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## OPENING STATEMENTS

### *Overview of Contents*

This month's lead article, Hypnotically Refreshed Testimony by Captain Marcus C. McCarty, explores the problems associated with the use of hypnosis at courts-martial. Defense Counsel must be prepared to argue both for and against the admissibility of such evidence, which is becoming increasingly popular as the CID continue to expand the use of hypnosis as an investigative tool. Our second article was written by Mr. Walter J. Stall, a CID forensic chemist. Mr. Stall discusses the unreliability of field tests as a means of identifying controlled substances. His article is especially useful in cross-examining CID agents who have conducted field tests. With this issue The Advocate begins a two part feature dealing with the Army urinalysis program. The first installment treats the constitutional issues raised by mandatory urinalysis. The next issue will address the scientific reliability (or lack thereof) of present urinalysis testing.

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The Advocate encourages the submission of articles by our readers. Mr. Stall's article demonstrates our willingness to publish articles by our "non-lawyer" readers too. We want to help share the expertise of our readership. We are keenly interested in hearing about new perspectives in defense advocacy and in addressing significant issues relevant to the defense bar.

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The enormous press of cases before the Army Judiciary has put the last few issues of The Advocate behind schedule. We are attempting to resolve this problem and appreciate your patience.

### Staff Notes

The Advocate welcomes Captain Donna Chapin Maizel to the staff as Business Editor. She replaces Captain John Lukjanowicz who is now an Associate Editor. Captain David M. England has departed DAD for the OTJAG Litigation Division. Captain England served most recently as an Associate Editor, and before that as the "Side-Bar" Editor.

# HYPNOTICALLY REFRESHED TESTIMONY

by Captain Marcus C. McCarty\*

## I. Introduction

Hypnosis is defined by Webster's New Collegiate Dictionary as "a state that resembles sleep but is induced by a hypnotizer whose suggestions are readily accepted by the subject." It has also been described as an excellent method for enhancing an individual's memory of past events, although the actual extent to which additional information, not previously consciously recalled, can be resurrected through hypnosis is the subject of some controversy.<sup>1</sup> The admissibility of hypnotically refreshed testimony at a court-martial is an unsettled question which is destined for resolution in at least one case presently on appeal.<sup>2</sup> It has also been the subject of controversy in at least a dozen state jurisdictions<sup>3</sup> and in the federal courts.<sup>4</sup>

Because the use of hypnosis to refresh a witness' recollection has been endorsed as a legitimate investigative tool by the Army Criminal Investigation Command (CID),<sup>5</sup> whether and to what extent witnesses who have undergone hypnosis for the purpose of enhancing their recollection of the events surrounding a crime may later testify at a trial appears certain to confront military counsel in the future. Moreover, as either the defense or the government might ultimately benefit from the witness' testimony, trial defense counsel may find themselves in the position of arguing either for or against the admission into evidence of a previously hypnotized witness'

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1. Orne, The Use and Misuse of Hypnosis in Court, 27. Int'l J. Clinical & Experimental Hypnosis, 311, 319 (1979).
2. United States v. Harrington, CM 442125.
3. See notes 27, 33, 35, infra.
4. See notes 28-30, infra.
5. Appendix Q, CID Reg. 195-1, Criminal Investigation-CID Operations (C2, 1 January 1980) [hereinafter CID Reg. 195-11].

testimony.<sup>6</sup> Therefore, this article has several distinct purposes. First, a brief examination of the literature surrounding the nature and limitations of hypnosis as an investigative tool for the enhancement of a witness' recall is offered. Second, an examination of the CID's procedure for determining when and how a hypnotic interview should be conducted is reviewed. Third, the relevant cases concerning the admissibility of hypnotically refreshed testimony are discussed. Finally, potential litigating strategies for counsel seeking to admit or suppress hypnotically refreshed testimony are suggested.

## II. The Nature of Hypnosis and its Limitations

The process of hypnosis, particularly in the area of memory regression, is not completely understood by the scientific community. As a method of medical treatment the use of hypnosis can be traced to ancient Greece and Egypt.<sup>7</sup> The discovery of hypnosis in Europe is generally credited to Franz Anton Mesmer, an 18th century Austrian physician, who discovered that some of his patients responded favorably to a procedure in which magnets were passed over their bodies. This procedure induced convulsive fits, then trancelike sleep, with beneficial results upon the patient's awakening.<sup>8</sup>

Sigmund Freud became interested in hypnosis during the late 19th century as a technique which might prove useful in aiding his patients recall of extremely traumatic past events which the conscious mind had forgotten. While Freud soon abandoned hypnosis as a therapeutic tool of psychoanalysis he did note one important aspect of hypnosis: hypnotic "age regression"—the subject's ability to apparently "relive" events during hypnosis that could not be recalled in a conscious waking state.

At least for a time, Freud fell prey to a misconception which persists to this day - a belief that a hypnotized subject has the ability to relive

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6. While trial defense counsel in United States v. Harrington argued against the admission of hypnotically refreshed testimony, in at least one other case, which ultimately was dismissed upon a defense motion for findings of not guilty, the defense had the accused hypnotized for the purpose of increasing his recollection of the crime.

