it. As this request would be discretionary, it is unlikely that the denial of it will create a good issue for appeal.

Finally, despite the fact that the Supreme Court has cut out the heart of the Wade-Gilbert-Stovall¹¹ traditional motions to suppress in-court and out-of-court identification based upon the suggestibility of pretrial confrontations and/or the denial of the right to counsel at confrontations, such motions should still be filed in every case where they appear to be the least bit meritorious. Not only are the motions often necessary to raise and preserve issues, but they provide an invaluable discovery tool for the lawyer whose defense rests upon discrediting eyewitness identification. Additionally, though courts rarely suppress in-court identification because of the ease of showing an independent source, to be rid of out-of-court identification goes a long way in successfully raising the defense. The Supreme Court has made clear that reliability, not suggestibility, is the key to due process. Reliability is, of course, normally a factual question and, therefore, courts will rarely throw out an identification as a matter of law.

Again, the purpose of setting out the above examples is not to provide an exclusive list of possible motions but to demonstrate that when the issue exists the pretrial motion stage of the proceedings can be of significant importance to the whole case. It is at this stage of the case that the lawyer lays the foundation for his request that the court exercise its discretion and allow him latitude in his challenge of the eyewitness identification evidence at trial.

10. Brady v. Maryland, id.; Giles v. Maryland, 386 U.S. 66 (1967).

11. United States v. Wade, 338 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

C. Voir Dire

The freedom to ask a broad range of voir dire questions depends upon the discretion of the trial judge. Assuming that the trial judge grants some latitude, however, voir dire can become an important part of the process vis-a-vis the eyewitness identification issue. Voir dire questions should seek to discover any characteristics of a potential juror which may affect your case, either positively or negatively, and educate potential jurors as to some of the facts and issues with which they will be confronted. Many questions come to mind in the eyewitness identification process. For example, jurors can be asked if they have had any mistaken identification experience.

Have any of you had the experience of seeing someone you thought you knew or had met, but later learned you mistook that person for someone else?

Does anyone on the panel think that all people have equal powers of observation and recall?

Voir dire can also go a long way in laying the foundation for the introduction of expert psychological testimony at trial. The primary reason such testimony has been excluded is that it allegedly invades the province of the jurors who are allegedly fully capable of determining witnesses' ability to perceive and remember. Thus, voir dire can be used to elicit the lack of knowledge and appreciation most people have for the psychological factors that exist in eyewitness identification testimony.

Are any of you aware there are tests that show that stress affects the reliability of eyewitness identification?

Are any of you aware there are studies that demonstrate cross-race eyewitness identification is less reliable than identification by people of the same race?

Properly phrased and fit within the factual framework of the specific case, these questions will serve to demonstrate to the judge, and for the record, that the general knowledge of perception and memory is not great and, just as importantly, alert the potential jurors of the key facts you will raise to challenge the eyewitness testimony.

Alert prosecutors object to questions such as these. There will ordinarily be one opportunity to educate in objection-response. For example, on objection to the first question above in this section:

Our position, if it pleases the Court, is that if anyone raped the alleged victim, Officer Jones was not that person and she is mistaken. And, it is, we believe, proper to explore the jurors' experience on this most critical issue, mistaken identification.

This rejoinder should be made forcefully and clearly in open court and not at the bench.

You are making a record for the later admissibility of expert testimony on the subject. If there is no response (no knowledge of tests and/or studies) by any or only a few jurors then the argument to admit is stronger. As the rationale of exclusion is an invasion of the province of the jury (it is also allegedly within their common experience), counsel may now counter with the compelling argument that in point of fact, with this jury, it is not within their experience.

You remember Judge, no juror was familiar with the tests/studies; none knew of recall differential; none had ever had the experience of misidentifying a person they thought they knew.

Additionally, if expert testimony will be offered, it is important to make sure that your jurors appear to have some faith in psychological theory and practice. A juror who believes that psychological theory is merely mumbo jumbo will not be a particularly good juror for the defense in an eye-witness case.

D. Opening

Each lawyer utilizes his own style of opening, but this writer believes in confronting issues only.

An identification exists or we could all go home at noon. Why not talk about it and juxtapose it to every known deficiency? Deficiencies range from suggestibility to observability. An example:

She says it was Officer Jones, but she did not know his name which was clearly on his uniform name tag; the number of his badge, plainly visible on his chest and hat; or the number of his car which is a foot and one-half tall and which is on his car in three places!

[These facts had been nailed down at the preliminary hearing].

E. Cross-Examination

If cross-examination was done properly at the preliminary hearing, the trial cross-examination will be substantially identical in substance but refined in procedure. If not, it may well be a treacherous path.

The point of it all is that no human is omniscient. There are areas which will be fruitful. In one police officer example, the collateral issues of badge, name tag, and car number became important.

As examples:

Isn't it true, the person you claim did this was in uniform?

Isn't it true you say it was an Atlanta police uniform?

Isn't it true they have badges? You don't remember the number? (Or you didn't observe the number?)

. . . there is a name tag?

. . . observe the tag?

The human deficiency always exists somewhere and if found is exploitable. It may be clothing, lighting, distance, a mistake in original description, or it may be an integral or collateral lie. The places to find it are in preliminaries, in investigation (visits to the scene, interviews, informal discovery, formal discovery, and any other tool to uncover the error of the witness' perceptions) and maybe even at the motions stage.

F. Expert Testimony

Over the past ten years or so, a battle over the admissibility of expert psychological testimony as it pertains to eye-witness testimony has been fought. A few conclusions at this stage may be drawn. First of all, it is within the exercise of a trial court's discretion to admit such testimony.¹² There are very few reported cases on the subject and it appears that all of those hold that it was proper for the court

¹². United States v. Foshier, 590 F.2d 381 (1st Cir. 1979); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); United States v. Thevis, 665 F.2d 616 (5th Cir. 1983).

to exclude such expert testimony. This is in large part due to the fact that the only cases on this subject to be reported are those in which the defendant appealed the unfavorable ruling of the trial court. If the trial court should rule favorably there is no issue for an appellate court to hear.

As stated before, the primary reason for the exclusion of such testimony is that it invades the province of the jury. This combined with "the aura of special reliability and trustworthiness" that jurors are alleged to give expert testimony causes some judges to find that it is more prejudicial than it is probative. Thus, as pointed out earlier, it can be critical to lay the foundation for the need for such testimony at voir dire. Additionally, it should be pointed out to the court that the expert will not testify to the credibility or reliability of a particular witness' statement. Instead the testimony will be directed to the general memory process (the acquisition phase, the retention phase, and the retrieval phase) and the significant psychological factors in the particular case.¹³

Obtaining an expert may be difficult. However, inquiry into the psychology department at the closest local university is a great place to begin. If financial limitations become paramount in regard to expert testimony, than a lawyer may wish to consider using a doctoral candidate in the area whose qualifications may be somewhat less but nevertheless may still have sufficient expertise to testify in the area.

G. Demonstrative Evidence

The possibilities in this area are virtually infinite. It is most important that such evidence recreate the scene at the time of the view as accurately as possible. Thus, if the prosecution's photographs show the scene of the crime during the daytime, not only should they be objected to as inaccurate representations but photographs taken in "available light" should be admitted by the defense to let the jurors see exactly how dark it was. Similarly, if lines of sight are a factor in a view then models made to scale are very advantageous. After a foundation has been laid as to the exact lighting at the scene, lawyers have been known to have the courtroom lights dimmed to demonstrate the difficulty in obtaining a view. Again, these are but a few examples of what is potentially an infinite pool of possibilities.

13. Loftus, Elizabeth E., Eyewitness Testimony, Section V (Harvard University Press, 1979) (an excellent source for what this expert testimony will be).

H. Closing Argument

Bring it all together! There is a balancing of deficiencies versus the reliability of the identification. If any particular weakness exists in the identification procedure itself or the seminal identification, the equilibrium shifts to the defense.

I. Jury Instructions

Cautionary instructions as to eyewitness testimony are within the broad discretion of the trial court. They are rarely, if ever, given without a request by the defendant. The standard model for a cautionary instruction is found in United States v. Telfaire.¹⁴

14. 469 F.2d 552, 558-59 (D.C. Cir. 1972).