7. 9 Encyclopedia Britannica, Hypnosis 134-35.

8. Id.

past events as they actually happened.<sup>9</sup> While Freud later realized that a deeply hypnotized subject's recollections were as likely to be fantasies as factual accounts, the recollections rendered by deeply hypnotized subjects are so detailed that Freud's initial misconception is prevalent even today.<sup>10</sup>

Modern studies have verified through empirical experimentation that a subject's apparently vivid recollection of long-forgotten events under hypnosis are primarily the product of two independent phenomena: (1) the tendency of a hypnotized subject to avoid screening of memories about which he is uncertain or which are too painful for conscious articulation<sup>11</sup> and, (2) a readiness on the part of the hypnotized subject to accept virtually any suggestion of the hypnotist, whether consciously or unconsciously transmitted.<sup>12</sup> These two factors have led psychiatrists and psychologists to conclude that hypnotically induced recollections are highly unreliable even if the most stringent therapeutical precautions are used to avoid inadvertently conveying suggestions to the hypnotized subject. While

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9. Available scientific data indicates that not all events perceived by our senses become part of our memories. Apparently there is no "video-tape" upon which all of our perceptions are recorded. Rather memory appears to be "spotty". Like a piece of Swiss cheese there are holes in our memories which are lost forever. During a hypnotic trance, a subject tends to confabulate (i.e. supply internally produced or externally generated falsifications to memory gaps). This process of confabulation makes hypnotic recall inherently unreliable. 11 Encyclopedia Britannica, Memory, Retention and Forgetting 891-95.

10. Sworn affidavit of Dr. Martin T. Orne, Appended to Answer of Amicus Curiae, California Attorney's for Criminal Justice in Opposition to Petition for Rehearing in People v. Shirley, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982) [hereinafter Orne Affidavit]. A copy of this affidavit is on file in the office of the Editor of The Advocate.

11. Putnam, "Hypnosis and Distortions of Eyewitness Memory," 27 Int'l J. Clinical & Experimental Hypnosis 437 (1979); Hilgard, Hypnotic Susceptibility (1968).

12. Orne, The Use and Misuse of Hypnosis in Court, supra, note 1; Shor, The Fundamental Problem in Hypnosis Research as Viewed from Historical Perspective, in Fromm and Shor, Hypnosis Research Developments and Perspectives (1972).

the information obtained might be accurate, it might be a fantasy prompted by the subject's innermost thoughts or the hypnotist's inadvertant suggestion.<sup>13</sup> In either case, the accuracy of the recollection can only be assured through independent verification of the reported memory.

A second effect of hypnosis which has been independently verified through clinical experimentation is the tendency of the subject to confuse memories held prior to the induction of a hypnotic trance with those fantasized or suggested during the course of the hypnotic interview.<sup>14</sup> Simply stated, the subject under hypnosis not only recalls past events, he relives them, and though such memories are not necessarily accurate, the hypnotized subject tends to confound them with accurate memories accepting and fixing the perceptions relived under hypnosis as the actual course of real life experience. Uncertainties tend to vanish, especially when the subject is given a post-hypnotic suggestion that he will recall the events related under hypnosis in a normal conscious state.<sup>15</sup> The hypnotic recollection, in effect, becomes the subject's memory of the event.

The process by which these fantasies are adopted as an actual recollection of the event by the subject is not merely superficial. Hypnotized

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13. The hypnotist need not have intentionally invited a response from a subject. In one experiment an attempt was made to test hypnotized subjects' ability to recall the day of the week on which their birthday fell many years ago by regressing them to the event. The subjects "recalled" the correct day with remarkable accuracy. However, it was later learned that the phenomena was due not to the hypnotized subjects' enhanced ability to recall the day of the week, but to the perceptible changes in the hypnotist's voice inflection as he stated the correct day of the week along with incorrect days for the subjects to choose among. Orne Affidavit, supra note 10.

14. Orne, The Use and Misuse of Hypnosis in Court, supra note 1.

15. Id.

subjects have successfully passed polygraph tests swearing to the accuracy of memories known to be inaccurate which the subject "confabulated" while under hypnosis. Thus, aside from independent verification, there are no means available today to tell whether a hypnotized witness is accurately recalling an event or confabulating detail.

The extent to which the twin dangers of hyper-suggestivity and the loss of an independent memory of events actually experienced can be avoided is subject to some debate within the scientific community. However, it is plain that some safeguards can be used to minimize these problems. The extent to which these methods have been implemented by the CID is now discussed.

### III. CID Policy in Regard to the Use of Hypnosis

The basic parameters and administrative procedures involved in securing an interview with a hypnotized individual which are utilized by the CID have been set forth in a recent issue of The Advocate.<sup>16</sup> It is apparent from the regulation dealing with the topic<sup>17</sup> that the CID is aware of the inherently unreliable character of hypnotically refreshed recollection. Therefore, the use of hypnosis is not considered proper until all conventional methods of solving the crime have been exhausted.<sup>18</sup> Moreover, CID policy precludes reaching investigative conclusions solely from information gained from a hypnotized subject. In every case investigators are instructed to verify information learned during the interview to insure its accuracy.<sup>19</sup>

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16. 14 The Advocate 195-96 (1982).