One of the most important issues in this case is the identification of the accused as the perpetrator of the crime. The government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the accused before you may convict him. If you are not convinced beyond a reasonable doubt that the accused was the person who committed the crime, you must find the accused not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

(Continued)

Obviously, this model instruction must be modified to make it applicable to a particular case. Moreover, if expert testimony has been introduced, a special instruction to that must be requested. Finally, whether a particular judge will entertain such an instruction will depend in large part upon how well he has been educated earlier.

14. Continued.

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness saw or knew the person in the past.

[In general, a witness bases any identification he makes on his perception through use of his senses. usually the witness identifies an offender by the sense of sight - but this is not necessarily so, and he may use other senses.]*

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the accused was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the accused, as a factor bearing on the reliability of the identification.

*Sentence in brackets ([]) to be used only if appropriate. Instructions may be inserted or modified as appropriate to the proof and contentions.

(Continued)

IV. Conclusion

A little luck, a little verve, an idea here, and an idea there is what it takes to win.

The author presupposes no magic and presumes nothing, but hopes there is a new thought here or an old one revived that is useful to all, some, or even one defense counsel.

14. Continued

[You may also take into account that an identification made by picking the accused out of a group of similar individuals is generally more reliable than one which results from the presentation of the accused alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of the accused, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness. Consider whether he is truthful and whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the accused as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the accused not guilty.

V. Bibliography

The books and article below are listed because, among all of them, they include a complete collection of case and other references. For example, the Loftus book thoroughly examines the psychological aspects of eyewitness testing. The Sobel book extensively analyzes the ramifications of suggestibility in the identification procedure. Ron Meshbesh's article includes a comprehensive list of case citations on many of the frequent issues arising in eyewitness cases.

Books: Loftus, Elizabeth E., Eyewitness Testimony, (Harvard University Press, 1979).

 Wall, Patrick, Eye-Witness Identification in Criminal Cases, (Charles C. Thomas, 1965).

 Sobel, Nathan R., Eyewitness Identification, (Clark Boardman, Second Edition, 1981).

Articles: Meshbesh, Ronald, Eyewitness Identification, 1981).

 Salisbury, Eyewitness Identification: A New Perspective on Old Law, 15 Tulsa L. Jour. 38 (1979).

 Note, Did your eyes deceive you? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977).

URINALYSIS: DEFENSE APPROACHES

I. INTRODUCTION

On 28 December 1981 the Deputy Secretary of Defense issued a memorandum to the military services announcing a new attack on drug and alcohol abuse by servicemembers. One aspect of this new effort envisions a sweeping, mandatory urinalysis program with the results being made available as evidence in court-martial proceedings. The Navy and Marine Corps implemented the memorandum almost immediately and several court-martial proceedings in both services have been initiated, although none have resulted in findings to date. The Army responded more cautiously, with several interim changes to Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program. A final interim change to this regulation, which outlines urinalysis procedures in detail, became effective on 11 February 1983.¹

The legality of the urinalysis program may be the single most controversial issue before the Court of Military Appeals this year. The Court recently ordered briefs and heard argument on an extraordinary writ in a Navy case on the issues of military jurisdiction and the constitutionality of the mandatory seizure of bodily fluids.² The crucial constitutional issues surrounding urinalysis were presented in the last issue of The Advocate.³ This article will analyze some of the legal issues concerning the admissibility of urinalysis evidence which may be raised at trial.

II. THE DEVELOPMENT OF A URINALYSIS TEST

Since a significant avenue for contesting the evidence resulting from mandatory urinalysis deals with the reliability of the testing procedures, a good working knowledge of the terms commonly used when discussing urinalysis and some background on the procedures involved is essential.

1. Interim Change No. 102, Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program (11 February 1983) [hereinafter cited as AR 600-85]

2. Murray v. Halderman, USQMA Misc. Dkt. No. 83-20/NA (20 Jan. 83).

3. Maizel, Urinalysis: Search and Seizure Aspects, 14 The Advocate 402 (1982).

Marijuana is derived from the leaves and flowers of the cannabis sativa L plant. Its principal psychoactive ingredient is delta-9-tetrahydrocannabinol [hereinafter referred to as THC]. The THC content of marijuana varies, but ranges from 0% to 5%. Hashish contains from 5% to 15% THC.⁴ THC is rapidly absorbed into the body, where it is then metabolized. Many of the metabolites are excreted in the urine. The most common metabolite is 11-nor-delta-9-THC-9-carboxylic acid. Metabolites can be detected in an individual's urine for up to ten days after he has smoked marijuana.⁵

The ability to detect THC in urine is new to science. In 1969 one study was able to detect cannabis from the mouth and fingers of smokers but not from their urine.⁶ In the early 1970's scientists tried unsuccessfully to develop a simple urinalysis test which could detect marijuana.⁷ Finally, in the mid-1970's, several immunoassay techniques were developed.⁸ The immunoassay test involves the mixing of the specimen with another agent in a test tube. If THC metabolites are present a specific chemical reaction will occur. The result is then compared against a reference solution. The manufacturers of EMIT and RIA, which are two types of immunoassays, acknowledge that these tests have varying degrees of accuracy, as they react to many metabolites, including non-THC compounds, present in the urine. They suggest that their technique

4. SYVA Company, Urine Cannabinoid Assay, (A Product Brochure), at 3 1982 [hereinafter cited as SYVA]. May be obtained by writing to SYVA at 900 Arastradero Road, P.O. Box 10058, Palo Alto, CA 94303.

5. Id.

6. Stone and Stevens, The Detection of Cannabis Constituents in the Mouth and the Fingers of Smokers, Forsenic Science Society Journal 9, 31 (1969) as reported in 22 Am. Jur. Proof of Facts, Identification of Substances by Instrumental Analysis § 5.5 (Supp. 1981) [hereinafter cited as 22 Am. Jur. Proof of Facts].

7. Gross and Soares, Separate Radioimmune Measurements of Body Fluid, Delta-9-THC and 11-Nor-9-Carboxy-Delta-9-THC, in Cannabinoid Assays in Humans, 10-14 (NIDA Research Monograph No. 7, 1977). Copies of all NIDA Research Monographs discussed herein can be obtained by contacting the National Institute of Drug Abuse, 5600 Fishers Lane, Rockville, Maryland 20857.

8. Id.

only be used as a screening device, and that an alternative method be used to confirm its results.⁹

Gas chromatography is a forensic technique that has been used for many years, although not for detecting THC metabolites in urine. Chromatography separates substances for further identification by, for example, mass spectrometry. It is a more complex technique than EMIT or RIA and can only be achieved in a laboratory setting.¹⁰ By the late 1970's the technique of gas chromatography/mass spectrometry [hereinafter referred to as GC/MS] was developed to test for the presence of drugs in biological fluids. To date, GC/MS is considered the most specific and sensitive test available to detect cannabinoid metabolites in urine.¹¹

In response to the Deputy Secretary's memorandum of 28 December 1981, the Department of Defense turned to its scientists at the Armed Forces Institute of Pathology. There, Doctors John D. Whiting and William W. Manders agreed that GC/MS "has become the instrument of choice for the detection of THC metabolites in urine." [However,] "because of the high cost and the need for specially trained operators,"¹² GC/MS was rejected as a feasible test for the military and the researchers developed a new

9. See SYVA supra note 4, at 23-25. See also, McBay, Dubowski, and Finkle, Letter to the Editor, The Journal of the American Medical Association, 249 JAMA 881 (February 1983) [hereinafter cited as McBay, et al., Letter to JAMA].

10. 22 Am. Jur. Proof of Facts, supra note 6, at § 7, contains a detailed explanation of the gas chromatography process, as do several treatises dealing with the handling of drug prosecutions. See also, Raezer, Prosecution of Drug Offenders Based on The Newly Developed Urine Test (Part 1), I Trial Counsel Forum No. 2, Trial Counsel Assistance Program, United States Army Legal Services Agency (September 1982); Bernheim, Defense of Narcotic Cases § 4.09 (1982).

11. Jones, Human Effects: An Overview, 54, 59 (NIDA Research Monograph No. 31, 1980) and Turner, Chemistry and Metabolism In Marijuana Research Findings: 1980, 81, 89 (NIDA Research Monograph 31, 1980).