17. Appendix Q, CID Reg. 195-1.

18. Id.

19. Id.

The CID also recognizes the inherent difficulties in using its own agents as the hypnotist.<sup>20</sup> Therefore only a mental health professional who is a member of one of the three professional societies of hypnotists may actually induce hypnosis.<sup>21</sup> However, the regulation does permit an agent to be present during the interview and to actually conduct portions of the questioning.<sup>22</sup>

In order to preserve an accurate account of the interview, the regulation requires that it be video-taped and that a time keeping device be placed within camera view to avoid questions concerning any gaps in the tape.<sup>23</sup> The regulation also requires that the witness be extensively interviewed and execute a sworn statement prior to the induction of hypnosis to insure that some account of the witness' testimony not affected by hypnosis is available for later use.<sup>24</sup>

Thus, the CID Regulation appears to recognize the inherent dangers in relying upon hypnosis as an investigative tool. Controls are placed upon its use to insure that it is ordered only in extraordinary cases and that independent verification support any investigative conclusions based on the hypnotically obtained statement. However, because interrogation could be conducted by a law enforcement agent during the hypnotic interview, it could be argued that inadequate attention has been given to the danger of his inadvertently suggesting a response to the hypnotized subject that would be consistent with the investigator's theory of the case.

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20. This procedure is subject to two obvious criticisms. First, the agent will probably not be a psychologist or psychiatrist. For this reason his training may not be extensive enough to completely understand the risks, benefits, and limitations of hypnosis. Second, an agent, because of his connection with law enforcement, is much more likely to hold a specific bias as to the most probable solution to a given case. Thus, there is a danger that the agent may inadvertently suggest an inaccurate response to the subject.

21. Appendix Q-3, CID Reg. 195-1.

22. Id., Q-11(e).

23. Id., Q-12a-b.

24. Id., Q-10.

#### IV. The Development of Case Law Regarding the Admissibility of Hypnotically Refreshed Testimony

Absent some connection between the hypnotically obtained information and the court-martial, the use of hypnosis as an investigative technique poses no serious dangers to an accused's constitutional rights or to the integrity of the criminal justice process. Like other investigative techniques which are barred from the courtroom, hypnosis may be used extensively by law enforcement personnel and defense counsel as an investigative tool.<sup>25</sup> However, when an individual who has previously been hypnotized for the purpose of enhancing his or her recollection of events connected with the offense later is called to testify at a trial several issues become apparent. First, should the witness' hypnotically refreshed or induced testimony be viewed as the product of a scientific method? Second, assuming that the testimony is the product of a scientific method, what test should be utilized in determining whether the scientific method of inducing the hypnotic recollection was reliable enough for presentation to the trier of fact? Finally, when the testimony is offered against the accused, can his right to confront the witness through cross-examination be protected? All of these questions have prompted wide debate recently in the courts. The best method of analyzing this body of case law is to examine the relevant cases in chronological order noting the evolutionary level of analysis employed.

While the use of hypnosis at a trial has been the subject of several cases over the past one hundred years, serious debate among state and federal courts as to the admissibility of hypnotically refreshed or induced testimony can be traced to the Maryland Court of Appeals decision in Harding v. State.<sup>26</sup> In that case the accused, James Harding, was convicted of assault with intent to commit rape and murder. The victim, Mildred Coley, testified that her recollection of the crime was almost entirely the product of a hypnotic interview with a trained psychologist. On appeal, the defense

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25. An obvious example is the polygraph. Although the use of this machine has been barred since Frye v. United States, 293 F. 1013 (DC Cir. 1923) it remains a valuable tool in law enforcement which has resulted in countless confessions being obtained after a suspects failure of a polygraph examination. See generally, Admissibility of Polygraph Results Under Military and Federal Rules of Evidence, 12 The Advocate 256 (1980).

26. Harding v. State, 5 Md. App. 230, 246 A.2d. 302, 310 n.1 (1968), cert. denied. 395 U.S. 949 (1969) (collecting the cases).

objected to the admission of Ms. Coley's testimony and to the qualifications of the psychologist who induced hypnosis.

The Maryland Court of Appeals held that the fact that Ms. Coley's testimony was a product of hypnosis was a factor going solely to the "weight" which the trier of fact should ascribe to the evidence. In so doing the Maryland Court did not recognize any need to analyze the source of the victim's memory. The fact that Ms. Coley testified "from her own recollection" was sufficient to overcome this threshold question.

The Maryland Court then considered the sufficiency of the evidence supporting Harding's conviction. The Court noted three factors which supported the jury's verdict; first, that the hypnotic procedure had been fully presented to the jury; second, hypnosis had been induced by a trained psychologist who opined that there was no reason to doubt the accuracy of the victim's testimony; and finally, the victim's testimony was substantiated by independent corroborating evidence.

Thus, the Court in Harding did not require any special foundation to the admission of a witness' testimony which had been "refreshed" through the use of a hypnotic interview. The testimony was neither viewed nor analyzed as "scientific" evidence. That aspect of the testimony was a matter which only affected credibility and weight. The issue of the accused's inability to effectively cross-examine the witness, because of her tendency to adopt the recollection of events recited while she was under hypnosis, was not examined by the Court and apparently was not argued by the defense.

Harding spawned a number of progeny within the state<sup>27</sup> and federal courts.<sup>28</sup> All of these cases assume that hypnotically refreshed testimony

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27. Chapman v. State, 638 P.2d 1280 (Wyo. 1982); Clark v. State, 379 So.2d 372 (Fla. Dist. Ct. App. 1979); People v. Smrekar, 68 Ill.App. 3d 309, 24 Ill. Dec. 758, 385 N.E.2d 848 (1979); People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S. 2d 643 (1979) rev'd App. Div. \_\_\_, 452 N.Y.S. 2d 929 (1982), State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); Creamer v. State, 232 Ga. 136, 205 S.E. 2d 240 (1974); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971).

28. United States v. Awkard, 597 F.2d 667 (9th Cir.), cert. denied 444 U.S. 885 (1979); see also, Kline v. Ford Motor Co., Inc., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1979); United States v. Narciso, 446 F.Supp. 252 (D.C. Mich. 1977).

is admissible because the witness is testifying from his or her "own memory." One Court analogized the use of hypnosis to permitting a witness to read a document in order to refresh her testimony.<sup>29</sup> This line of cases views the testimony as "non-scientific" in nature and requires no special evidence of the hypnotic technique's reliability. That matter is viewed as a question relating solely to the credibility of the testimony which may be explored through cross-examination by the opposing party.

A more searching analysis of the admissibility of hypnotically refreshed testimony had its genesis in the Virginia courts. In Greenfield v. Commonwealth,<sup>30</sup> the Virginia Supreme Court held that the trial judge did not err in refusing to permit a psychiatrist to testify as to a defendant's hypnotically induced recollection of a murder for which he was accused. The defendant, Ronald Greenfield, maintained that he was in an unconscious trance at the time of the stabbing death of the victim and that he had no conscious memory of the event. In ruling that the recollections under hypnosis were inadmissible, the Court noted that most experts in the field of hypnosis had determined that hypnotic recollections were inherently unreliable. This unreliability, the Court held, precluded the use of such evidence either from the accused or the hypnotist.<sup>31</sup> While the Court did not expressly state that this testimony should be analyzed as "scientific evidence," that requirement is inescapable given the Court's articulated reason for excluding the testimony.

In State v. Mack,<sup>32</sup> the Minnesota Supreme Court squarely addressed the question of the admissibility of hypnotically refreshed testimony in the abstract. Prior to the prosecution of this sexual assault case, the Minnesota Supreme Court considered the question of the admissibility of the victim's testimony which had been "revived" through hypnosis.

The Minnesota Supreme Court held that because the witness' testimony was the product of a scientific technique (i.e. hypnosis) the test set

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29. Kline v. Ford Motor Co., Inc., 523 F.2d at 1069-70.

30. 214 Va. 710, 204 S.E.2d 414 (1974).

31. In Greenfield v. Robinson, 413 F. Supp. 1113, 1121 (W.D. Va. 1976), the Federal District Court rejected the same accused's habeas corpus petition which was based in part upon the theory that he had been denied due process of law because of the exclusion of his statements made while under hypnosis. That Court also based its opinion on the inherent unreliability of the hypnotic procedure.

32. 292 N.W.2d 764 (Minn. 1980).

forth in Frye v. United States<sup>33</sup> was appropriate to determine whether the testimony would be admissible. In so doing the Minnesota Court rejected as superficial the government's argument that the testimony of the victim had merely been "refreshed." Since it was conceded that the victim had little or no independent memory of the crime prior to hypnosis, the critical issue which concerned the Court in Mack was the reliability of the procedure used to "refresh" the witness' recollection. In other words, the issue was whether the method used resurrected a buried memory or whether it instead created an inaccurate recollection. Of equal concern to the court in Mack was the danger that the witness' inaccurate recollection under hypnosis would be confounded with her original memory and harden to such an extent that the accused could not adequately exercise his right to confront and cross-examine her. For these reasons the Minnesota Supreme Court required the government to come forward with evidence that hypnosis was generally accepted as a scientific method of accurately resurrecting memories of forgotten events prior to the admission of the testimony. As the government was unable to meet this burden,<sup>34</sup> the Minnesota Supreme Court refused to allow the witness to testify as to any matter which had been "recalled" under hypnosis.

The opinion in State v. Mack has been accepted by most jurisdictions which have examined the question subsequent to its writing.<sup>35</sup> Indeed, its rationale has been used by the Maryland Court of Appeals to overrule its reasoning in Harding.<sup>36</sup> However, not every court has recognized the application of the Frye test to hypnotically refreshed testimony.

33. 293 F. 1013 (D.C. Cir. 1923). Under the Frye analysis the results of scientific evidence are admissible at trial only after the proponent establishes that the result is generally considered to be accurate among the relevant scientific community.

34. The government could not demonstrate general acceptance of the procedure for this purpose because of the problems noted in Section 2 of this Article.