12. Whiting and Manders, Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatograph, 6 Journal of Analytical Toxicology, January/February 1982 [hereinafter cited as Whiting and Manders].

confirming test: gas chromatography equipped with a flame ionization detector [hereinafter referred to as GC/FID].¹³

According to Whiting and Manders the GC/FID procedure should be used to confirm the presence of THC metabolites only in those samples of urine producing a response greater than 20 ng/ml (nanograms per milliliter) by the screening tests, EMIT or RIA. Specimens initially producing less than 20 ng/ml should not be tested further.¹⁴ The accuracy of the GC/FID technique was reportedly confirmed by testing the same samples with the GC/MS method. Of 62 specimens tested, 21 were confirmed to have greater than 75 ng/ml of THC by GC/FID and 22 were confirmed by GC/MS. Whiting and Manders concluded that the tests show a "greater than 95% correlation."¹⁵ The RIA screening test with confirmation by GC/FID as developed by Whiting and Manders has been adopted for use by the Army.¹⁶

13. GC/FID is referred to as GLC in Interim Change IO2, AR 600-85.

14. Whiting and Manders, supra note 12, at 49.

15. Id. at 51.

16. Para. 3-17g (3), Interim Change IO2, AR 600-85. See also, Para. 3-15, AR 600-85. Standard operating procedures [hereinafter SOP] for the Army's drug testing laboratories require specimens yielding positive results by RIA to be retested by RIA prior to testing by GLC. Revised Policies and Forms for Biochemical Testing Programs, HQDA Letter 40-83-1 (18 February 1983). The SOP also provides for re-test by the Army lab at the request of the servicemember. The request must be in writing and signed by the servicemember or his counsel. The SOP will be supplemented by local SOPs, prepared by each drug testing laboratory. According to the supervisor of the Fort Meade Laboratory, Army laboratories (Fort Meade, Tripler, and Weisbaden) will be equipped with GC/MS for "quality control purposes." Although not a part of HQDA's SOP, his laboratory's SOP will probably require confirmation of all specimens to be used in proceedings under the Uniform Code of Military Justice [hereinafter cited as UCMJ] by both GC/FID and GC/MS. Telephone interview with CPT Dennis Shingleton, Chief of Drug Urinalysis Test Center, Fort Meade, Maryland (24 January 1982). If in fact the government uses both procedures, reliability of both tests must be established. See discussion at III B., infra.

III. DEFENSE APPROACHES TO MANDATORY URINALYSIS EVIDENCE

A. Jurisdiction

Urinalysis test results may constitute evidence of drug use. These results cannot prove where and when that alleged use occurred. The burden is on the government to prove that the military has jurisdiction to prosecute the alleged offense.

In the landmark case of O'Callahan v. Parker,¹⁷ the Supreme Court held that a court-martial lacked jurisdiction over the subject matter of an offense charged against a service member unless that offense was "service connected." In Relford v. Commandant,¹⁸ the Court amplified the O'Callahan decision by holding that, in "an ad hoc approach to cases where trial by court-martial is challenged,"¹⁹ the courts should determine jurisdiction by consideration of certain specifically enumerated criteria.²⁰ In United States v. Trottier,²¹ the Court of Military Appeals held that the "slavish" application of the Relford criteria was unnecessary if a class of cases could be recognized in which military jurisdiction exists.²² The Court then created such a class, including within it "almost every involvement of service personnel with the commerce of drugs" and declared this class to be "service connected."²³ The Court did, however, recognize an exception to the class:

17. 395 U.S. 258 (1969).

18. 401 U.S. 355 (1971).

19. Id. at 366.

20. Id. at 365.

21. 9 M.J. 337 (CMA 1980).

22. Id. at 343-345.

23. Id. at 350. The Court has further weakened the protections of the Relford decision by recently holding that the criteria enumerated in Relford "were not intended to be exhaustive." United States v. Lockwood, 15 M.J. 1, 4 (CMA 1983). The Court suggested several new criteria for finding service connection, including the overbroad "need" to maintain the "reputation" and "morale" of the Armed Services. Id. at 10.

Only under unusual circumstances, then, can it be concluded that drug abuse by a serviceperson would not have a major and direct untoward impact on the military. For instance, it would not appear that use of marijuana by a serviceperson on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under O'Callahan. . . .²⁴

The importance of this exception in dealing with mandatory urinalysis cases cannot be overemphasized. Defense counsel should argue that this exception is applicable in almost every drug use case where the sole evidence against an accused is the result of a urinalysis test.²⁵

While it is vital to show the court any favorable facts available, e.g., that your client was on leave just prior to the urinalysis or that his duty performance has never appeared to be affected by drug use, remember that the government has the burden to plead jurisdiction in the specification²⁶ and to prove the existence of service connection.²⁷

B. The Admissibility Of Novel Scientific Evidence

The GC/FID technique is not only new, but virtually untested. Defense lawyers can make a persuasive argument that the laboratory results produced by GC/FID should not be admitted into evidence because neither the method nor its results have been proven reliable.

24. United States v. Trottier, 9 M.J. at 350 n.28.

25. In Murray v. Haldeman, USCMA Misc. Dkt. No. 83-20/NA (20 Jan. 83), the appellant was on thirty days leave in conjunction with a permanent change of station. The urinalysis was performed when he reported for duty at his new assignment. The Court of Military Appeals has requested briefs on the issue of whether the military could assert jurisdiction under these circumstances. The impact of the decision in United States v. Lockwood, 15 M.J. 1 (CMA 1983), on this exception may be significant. See note 23, supra.

26. United States v. Alef, 3 M.J. 414 (CMA 1977).

27. Runkle v. United States, 122 U.S. 543 (1887).

In an oft-quoted passage, the Court of Appeals for the District of Columbia Circuit, in Frye v. United States,²⁸ established the standard for the admissibility of novel scientific evidence:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.²⁹

The Frye standard was adopted by the military in United States v. Hulen.³⁰ However, subsequent to Hulen, the Military Rules of Evidence [hereinafter cited as Mil. R. Evid.] were enacted. Military Rule of Evidence 702, identical to Rule 702 of the Federal Rules of Evidence, fails to mention the Frye standard, and states only that scientific evidence is admissible if it is helpful to the trier of fact.³¹ In a footnote to United States v. Martin,³² the Court of Military Appeals recently suggested that Mil. R. Evid. 702 may alter the application of Frye to court-martial proceedings. Indeed, a number of courts have seized upon the Federal Rules of Evidence as the opportunity to rid themselves of the Frye standard, regarding the silence of the Federal Rules of Evidence as tantamount to an abandonment of the "general accept-

28. 293 F. 1013 (D.C. Cir. 1923).

29. Id. at 1014.

30. 3 M.J. 275 (CMA 1977).

31. Mil. R. Evid. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

32. 13 M.J. 66, 68, n.4 (CMA 1982).

ance" standard.³³ Other courts however, have argued that the Frye standard was omitted from the Federal Rules of Evidence simply because it was unnecessary to codify an established evidentiary rule.³⁴

Trial defense lawyers should argue that the rationale of Frye is still alive, and that the evidence should be suppressed under Mil. R. Evid. 403.³⁵ The admission of novel scientific evidence on the basis that it is helpful,³⁶ without a prior judicial determination that the evidence is reliable, creates a dangerous situation which may invade the province of the jury. Admitting novel scientific evidence could "deprive the defendant of the common sense and collective judgment of his peers, derived after weighing the facts and considering the credibility of witnesses, which has been the hallmark of the jury tradition."³⁷ An "aura of special reliability and trustworthiness"³⁸ attaches to scientific evidence. Because of its apparent objectivity, an opinion that claims a

33. See e.g., United States v. Williams, 583 F.2d 1194 (2d Cir. 1978), cert. denied, 439 U.S. 1117, (1979). See generally, 3 J. Weinstein and M. Berger, Weinstein's Evidence 702-16 (1981) [hereinafter cited as Weinstein's Evidence].

34. See e.g., United States v. Brown, 557 F.2d 541 (6th Cir. 1977). See generally, Gianelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 Colum. L. Rev. 1197 (1980) [hereinafter cited as Gianelli]; McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L. Rev. 879 (1982). Both law review articles contain exhaustive reviews of the cases accepting and rejecting the Frye standard.