35. People v. Hughes, \_\_\_ App.Div. \_\_\_, 452 N.Y.S.2d 929 (1982); Collins v. State, 52 Md.App. 186, 447 A.2d 1272 (1982); State ex rel Collins v. Superior Ct., 644 P.2d 1266 (Az. 1982); People v. Shirley, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982); People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981); Commonwealth v. Nazarovitch, 436 A.2d 170 (Pa. 1981). This result is not surprising because at present it is virtually indisputable that hypnosis is not a scientifically reliable method of accurately refreshing recollection.

36. Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982).

In States v. Hurd,<sup>37</sup> the New Jersey Supreme Court recognized that hypnosis is substantially different from normal methods of refreshing memory but held that if six standards governing the conduct of the hypnotic interview were satisfied the witness who had been previously hypnotized would be permitted to testify.<sup>38</sup> The Court refused to apply the Frye test, holding instead that the question of admissibility should be based upon a case-by-case analysis of the relative probative value and indicia of reliability in relation to the danger of unfair prejudice to an opposing party. The six standards announced in State v. Hurd set a minimum level of compliance which the proponent of the evidence had to meet. Beyond those standards, however, the trial judge was given latitude to admit or exclude the evidence depending on its perceived value. This ad hoc approach to admissibility was also initially adopted in New York courts.<sup>39</sup> However, that state has since repudiated this analysis in favor of an absolute prohibition of hypnotically refreshed testimony.<sup>40</sup>

While several jurisdictions initially permitted hypnotically refreshed testimony at trial without any special safeguards, since State v. Mack was decided, this view has been changing.<sup>41</sup> The key question throughout all cases examining the issue is whether the court chooses to analyze the testimony as scientific evidence or as "refreshed" testimony. Where hypnotically refreshed testimony is analyzed as a product of a scientific method, it

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37. 85 N.J. 525, 432 A.2d 86 (1981).

38. The six standards are: 1) The hypnotist should be a psychologist or psychiatrist independent of the prosecution or the defense; 2) the interview should be conducted in a neutral environment; 3) background information provided to the hypnotist should be in writing; 4) the interviewee should be interviewed prior to inducing hypnosis; 5) The hypnotic interview and all other major contacts with the witness should be video-taped. 6) only the hypnotist should be present during hypnosis. State v. Hurd, 432 A.2d at 96-97.

39. People v. Lucas, 107 Misc. 2d 231, 435 N.Y.S.2d 461 (1980).

40. People v. Hughes, \_\_ App. Div. \_\_, 452 N.Y.S.2d 929 (1982).

41. During the past two years, only Wyoming has adopted the view that such testimony is admissible in every case. Chapman v. State, 638 P.2d 1280.

has been universally barred from the courtroom.<sup>42</sup> On the other hand, where it is viewed as a method of refreshing a witness' testimony it is generally admitted.

#### V. Suggested Strategies Regarding the Admission of Hypnotically Refreshed Testimony

Trial defense counsel, because of their inherent lack of independent resources, are most likely to find themselves in the position of trying to bar the admission of hypnotically refreshed testimony.<sup>43</sup> Therefore, the primary focus of this section will be to suggest strategies for keeping such testimony out of the trial. While it is impossible to generalize for every conceivable circumstance, the following points should be relevant to most cases.

First, defense counsel should litigate a motion to bar the admission of hypnotically "refreshed" testimony prior to trial by way of a motion in limine.<sup>44</sup> There is simply no good tactical reason to interrupt the flow of a trial in order to litigate the motion. In most cases delaying litigation of the motion will operate to the client's disadvantage. The witness' testimony typically will be critical to the government's case and the military judge will be disinclined to abort the entire trial proceedings even if you make a plausible case for excluding the testimony. If the defense is surprised during the course of the trial with the revelation that one of the prosecution witnesses has been previously hypnotized, they should move to strike the testimony and for a mistrial. Such information is favorable to the defense and under Brady v. Maryland<sup>45</sup> should have been disclosed prior to trial.

Second, counsel should be prepared to properly articulate a motion to bar hypnotically refreshed testimony at trial. Since the adoption of the Military Rules of Evidence, no witness is incompetent to testify.<sup>46</sup> There-

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42. The only exception is State v. Hurd, 85 N.J. 525, 432 A.2d 86 (1981) where the New Jersey Supreme Court analyzed hypnosis testimony as a scientific method but did not apply the Frye test.

43. The CID will not conduct a hypnotic interview unless it has received the permission of the local Staff Judge Advocate.

44. United States v. Cofield, 11 M.J. 422 (CMA 1981).

45. 373 U.S. 83 (1963).

46. Rule 601, Mil. R. Evid.

fore the defense must allay any misconception on the part of the military judge that this is the thrust of the argument. Defense counsel should argue that the witness' testimony is the product of a scientific method of refreshing memory and must be examined under the Frye test.<sup>47</sup> Thus, the government must come forward with evidence that the method it used to "refresh" the witness' testimony has been generally accepted as a manner of accurately enhancing an individual's memory before it offers testimony which is the product of the technique. As this Article has illustrated, the government will be hard-pressed to meet this burden.

One potential point of contention which may arise in litigating the admissibility of hypnotically refreshed testimony is the issue of whether, conceding that hypnotically refreshed testimony is "scientific evidence," the adoption of the Military Rules of Evidence discarded the Frye standard.<sup>48</sup> While initially the drafters of the Federal Rules of Evidence saw the identical provision in the Federal Rules as creating a substantial question for debate, recent rulings within the federal courts do not indicate any wholesale retreat from the Frye test.<sup>49</sup>

In any event, trial defense counsel can argue that even if the Frye test is no longer expressly embraced as the applicable standard in the Military Rules of Evidence, the government must still demonstrate that its method is reliable under the general rules of relevancy.<sup>50</sup> In this regard counsel should argue (1) the inherent unreliability of hypnosis as a method of accurately resurrecting suppressed memories; (2) the danger that the court members will place undue credit upon the testimony if they learn that

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47. The Frye test has been adopted by military courts. United States v. Ford, 4 USCMA 611, 613, 16 CMR 185, 187 (1954).

48. Rule 702, Mil. R. Evid. now permits expert testimony whenever such evidence will aid the trier of fact. Some commentators have therefore questioned whether the Frye test has been implicitly overruled for a more vague and liberal standard. See Appendix 18-93, Drafter's Analysis, Manual for Courts-Martial, United States, 1969 (Revised edition).

49. See United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980); United States v. Brady, 595 F.2d 359 (6th Cir. 1979); United States v. Kilgus, 571 F.2d 508, 570 (9th Cir. 1978); United States v. Brown, 557 F.2d 541, 559 (6th Cir. 1977). But see United States v. Williams, 583 F.2d 1194 (2d Cir. 1978).

50. Rule 403, Mil. R. Evid.

the witness was hypnotized; and (3) the danger that the accused will be unfairly prejudiced because hypnosis tends to deprive the opposing party of the ability to probe uncertainties in the witness' testimony through cross-examination.<sup>51</sup>

When arguing against the general reliability of hypnotically refreshed testimony counsel should point out any failure of the CID to conform to its own service regulation governing the use of the procedure. If the defense is able to convince the military judge that the CID failed to follow its own regulation governing the conduct and subsequent use of hypnotic interviews, a much stronger case can be made for barring the testimony as too unreliable for admission under Military Rule of Evidence, 403.

Finally, if the defense is confronted with a situation in which the government plans to introduce a witness whose testimony has been hypnotically refreshed counsel must be prepared to affirmatively demonstrate that hypnosis is not accepted as a scientific method for accurately refreshing an individual's recollection. This can be done through the introduction of learned treatises when cross-examining government witnesses.<sup>52</sup> A more effective means, however, would be through the introduction of testimony of experts within the field. In this regard counsel may wish to explore the possibility of using Paragraph 116 of the Manual for Courts-Martial, United States, 1969 (Revised edition) to procure the services of a defense expert at government expense.

Situations where the defense desires to introduce the testimony of a witness whose memory has been revived through hypnosis are likely to be somewhat rare, although not impossible.<sup>53</sup> Counsel considering such a

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51. The defense's potential for success on this latter point depends to a large extent upon the particular circumstances of the case. Obviously the best situation for the defense is the case where the victim was highly uncertain of the course of events prior to the hypnotic interview but thereafter becomes absolutely certain that his recollections while under hypnosis are factually accurate. Here the defense has an extremely persuasive argument that, given the real possibility that the witness' testimony may well be inaccurate, hypnosis has deprived the defense of a necessary element of confrontation, the ability to cross-examine the witness.

52. Rule 803(18), Mil. R. Evid.

53. At least one trial defense counsel has engaged a civilian hypnotist to refresh the recollection of an accused. See note 6, supra.

procedure should balance the relative gains which might result from hypnosis with the potential danger that witness' testimony might later be lost at trial. However, because the accused has a sixth amendment right to present favorable evidence it would appear that the government could not bar the witness' entire testimony, but only matters which were recalled as a result of the hypnotic interview. Thus, the potential risk can be mitigated to a large extent by carefully memorializing in a sworn statement the witness' recollections prior to the hypnotic interview.<sup>54</sup>

The procedure used by the defense in a hypnotic interview must take into consideration the inherent dangers of confabulation and loss of an independent memory.<sup>55</sup> At a minimum, the defense should utilize the procedural safeguards already adopted by the CID.<sup>56</sup> Further reliability could be achieved by excluding those individuals who are actively involved in the defense of the case from the hypnotic interview<sup>57</sup> and by not giving the hypnotized subject post-hypnotic suggestions which might impair the witness' independent memory of the event.

## VI. Conclusion

The use of hypnosis as a method of enhancing an individual's memory poses significant problems when that individual is later called as a witness at trial. The primary difficulties lie in two areas; (1) the inherent unreliability of hypnotically induced recollections and (2) the loss of an independent memory. Conflicting with the interest of a fair trial is the valuable evidence which the hypnotic interview may produce. The potential value of hypnosis in developing leads and derivative evidence cannot be discounted.