35. Mil. R. Evid. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

36. Mil. R. Evid. 702.

37. United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975).

38. United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

scientific basis is apt to carry undue weight with the trier of fact."³⁹ Consequently, the probative value of the urinalysis results, weakened by the test's unproven reliability, is greatly outweighed by the potential of prejudice to the accused.⁴⁰

Many of the cases which reject the Frye standard can be distinguished. A clear distinction exists between novel scientific evidence such as GC/FID and other scientific tests such as those for voiceprints⁴¹ or bite marks.⁴² Chemical urinalysis does not permit the jury to independently judge the reliability of the evidence. A jury can listen to tapes of an accused's voice and decide for themselves if he sounds like the alleged obscene phone caller. A jury can look at the photographs of the victim's wounds and compare them with photographs of the accused's teeth. With chemical urinalysis, once the evidence is placed before the jury, and once the jury accepts its validity, the decision as to whether the accused is guilty or innocent has, in effect, been made.

If urinalysis evidence is admitted merely on the basis of its "helpfulness," the burden of proof is shifted to the accused to disprove the validity of its results. "A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence. . . ."⁴³

39. United States v. Baller, 519 F.2d 463, 466 (4th Cir. 1975), cert. denied, 423 U.S. 1019 (1975). See also United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974).

40. Mil. R. Evid. 403. See also United States v. Hicks, 7 M.J. 761 (ACMR 1979), pet. denied, 7 M.J. 249 (CMA 1979).

41. See e.g., United States v. Baller, 519 F.2d at 466 n.39.

42. E.g., People v. Marx, 54 Cal. App.3d 100, 111, 126 Cal. Rptr. 350, 356 (Cal. Ct. App. 1975).

43. United States v. Brown, 557 F.2d at 556 n.34. But see United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980).

Several suggestions have been made which would insure the vitality of the Frye standard under the Rules of Evidence. One suggestion is that the provisions of Mil. R. Evid. 703, requiring an expert to base his opinion on data which is "reasonably relied upon by experts in the particular field", be extended to the admission of scientific evidence under Mil. R. Evid. 702.⁴⁴ Another suggestion is that the probative value of the evidence be determined by weighing several indicia of reliability, including support for the technique in the scientific community.⁴⁵ Professor Giannelli has proposed that a special burden be placed on the government, requiring that the validity of the novel technique be proven beyond a reasonable doubt before its admission under Mil. R. Evid. 702 may be considered.⁴⁶

The government most assuredly will argue that the reliability of its evidence cannot rest solely on a process of "counting [scientific] noses,"⁴⁷ and that Whiting and Manders' test on 62 specimens⁴⁸ suffices to ensure that the results are valid. However, even those courts which have rejected Frye outright will not permit the introduction of evidence which is unsupported in the scientific community.⁴⁹ Since the only research offered to validate the new technique was conducted by those who developed the theory, defense counsel may argue that the Whiting and Manders' test is unsupported by independent research.⁵⁰ The government may also point to the few cases which have accepted the results of various

44. Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 324-325 (1981) [hereinafter cited as Saltzburg, Schinasi and Schlueter].

45. Weinstein's Evidence, supra note 33, at 702-18, 19.

46. Giannelli, supra note 34, at 1245-1248.

47. United States v. Williams, 583 F.2d at 1198 n.33.

48. Whiting and Manders, supra note 12.

49. United States v. Trankowski, 659 F.2d 750, 757 (7th Cir. 1981).

50. Giannelli, supra note 34, at 1213.

forms of gas chromatography.⁵¹ These cases prove only the limited acceptance in the scientific community of various forms of the technique. No case has yet accepted the reliability of the GC/FID technique when used to specifically analyze urine for THC content.

The fundamental problem with novel scientific evidence is that although science may ultimately prove the method and its results to be reliable, it may just as likely reject the test entirely. While scientists have the luxury of continuing their experiments over several years, the same cannot be said for criminal defendants.⁵² The government should have the burden of showing that the test results proved beyond a reasonable doubt that the accused has used marijuana. The burden should not be shifted to the accused to disprove the government's case when it is based solely on novel scientific evidence.

In addition to questioning the validity of the GC/FID method and the reliability of its results, the defense should ensure that the government proves the proper application of the technique, that the laboratory instruments and other conditions were proper, that all standard procedures were followed, and that the persons conducting and interpreting the results were qualified to do so. In that regard it will be wise to demand the presence of those who performed the test. While the government may generally rely on the presumed regularity of their laboratory reports, the admissibility of the laboratory report does not insulate the laboratory chemist from defense requests for production at trial when the defense wishes to examine him as to his competency and as to the accuracy of the procedure employed.⁵³ In the area of urinalysis a strong argument can be made that the complexity of the laboratory procedure makes the likelihood of error high and the need to examine the laboratory chemist essential.

51. *United States v. Distler*, 671 F.2d 954 (9th Cir. 1981) (GC used to prove water pollution by oil residue); *State v. Perryman*, 520 S.W.2d 126 (Mo. 1975) (hair analysis); *City of Abilene v. Hall*, 202 Kan. 636, 451 P.2d 188 (1969) (blood alcohol levels).

52. Saltzburg, Schinasi and Schlueter, *supra* note 44, at 324-325.

53. *United States v. Davis*, 14 M.J. 847, 848 (ACMR 1982). See also, *McBay, et al*, Letter to JAMA, *supra*, note 9, stating that if urinalysis results are to be used in adversary proceedings they must be performed by a qualified analyst and interpreted by a qualified toxicologist. The SOP for Army drug testing laboratories, *supra* note 16, provides for the interpretation of the results by the officer in charge of the laboratory, civilian supervisor, or the noncommissioned officer in charge.

C. Proving Possession Or Use - The Problem Of Passive Inhalers

A positive urinalysis result may be strong circumstantial evidence of drug use,⁵⁴ but it only creates a rebuttable presumption. Studies have revealed that some individuals whose urine indicates a THC content may not have even used the drug. Unlike other drugs, marijuana is ingested into the system by smoking. Marijuana is often smoked in closed rooms with poor ventilation because it is illegal and cannot be smoked in public.⁵⁵ Individuals in close contact with marijuana smokers may inhale the smoke passively, thereby absorbing THC into their systems and causing a positive urinalysis test result even though they did not themselves smoke the marijuana.⁵⁶ The issue which is still a matter of controversy is the quantity of THC which can be inhaled passively.

The Zeidenberg study placed one non-user in a locked hospital ward with five heavy marijuana smokers for over a month. The non-user's urine showed negligible amounts of THC in the first week, 100 ng/ml by the second week, and 260 ng/ml by the third week. For the next three weeks the urinalysis results steadily decreased, as the subject learned to avoid the marijuana smokers in the ward.⁵⁷

54. Convictions for drug use or possession based purely on circumstantial evidence have been upheld. See United States v. Yanez, 89 N.M. 397, 553 P.2d 252 (1976) (urinalysis results are circumstantial evidence of possession); Anderson v. State, 9 Md. App. 639, 267 A.2d 302 (1970) (needle mark on arm is circumstantial evidence of possession of drug paraphernalia).

55. Zeidenberg, Bourdon, and Nahas, Marijuana Intoxication By Passive Inhalation: Documentation by Detection of Urinary Metabolites, 134 American Journal of Psychiatry 76 (January 1977) [hereinafter cited as Zeidenberg et al.]

56. Id.; Perez-Reyes, DiGuisseppi, and Davis, Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids (unpub. 1982) [hereinafter cited as Perez-Reyes, et al.].

57. Zeidenberg, et al., supra note 55.

The Perez-Reyes study was more complex. It used six subjects, three experienced marijuana users and three individuals who have never used marijuana. The subjects were placed in various situations with varying amounts of marijuana smoked in each situation. In Study I two users and two non-users were placed in a small, closed room for one hour while the two users smoked marijuana with 2.5% THC and 2.8% THC on two separate occasions. FMIT screening tests performed on the urine of the non-users tested below 20 ng/ml (negative for drug use).