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54. The procedure is required by CID Regulation. Appendix Q-10, CID Reg. 195-1. Cf. State ex rel. Collins v. Superior Ct., 644 P.2d 1266 (AZ. 1982) (holding that witness may testify as to matters which were not recalled as a result of hypnosis); Greenfield v. Commonwealth, 423 F.Supp. at 1121 (holding that an accused has no sixth amendment right to present hypnotically refreshed testimony).

55. See notes 6-15, supra and accompanying text.

56. See notes 16-24, supra and accompanying text.

57. See State v. Hurd, 85 N.J. 525, 432 A.2d 86 (1981).

The goal which appellate courts should seek is a rule which bars hypnotically refreshed testimony which is uncorroborated or tainted by the overt or inadvertant suggestions of those individuals connected with the development of the criminal prosecution. Of equal concern should be the development of procedures which minimize the hypnotized subject's loss of an independent memory of the events. When the subject is called to testify against the defense, hypnotism can severely limit the defense's ability to effectively cross-examine the witness. Where the subject of the testimony has been verified through independent investigation, the danger to the accused might be minimal. However, when the witness' testimony, recalled only through a hypnotic interview, is unsubstantiated by any other independent evidence, the inherent unreliability of the technique creates a substantial risk of a miscarriage of justice.

# UNRELIABILITY OF FIELD TESTS AS MEANS OF IDENTIFYING CONTROLLED SUBSTANCES

*By Walter J. Stall\**

General Smith, the convening authority, is talking to Colonel Jones, the Staff Judge Advocate. "I don't care if all we have is a field test on the drug. Why can't the individual either be court-martialed for possession of drugs or discharged by an administrative board?" The Commander, CPT Green is speaking to the trial counsel, CPT White: "So what if all we have is a field test. Let's get rid of him and do it now! The above demonstrate that convening authorities, commanders and military attorneys can easily misapply the findings of field tests for drugs.

Field tests were designed to assist law enforcement agencies in drug investigations. They are simple and quick procedures for testing materials suspected of containing drugs which help the agent determine if a substance requires additional analysis by forensic laboratory personnel. Field tests were never intended to be used as a positive method of drug identification.

Field tests, also known as color tests in the forensic laboratory, are conducted by mixing the drug in question with a chemical reagent and observing any color development in the mixture. The color obtained in the field test is interpreted as either positive or negative without comparison to a standard or compared against a reference chart. A reference or color chart contains representations (small printed blocks of colors) of the actual colors obtained with field tests on known drugs.

For example, an agent conducts a field test on a white powder with the Marquis reagent. He mixes the two together and observes the development of an orange color. He then turns to the page of the reference chart containing the color blocks associated with the Marquis reagent. The chart indicates the Marquis gives a purple with opium alkaloids and derivatives, and orange with amphetamines. The orange color in his field tests is a close match with the orange block printed in the reference chart. He interprets his

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field test as positive for amphetamines. He should now send the white powder to the laboratory for analysis. Why? Didn't the field test just tell him the white powder contained amphetamines? The answer is a strong and definite NO. The field test has told him that amphetamines may be present in the white powder. A final determination must be made by a trained forensic chemist.

Field tests cannot be used to conclusively identify drugs for several reasons. First, when a reagent and drug are mixed they undergo a chemical reaction to form a new colored compound. This reaction involves only part of the drug molecule. Hence many drugs with similar structures will react with a reagent to form similar colors. For example methapyrilene, a prescription controlled antihistamine, will react with the Marquis reagent to yield a purple color very similar to heroin or morphine. There are thousands of substances which will render these "false positives".

Second, heat, light, age of the reagent, concentrations of the substances involved and other factors can affect field tests with unpredictable results. Third, many commercial and clandestine preparations often contain more than one drug. These mixtures may interact when tested to yield a different color than those achieved when the substances are tested separately. For example, aspirin and diphenhydramine, an antihistamine, react to yield a red and yellow color with the Marquis reagent, respectively. Proper concentrations of the two drugs in a mixture might yield an orange color, erroneously indicating the presence of amphetamines. Finally, field tests are inherently subjective since interpretation of tests are contingent upon the observation of colors. What may appear to be a blue to one individual may appear to be purple to another. A purple achieved with the Koppanyi's reagent indicates the presence of barbiturates. A blue would indicate the presence of some type of compound other than barbiturates.

Courts-martial or administrative elimination boards for possession of drugs based solely on field tests should not be attempted, for all the reasons above. Staff Judge Advocate personnel must learn the uses and limitations of field tests. They in turn must educate convening authorities and commanders.

Military attorneys will continue to find themselves participating in courts-martial or discharge boards for drug offenses where the drug has been identified with field tests. As a trial counsel your best course of action is to submit the substance to a forensic laboratory for analysis, if any is available. Otherwise you must try to prove the identity of the drug using the field tests results.

As a defense counsel there are several recommended actions you may take. Consult other attorneys who have had experience in similar cases. Determine how they prepared and conducted their defenses, and if they were successful. Organize a "think tank" session with others in your office to develop novel defense approaches. Talk with a forensic drug chemist to obtain as much information about field tests as possible. Research the scientific literature and obtain articles about field tests that will be useful to your defense (the drug chemist can help you here).