In Study II, two smokers and two non-smokers were placed in an automobile for one hour with the smokers using 2.8% THC marijuana. One of the non-smokers tested above 20 ng/ml by EMIT, but was negative by the GC/MS method.

In Study III, four subjects simultaneously smoked four 2.8% THC cigarettes daily for three consecutive days in the presence of two non-users, in a closed, small room for a period of one hour. Only one urine specimen, taken five hours after exposure on the third day, registered above 20 ng/ml.

Based on these studies Perez-Reyes concluded that the obtaining of higher concentrations of THC in the bodily fluids of non-users in "real life situations" is "highly unlikely."⁵⁸ An argument can be made that "real life situations" in a barracks environment are more accurately reflected by the Zeidenberg study. Furthermore, the Perez-Reyes study was seriously handicapped by using marijuana which contained no more than 2.8% THC. An earlier study by Perez-Reyes reveals that the concentration of THC absorbed within the body increases in direct proportion to the THC content of the marijuana inhaled.⁵⁹ Thus, the passive inhalation study fails to take into account the higher potencies of certain forms of marijuana such as hash oil and hashish⁶⁰ which may also be passively inhaled.

58. Perez-Reyes, et al., supra note 56.

59. Perez-Reyes, DiGuisseppi, Davis, Schindler, and Cook, Comparison of Effects of Marijuana Cigarettes of Three Different Potencies, 31 Clinical Pharmacology and Therapeutics 617 (1982).

60. Typical samples of "street" marijuana analyzed at the University of Mississippi in 1979 ranged from 15 to 20% THC content, while "hash oil" was found to have as high as 28% THC content. Peterson, Marijuana and Health: 1980 2 (NIDA Research Monograph No. 31, 1980).

The Whiting and Manders technique attempts to avoid the question of passive inhalation by setting a cutoff level of 100 ng/ml for a positive result by the GC/FID method.⁶¹ This cutoff level may be inadequate. Defense counsel should develop the facts, where appropriate, and should consider bringing in an expert witness to testify on the issue of passive inhalation.

D. Chain Of Custody

The standard operating procedures for chain-of-custody for the urinalysis program have been outlined in detail in the interim change to AR 600-85.⁶² A section leader is responsible for obtaining the specimen.⁶³ The section leader must then release the specimen to the unit Alcohol and Drug Coordinator (ADC), and sign a chain-of-custody document.⁶⁴ The unit ADC must seal the specimen, mark it, and release it to the Installation Biochemical Test Coordinator (IBTC), and both must sign the chain-of-custody document. The IBTC forwards the specimen to the drug testing lab.⁶⁵

The drug testing laboratories are currently preparing standard operating procedures specifically for the urinalysis program.⁶⁶ The laboratories will retain the specimens until completion of the court-martial.⁶⁷ A newly devised "Urinalysis Custody and Report Record Form"⁶⁸ will be returned to the originating unit with the results of the examina-

61. Whiting and Manders, supra note 12; and Table 3-1, AR 600-85 Dec. 81).

62. Appendix H, Interim Change IO2, AR 600-85.

63. Id. at para. H-5.

64. Id. at para. H-6.

65. Id. at para. H-8 through H-13.

66. Interview with CPT Dennis Shingleton, Chief of Drug Urinalysis Test Center, Fort Meade, Maryland (24 Jan. 1983). See also, HQDA's SOP, supra note 16.

67. Para. 3-17(e)(4), Interim Change IO2, AR 600-85.

68. Id. at para. 3-17(g)(5). DA Form 5180-R (Test).

tion. This form will be introduced into evidence in the same manner as a DA Form 4137, "Chain-of-Custody Document", and should be treated in a similar manner.

The government must show a complete chain-of-custody from the seizure of the evidence to the preparation of the lab report.⁶⁹ Defense counsel should carefully cross-examine the individuals whose testimony is relied upon to establish the chain-of-custody. In light of the lack of experience with the program, unexplained events and breaks in the chain of custody are very likely to occur.

The government will probably offer the Urinalysis Custody and Report Record Form under the business records exception to the Military Rules of Evidence.⁷⁰ Again, the procedures should be scrutinized as irregularities may occur at the laboratories because of their lack of familiarity with the new programs.⁷¹

E. Independent Testing of Urine Specimens

Defense counsel should demand access to the urine specimens so that an independent urinalysis can be performed.⁷² In the event that the specimen has been destroyed⁷³ or the request is denied, defense counsel should argue that the accused's due process rights have been violated.⁷⁴

69. United States v. Nault, 4 M.J. 318 (CMA 1978).

70. Mil. R. Evid. 803(8); United States v. Strangstalien, 7 M.J. 225 (CMA 1979).

71. United States v. Vietor, 10 M.J. 69 (CMA 1980). The government will most likely produce the witness to establish its case; provisions to make such personnel available are contained in Interim Change IO2, AR 600-85.

72. Paragraph 115c, Manual for Courts-Martial United States 1969 (Revised edition) [hereinafter cited as MCM, 1969].

73. Para. 3-17(e)(4), Interim Change IO2, AR 600-85, directs the unit commander to advise the laboratory, by message, to retain the sample for a total of 180 days where UCMJ action is contemplated.

74. See Banks v. F.A.A., 687 F.2d 92 (5th Cir. 1982) (in an administrative discharge case the destruction of the urine specimens on which the discharge was based violated Due Process). Accord People v. Garries, 645 P.2d 1306 (Col. 1982); People v. Gomez, 596 P.2d 1192 (Col. 1979). See Generally Note, The Right To Independent Testing: A New Hitch In The Preservation Of Evidence Doctrine, 75 Col. L. Rev. 1355 (1975).

As a practical matter the expense of performing an independent analysis may be prohibitive. One alternative may be to seek help from organizations which provide trial assistance for indigent defendants. However, a more readily accessible alternative may be to seek government funds. The Manual for Courts-Martial provides that experts may be employed at government expense by either side when necessary.⁷⁵ While in the typical case a demonstration of necessity may be difficult, the controversy surrounding urinalysis will provide counsel with a firm foundation for making such a request.

Several civilian courts have emphasized the importance of independent expert analysis of evidence in situations where a different opinion by a defense expert would be material and exculpatory.⁷⁶ Those courts have made it clear that where the government relies on expert testimony, it would be very difficult for the accused to challenge the validity of testimony, the methods used or the results obtained without also using expert witnesses.⁷⁷

75. Paragraph 116, MCM, 1969; United States v. Johnson, 22 USCMA 424, 47 CMR 402 (1973). In Raezer, Prosecution of Drug Offenders Based on the Newly Developed Urine Test (Part II), II Trial Counsel Forum No. 1, Trial Counsel Assistance Program, United States Army Legal Services Agency, (January 1983), trial counsel are urged to oppose an independent re-test at Government expense by arguing that the DOD procedure is "not subject to varying opinion," and, therefore, no need for independent testing exists. This position presumes the reliability of the DOD testing procedure. Such a presumption is not supportable. See Section III B, supra. If the government rigidly rejects all defense requests for independent retesting or for funding for defense experts, a sound argument could be made that such unreasoned inflexibility constitutes an abuse of discretion or a violation of due process. See State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976) and cases cited therein.

76. See White v. Maggio, 556 F.2d 1352 (5th 1977); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975); State v. Hanson, 278 N.W.2d 198 (N.D. 1979); State v. Sahlie, 245 N.W.2d 476 (N.D. 1976); State v. Warren, 292 Ala. 71, 288 So.2d 826 (1973); Jackson v. State, 243 So.2d 396 (Miss. 1971).

77. The toxicology department of any leading University or Hospital in the area might provide a good source for a defense expert witness.

While those decisions dealt with the accused's right of access to the evidence, they provide support for the proposition that expert testing is necessary. Access to the evidence in question is an empty gesture to an accused who does not have the means to obtain independent expert opinions.⁷⁸ Defense counsel should argue that when relying on scientific evidence as new and controversial as urinalysis, the defense's use of experts is, at a minimum, necessary if not essential.

III. CONCLUSION

This article is intended to give trial defense lawyers some understanding of what to anticipate with regard to the implementation of the urinalysis program. The true impact of the program is speculative at this point in time. However, carefully considered and well prepared defense responses are necessary to ensure that both the government and the courts define the program in a way which will limit its detrimental impact on the rights of servicemembers and ensure the fairness of judicial proceedings initiated against them.

VIVIAN B. WIESNER

78. See State v. Hanson, 278 N.W.2d 198, 201 (N.D. 1979); State v. Sahlie, 245 S.W.2d 476, 480 (N.D. 1976).

Appendix

GLOSSARY

THC	The principal psychoactive ingredient in marijuana. Its chemical name is delta-9-tetrahydrocannabinol (delta-9-THC).
METABOLITE	The waste product of a substance which has been processed through the body's organs. THC is absorbed through the lungs, passes into the bloodstream, through the liver and excreted in the urine in the form of metabolites.
9-CARBOXY-THC	The major THC metabolite. Its chemical name is 11-nor-delta-9-THC carboxylic acid.
RIA/EMIT	Immunoassay techniques which detect THC metabolites in urine. RIA is used as a screening test. It is relatively simple to perform, but its results must be confirmed by another method because of its inaccuracy.
GAS CHROMATOGRAPHY	A laboratory test which separates substances into its components. Alone, GC cannot identify the substance isolated. The components must be identified by a detector test.
GC/MS	Gas chromatography/mass spectrometry. The combination of GC with the detector test mass spectrometry, is considered the most accurate test available.
GC/FID	Gas chromatography with flame ionization detector. This test was developed by the Armed Forces Institute of Pathology and is the DOD method of choice. Referred to as GLC in Interim Change IO2, AR 600-85.
ADC	Alcohol and Drug Coordinators. The specimen custodian within each unit. The ADC must be an E-5 or above.
IBTC	Installation Biochemical Test Coordinator. The designated individual to forward all specimens from the installation to the drug testing laboratory.
DA Form 5180-R (TEST)	The Urinalysis and Report Record.

SIDEBAR

Treading Warily Near the Pitfall of Uncharged Misconduct

Occasionally counsel will encounter a client who protests mightily that he has been "entrapped" into selling drugs by and to undercover drug agents. Before plunging ahead, counsel should carefully consider and advise the client about the dangers which surround this affirmative defense. Inherent in this defense is the admission that the client actually sold illegal drugs, albeit due to entrapment. Such an assertion opens the door to the introduction of evidence of uncharged misconduct in order to prove a predisposition to sell drugs, United States v. Sermons, 14 M.J. 350 (CMA 1982), or, for instance, a criminal plan, intent, or motive. See Mil. R. Evid. 404(b). The list set forth in Mil. R. Evid. 404(b) is not exhaustive, only illustrative. United States v. Stokes, 12 M.J. 229 (CMA 1982). Consequently, evidence of uncharged misconduct will be admissible "if that evidence is probative of something other than evil disposition on the part of the accused." Id. at 239. If there is any inclination on the part of the military judge or the court members to view your client as a "dealer," evidence that your client discussed other "deals" with an agent previously or evidence of extensive involvement in other drug transactions will remove any reluctance to do so. Once such a conclusion is reached it cannot help but have an adverse impact on the determination of guilt. See also United States v. Brannon, CM 441705, pet. granted, ___ M.J. ___ (CMA 1 March 1983) (admissibility of uncharged misconduct under Rule 404(b)).

Uncharged misconduct is a two edged sword. Not only can it dispel the assertion of entrapment, see United States v. Vanzandt, 14 M.J. 332 (CMA 1982), but such evidence properly introduced in the case may be considered by the court for sentencing, "even if it was introduced for a limited purposes before the findings." Para 76(a)(2), MCM, 1969. See also United States v. Mallard, 19 USCMA 457, 42 CMR 59 (1970); United States v. Clark, 49 CMR 192 (ACMR 1974). Evidence of involvement in other drug transactions will cast your client into the worst possible light for sentencing.

Post-Trial Delay

Although the presumption of prejudice announced in Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974) was abandoned in United States v. Banks, 7 M.J. 92 (CMA 1979), the issue of prejudice as a result of delay in the post trial review is not dead. Since a given delay is not ipso facto prejudicial, counsel should be alert to specify how their client has been prejudiced in their rebuttal to the post trial review.

In his concurrence in United States v. Johnson, 10 M.J. 213, 218 (CMA 1981), Chief Judge Everett warned that "the Court should be vigilant in finding prejudice wherever lengthy post-trial delay in review by a convening authority is involved." The Court found such prejudice in United States v. Clevidence, 14 M.J. 17 (CMA 1982), even though the accused was released from confinement after only 77 days. The Court found that the lapse of 200 days from the trial until the military judge authenticated the record and of an additional 133 days until the convening authority took action was unreasonable and required dismissal of the charges.

In demonstrating prejudice, counsel should, for example, point out the difficulty the accused will have in receiving clemency from the convening authority due to the delay. Another factor relevant to showing prejudice and one which the Court relied upon in Clevidence, is the difficulty of finding adequate employment caused by a potential employer's fear that the accused may be recalled to active duty. This factor is particularly persuasive where the accused has been involuntarily placed on excess leave. Special family and personal hardships should also be discussed. In this regard a previously filed request for a deferment will add weight to appellant's claim that there truly are matters to which the appellant must attend and that the delay will unfairly prejudice him.

Defense counsel are urged to avoid requesting delays in order to review a record and submit rebuttal where the timely processing of the post trial review may be subject to litigation. It is difficult to argue prejudice at the appellate level when the delay is partially attributable to the defense. United States v. Trantham, CM 441061 (ACMR 30 December 1981) (unpub.) Counsel may wish to review a copy of the record to check for errata later if the original record is tied up elsewhere to avoid requesting a defense delay.

Inaccuracies in The Post-Trial Review

Recently, the Army Court of Military Review rebuked the responsible staff judge advocate where the post trial review contained obvious errors concerning the maximum period of confinement. In United States v. Jackson, CM 442567 (ACMR 22 December 1982) (unpub.), the waiver doctrine was applied where the defense counsel failed to discuss in his rebuttal to the post trial review errors concerning the maximum punishment which could be imposed. In United States v. McWilliams, CM 443060 (ACMR 30 December 1982) (unpub.), however, the Army Court declined to apply the waiver doctrine under similar facts, and reassessed the sentence. The staff judge advocate was again criticized for carelessness. In United States v. Shaw, 14 M.J. 967, 968 (ACMR 1982), the Court "serve[d] notice that [its] patience is wearing thin" as to such errors in post trial reviews.

Counsel are urged to examine the post-trial review with care and discuss any errors in the Goode rebuttal. This action will safeguard your client's right to a prompt and accurate post trial review and will avoid application of the waiver doctrine. Moreover, counsel are reminded that a post trial review prepared by a subordinate is valid only if approved and adopted by the staff judge advocate. See United States v. Kema, 10 USCMA 272, 27 CMR 346 (1959); United States v. Callahan, 10 USCMA 156, 27 CMR 230 (1959); United States v. Gray, 14 M.J. 816 (ACMR 1982). Consequently if defects in the post trial review are consistently discovered, counsel should consider challenging the entire review on the basis that the staff judge advocate could not have meaningfully reviewed and adopted the opinions in the review as his own.

CASE NOTES

Synopsis of Selected Federal and State Court Decisions

FEDERAL COURT DECISIONS

DUE PROCESS: In-Court Identification

Dickerson v. Fogg, 692 F.2d 238 (2d Cir. 1982).

At the arraignment of a robbery suspect, a police officer pointed to two black men who had come as defense witnesses and asked the robbery victim if either had also been a participant in the robbery. The victim tentatively identified Dickerson and was asked to take a better look. He then said Dickerson "looked just like" one of the robbers. As Dickerson left the courtroom, the officer asked the victim, "Is it him or not?" The victim responded affirmatively and Dickerson was arrested in the victim's presence. The victim identified Dickerson as a passenger in the back seat whom he had seen only briefly during the robbery. He had not previously described this man in detail. Applying the criteria of Neil v. Riggers, 409 U.S. 188 (1972), the court concluded that the victim's in court identification of Dickerson was tainted by a suggestive show up.

SEARCH AND SEIZURE: Warrantless Searches

United States v. Martin, 693 F.2d 77 (9th Cir. 1982).

An undercover agent observed Martin place some cocaine in an envelope, seal the envelope, place it in a locked bank bag, and put the bag in a desk drawer. The agent then went outside Martin's house, met with another agent, reentered the house and placed Martin under arrest. The agent seized the bank bag. The court assumed that this seizure was lawful, but held that a subsequent warrantless search of its contents was unlawful in the absence of exigent circumstances.

STATE COURT DECISIONS

OFFENSES: Forgery

State v. Rayno, 419 So.2d 858 (La. 1982).

Rayno was convicted of forgery for presenting a prescription form to a pharmacist after having signed a certain physician's name to the form. Since there was no evidence that Rayno intended to obtain either medical services from the doctor or drugs from the pharmacist without paying for them, there was no intention to prejudice the rights of another. Consequently, an element of the offense of forgery had not been proven, and Rayno's conviction was set aside.

EVIDENCE: Rape Trauma Syndrome

State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

Saldana was convicted of rape in spite of his claim that the act was consensual. The government was allowed to present the testimony of a sexual assault counselor who was not a physician. Her testimony consisted essentially of an explanation of rape trauma syndrome. The court held that "the scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the quality of common sense evaluation" and reversed.

State v. McGee, 324 N.W.2d 233 (Minn. 1982).

The court applied the reasoning announced in Saldana, supra, to reverse another rape conviction. In this case, the expert witness was a physician who had actually examined the victim shortly after the incident and on subsequent occasions.

SEARCH AND SEIZURE: Probable Cause

People v. Exline, 439 N.E.2d 1097 (Ill. App. 1982).

Supervising agents watched a confidential informant, known not to have drugs on his person, disappear into a building containing a number of apartments. The informant returned with marijuana, claiming to have bought it from a person in Exline's apartment. This procedure was repeated on two subsequent dates. No other evidence established the informant's reliability. The court held that the "veracity prong" of Aguilar v. Texas, 378 U.S. 108 (1964) had not been satisfied. In the absence of evidence of the informant's past performance, an unusually detailed description of criminal activities, or declarations against interest, reversal of the conviction was required.

SEARCH AND SEIZURE: "Terry" Stops

People v. Navarro, 187 Cal. Rptr. 70 (Cal. App. 1982).

A deputy sheriff stopped Navarro's car for a series of illegal lane changes. He became concerned for his safety when he observed that Navarro wore a green beret and military field jacket to which was attached a sheathed knife. Assuming the sheriff's concern for his safety was honest, the court nevertheless held that Navarro's "offensive garb and his carrying a sheathed knife provided no grounds" for a pat down search under Terry v. Ohio, 392 U.S. 1 (1968). A small handgun found during the pat down should have been suppressed and the conviction for possession of a concealed weapon was reversed.

SEARCH AND SEIZURE: Consent Searches

State v. Ahart, 324 N.W.2d 317 (Iowa 1982).

A police officer obtained entry to Ahart's home by pretending to have car trouble and asking to use the phone. While inside, he observed marijuana and drug paraphernalia in the house. Based on this observation, the police obtained a search warrant which led to Ahart's conviction. Since the police could articulate no reasonable suspicion upon which to base their original entry by ruse, this consent search was held unlawful. This tainted the subsequent warranted search.

USCMA WATCH

Synopses of Selected Cases In Which The Court of Military Appeals Granted Petitions for Review

MULTIPLICITY: Findings

The question of when charges are multiplicitous for findings appears to be headed for final resolution by the Court in the near future. The Court has either specified the issue or granted petitions on the issue in six cases filed between November 1982 and January 1983 and has required briefs rather than disposing of the cases summarily. See United States v. Zickefoose, ACOMR 442196, pet. granted, ___ M.J. ___ (CMA 24 January 1983); United States v. Armstrong, ACOMR 17510, pet. granted, 15 M.J. 99 (CMA 1983); United States v. Green, NCOMR 82-0344, pet. granted, 15 M.J. 81 (CMA 1982); United States v. Tolbert, NCOMR 82-0472, pet. granted, 15 M.J. 97 (CMA 1982); United States v. Morrison, AFCMR 23467, pet. granted, 15 M.J. 98 (CMA 1983); United States v. Hill, AFCMR S25555, pet. granted, 15 M.J. 60 (CMA 1982).

EVIDENCE: Rape Shield

The Court has continued to grant petitions for review and to request briefs on the question of when evidence of the past sexual conduct of the prosecutrix in a rape case must be excluded under Mil. R. Evid. 412. See United States v. Todd, AFCMR S25553, pet. granted, 15 M.J. 59 (CMA 1982); and United States v. Hollimon, ACOMR 440392, pet. granted, ___ M.J. ___ (CMA 17 January 1983).

WITNESSES: Invocation of Article 31 Rights by Government Witness

In United States v. Hornbrook, ACOMR 17189, pet. granted, 15 M.J. 95 (CMA 1983) the appellant was convicted of two sales of marijuana based upon the testimony of a confidential informant. The issue in this case is whether the military judge erred in failing to strike the direct testimony of the confidential informant when he refused to answer questions dealing with his pending investigation for soliciting sales of marijuana. The Army Court of Military Review held that the trial defense counsel failed to indicate that his examination would produce evidence that would do more than impeach the witness' general credibility.

DEFENSE COUNSEL: Representation

EVIDENCE: Sufficiency

In United States v. Fuller, ACOMR 441839, pet. granted, 14 M.J. 449 (CMA 1982) the appellant was convicted of assault by intentionally inflicting grievous bodily harm with a knife. The victim, the victim's daughter, and a third witness all testified that the victim was stabbed by a black man. None of the witnesses, however, identified Fuller. The parties to the trial stipulated that Fuller, a black man, was present at the scene of the assault. Thereafter, although there was no evidence that the appellant stabbed the victim, the defense counsel argued that the stabbing was done in self-defense. In finding him guilty, the military judge stated, in part, "[T]he [appellant], . . . by his own stipulation, . . . placed himself in the area [and] [t]here is no testimony from any persons of any other black individuals in that area on that night." The Court will examine the sufficiency of the evidence against the appellant and the extent of the prejudice resulting from the defense counsel's actions.

OFFENSES: Rape and Adultery

In United States v. McCrae, ACOMR 441816, pet. granted, 15 M.J. 93 (CMA 1983) the appellant was found guilty at a bench trial of both rape and adultery arising out of one incident with one victim. The Court requested briefs on the questions of whether consent is an element of adultery. The Court is apparently concerned with two questions: (1) If consent is an element of adultery, is a conviction for that offense inconsistent with a conviction for rape? and (2) If adultery and rape are crimes with a mutually exclusive element, should a military judge in a bench trial be allowed to make such inconsistent findings?

SEARCH AND SEIZURE: Withdrawal of Consent to Search

The Court will consider in United States v. Stoecker, ACOMR 44466, pet. granted, 14 M.J. 451 (CMA 1982) the question of what constitutes withdrawal of consent to an investigative search will be considered. In that case, the appellant consented to a search of his automobile and his barracks room after having been detained in connection with the larceny of an oscilloscope. While assisting a law enforcement officer in the search of his barracks room, the appellant noted a small box atop his wall locker which he attempted to unobtrusively place in his pocket. Despite the fact that this box could not possibly have concealed the object for which the policeman was searching, he demanded the package and discovered that it contained marijuana. On appeal, the appellant will alternatively argue

that his furtive gesture constituted a withdrawal of consent or that such conduct permissively removed the seized object from the authorized search area. In either event, he will contest the seizure since it was not properly preceded by a rights warning pursuant to Article 31(b).

IMPEACHMENT: Prior Statements

In United States v. Meyers, 14 M.J. 749 (ACMR 1982), pet. granted, 15 M.J. 81 (CMA 1982) the Court will determine whether error was committed when the military judge admitted an MP's police report identifying the appellant as an individual who had sold marijuana. The report was admitted as a prior consistent statement following defense cross-examination indicating that the officer was confused as to dates and identity. The Army Court of Military Review held that the cross-examination implied the MP would lie on the stand.

A majority of jurisdictions would not admit the statement under Fed. R. Evid. 801(d)(1)(B) [prior consistent statements] if the motive to falsify existed at the time of the earlier statement. See, e.g., United States v. Quinto, 582 F.2d 224 (2d Cir. 1978). The appellant will argue that any motive to falsify at trial could have existed at the time the police report was written, and that in any event, the report should not have been admitted because the potential for prejudice outweighed any probative value the report may have had.

WITNESSES: Right to impeach

In United States v. Gonzales, ACMR 16913, pet. granted, 15 M.J. 59 (CMA 1982) the appellant was charged with communication of a threat against one SFC Hill. The military judge declined to admit evidence indicating that SFC Hill had made misrepresentations at appellant's prior court-martial. The military judge ruled this evidence pertained to truth and veracity and not bias. The Court will decide whether the military judge's ruling that the defense could not use extrinsic evidence to disclose SFC Hill's alleged bias deprived the appellant of an effective defense. In a similar case, United States v. Doney, 1 M.J. 169 (CMA 1975), the Court reversed when the judge refused to permit the defense to introduce evidence that a prosecution witness had threatened to "fry" the accused.

SUFFICIENCY OF SPECIFICATIONS: Burglary

In United States v. Shearer, ACMR 440867, pet. granted, 14 M.J. 455 (CMA 1982), the appellant was convicted of the attempted burglary of the residence of another service member. The challenged specification alleged that the appellant did "attempt to burglariously break and enter building 8477-1 Central, Walker Village, the dwelling house of United States Government." The issue before the Court is whether the offense fails to allege attempted burglary because it fails to allege that the building was the dwelling house of another person.

SEARCH AND SEIZURE: Probable Cause

In United States v. Scott, 13 M.J. 874 (NMCMR 1982), pet. granted, 15 M.J. 64 (CMA 1982) the Court will decide whether the military judge in that case was correct in ruling that the holding in Dunnaway v. New York, 442 U.S. 200 (1979), requiring probable cause before police may seize someone for questioning, did not apply in the military. The lower court had ruled that the "specialized needs" of the military permitted seizure on less than probable cause in order to maintain order, effectiveness and discipline in the command. The specialized needs in this case grew out of the "special need" of the military community to have a murderer brought to justice.

ARTICLE 32 INVESTIGATION: Ex Parte Discussions

In United States v. Brunson, CGCMR 840, certif. for rev. filed, 15 M.J. 72 (CMA 1982) the General Counsel for the Department of Transportation certified the question whether ex parte discussions between the government counsel and an Article 32 investigating office are presumed to be prejudicial or whether prejudice must be demonstrated by the defense.

FINDINGS: Variance

In United States v. Wray, NMCMR 82-0840, pet. granted, 14 M.J. 446 (CMA 1982) the issue of fatal variance between the crime charged in the specification and the crime proved at trial will be addressed by the Court. In that case the accused was charged with a larceny occurring on 6 August 1982 but was found guilty by exceptions and substitutions of a larceny occurring on 25 August 1982 when he took possession of the abandoned goods which he was charged with stealing.

OFFENSES: AWOL and Disobedience

In United States v. Peterson, AFOMR S25582, pet. granted, 15 M.J. 64 (CMA 1982) the Court has agreed to decide whether a servicemember who has been AWOL can be tried for, and found guilty of, both AWOL and disobedience of an order to return to military control.

MULTIPLICITY: Larceny and wrongful disposition

Whether a service member can be convicted of both larceny of government property and the wrongful disposition of the property he has stolen will be decided in United States v. West, SPCM 17730, pet. granted, 15 M.J. 51 (CMA 1982). The appellant, a small arms repairman, removed a .45 caliber pistol from the arms room where he worked. Five days later he transferred the weapon to another service member. Based upon these facts, he was convicted of larceny under Article 121, UCMJ and with wrongful disposition of government property under Article 108, UCMJ.

LAST MINUTE DEVELOPMENTS

CASE NOTES

Illinois v. Gates, ___ US ___, 51 U.S.L.W. 4711 (June 8, 1983). Two issues were briefed and argued before the Supreme Court in this case. The first issue involved the validity of a search warrant based on the partially corroborated tip of an anonymous informant. The second, which was specified by the Court, concerned the propriety of the application of the exclusionary rule where the police act in the reasonable belief that they are not violating the Fourth Amendment. Having solicited briefs and argument on the latter issue, the Court, per Justice Rehnquist, nevertheless declined to decide it, "with apologies to all." This decision was based on the state's failure to raise the issue in the lower courts and the failure of the state courts to pass upon the issue themselves. It remains unclear whether this abstinence when an issue is "not pressed or passed upon below" is required or "merely a prudential restriction."

With regard to the first issue, the Court rejected the two-pronged test for probable cause which had been derived from Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) and held the warrant valid. In its place was adopted a totality of the circumstances approach which does not require both a showing of the informant's veracity and a separate demonstration of the manner in which he acquired his information. While the Court acknowledged that these are highly relevant factors in the determination of probable cause, the absence of one does not automatically invalidate a search.

In spite of its holding in Gates, the Court made it clear that mere conclusory statements will still be insufficient to support a warrant. See Nathanson v. United States, 290 U.S. 41 (1933). Thus, on its particular facts, the evidence in Aguilar was properly suppressed. There, the affidavit merely alleged that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home. Where, however, the information given by an informant was corroborated, there may be probable cause even if he is not shown to have any particular credibility. Droper v. United States, 358 U.S. 307 (1959). The Court indicated at footnote 11 that Spinelli may have been wrongly decided on its facts.

COMA WATCH

Effective 1 July 1983 the Court of Military Appeals will implement new Rules of Practice and Procedure with several significant changes from past practice that trial defense counsel should be aware of.

Most notable for trial defense counsel is Rule 19(d) which states that a petition for extraordinary relief shall be filed "not later than 20 days after the petitioner learns of the action complained of." This rule is clearly going to be used as a procedural statute of limitations, with corresponding penalties for counsel who file late.

In connection with filing a writ, Rule 17 now provides that appellate counsel will be appointed when an accused is designated as the real party in interest. In all other cases, Rule 38 now requires counsel signing a pleading to become a member of the bar of COMA within 30 days of filing. The good news is that Rule 13 now does not require the \$10.00 fee unless the wall certificate is desired.

Rule 27 now expressly provides that special writs may be filed by electronic messages addressed to the Defense Appellate Division. Such messages must contain the verbatim text of the written petition and state that the written petition and supporting brief have been placed in the mail.

Rule 27 also provides that the Court may now appoint a special master to further develop the factual basis of a case, should the Court believe such action is necessary.

There are over twenty specific changes in the new Court Rules of procedure. Only those most directly relevant to defense counsel in the field have been covered here. Counsel should review the new rules at their first opportunity to ensure that clients are not harmed by reliance on the superseded Rules of Court.

ON THE RECORD

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*Quotable Quotes from Actual
Records of Trial Received in DAD*

MJ: This hearing is called back to order. Let the record reflect that some of the people that were here last time are present and some aren't.

DC: Your Honor, may I take a short comfort break in place?

MJ: Counselor, you may take a comfort break but you may not take it in place.

TC to MJ: So, I'm just -- I'm just trying to learn here. . .

MJ: This isn't a seminar.

DC: Did he ever try to make any homosexual advances toward you?

WIT: No, sirree!

TC: On the 29th of March 1982, did you have an occasion to perform an autopsy on Jane C _____?

WIT: Yes.

MJ: Not likely.

TC: Pardon me, your honor?

MJ: I said it's not likely as she is seated in the courtroom.

DC: Is your father alive today?

ACC: No.

DC: When did he die?

ACC: 1965.

DC: Is your mother alive?

ACC: No.

DC: Is she dead also?

* * * * *

(Defense counsel discusses accused's confession in opening statement)

DC: The accused is the defense's case. There are no other witnesses. It's basically his word against, apparently, his other words.

* * * * *

TC: Your, Honor, Article 113 of the Manual discussion talks about a soldier who is at post stationed in observation against the approach of an enemy.

MJ: Are we at war?

TC: No sir.

MJ: Good.

* * * * *

ACC: The first time, it was only a quarter ounce.

MJ: A quarter ounce?

ACC: Yes.

MJ: For fifty-five dollars?

ACC: It was a premium type of marijuana.

* * * * *