You should first attack the validity of the field tests. Try to use the scientific papers you gathered or the testimony of a forensic chemist to prove the non-specificity of field tests.

Consider also an attempt to establish the individual that conducted the field test as a "non-expert" in the use of the test kit. Cross examine him on his educational background (especially in chemistry), his training and experience with the kit and his comprehension of the theory and limitations of field tests. Pertinent questions you should ask in a pre-trial interview are: (1) has he ever received any training in the use of the test kits and if so (2) how much training did he receive, when and where was he trained and who trained him, (3) how many field tests has he conducted, (4) has he ever conducted field tests that resulted in "false positives", (5) is he aware that different drugs will yield similar results with field tests and if so, (6) will he agree that field tests are not confirmatory for drugs.

If he answers "yes" to questions four, five and six, you might convince the trial counsel to consider some alternative other than a court-martial or discharge board. At any rate his testimony will negate the field test results. If he has had minimal training and experience with the kit he probably will answer questions four, five and six "no". You should be prepared to offer evidence to demonstrate his lack of expertise. Again you may need your scientific articles or the testimony of a forensic chemist.

If you decide to use a forensic chemist, contact one you know, discuss the circumstances of your case and explain your requirements. Most forensic chemists have degrees in chemistry and are qualified to testify as expert witnesses.

Occasionally you might encounter a case where a witness will be used in conjunction with the field test. His testimony will be similar to; "Yes, I took the drug. I have taken it before, so I know what it feels like. Yes, I know the identity of this drug. It's . . . .".

The consumption of a drug is not a valid method of identification. It is less scientific than a field test (consider the placebo effect). To properly prepare a defense against this type of testimony you should seek assistance from your local medical authorities.

In summary, field tests are not confirmatory for drugs. They were never intended to be confirmatory nor should they be used as such in courts-martial or elimination boards. A laboratory analysis by a trained forensic chemist is required for positive identification of any drug. As a footnote, twenty to thirty percent of all substances initially field tested positive for a drug and subsequently submitted to this laboratory for analysis are devoid of any drugs or contain a different drug than the one indicated by the field test.

Lastly, if you need help in preparing your defense obtain assistance from experienced attorneys and forensic chemists. Most forensic chemists are not lawyers but some have substantial trial-related experience. They are often prove to be a valuable in the development and execution of defense strategy.

It is hoped in the interest of justice that this article is informative and helpful to members of the legal community involved in drug trials.\*\*

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\*\* See Side Bar, Drug Field Tests, 14 The Advocate 192 (1982).

# URINALYSIS: Search and Seizure Aspects

## I. Introduction

Although military personnel are "entitled to the protection of the fourth amendment as are all other American citizens",<sup>1</sup> under certain circumstances a given fourth amendment protection may be inapplicable. Special circumstances within military society may affect a servicemember's "reasonable expectation of privacy"<sup>2</sup> and thus alter the scope of the fourth amendment protections. The government, however, bears the burden of demonstrating that circumstances peculiar to the military justify an exception to the privileges enjoyed by private citizens.<sup>3</sup> This article questions whether the government-ordered production of urine samples on a unit-wide basis can be justified without a probable cause showing that evidence of criminal activity will be found.

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1. *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

2. The fourth amendment privilege affords the individual privacy against certain types of government intrusion. *Katz v. United States*, 389 U.S. 347 (1967). Before the provisions of the fourth amendment are triggered, however, an individual must show that he had a reasonable expectation of privacy in the area subject to the government's intrusion. To determine whether a reasonable expectation of privacy exists, an individual's subjective expectation of privacy is balanced against the nature and quality of the intrusion on individual rights. *Terry v. Ohio*, 392 U.S. 1 (1968).

3. *United States v. Ezell*, 6 M.J. 307 (CMA 1979); *Courtney v. Williams*, 1 M.J. 267 (CMA 1976); *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960).

### A. Military Inspection Exception to the Fourth Amendment

In the area of military inspections the government has succeeded in establishing the necessity for a restricted fourth amendment protection.<sup>4</sup> The need for military inspections is directly linked to the readiness of the individual servicemember and of his unit to respond to national emergency. Since a military inspection has legitimate military objectives, the Court of Military Appeals has held that a servicemember has no subjective expectation of privacy in any area which is subject to a valid inspection.<sup>5</sup>

The necessity for conducting military inspections merely affects the scope, not the existence, of fourth amendment protections. If a particular search is so extensive that it exceeds the bounds of the area to

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4. The standards recognized as defining the parameters of a valid health and welfare inspection were elucidated by the Army Court of Military Review in the case of *United States v. Hay*, 3 M.J. 654, 655 (ACMR 1977):

A military inspection is an examination or review of the person, property, and equipment of a soldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories. Its purpose may be to examine the clothing and appearance of individuals, the presence and condition of equipment, the state of repair and cleanliness of barracks and work areas, and the security of an area or unit. Except for the ceremonial aspect, its basis is military necessity.

5. *United States v. Middleton*, 10 M.J. 123, 128 (CMA 1981). Any contraband which the commander sees during a legitimate inspection may be seized. Moreover, the commander is not limited to utilizing his sense of sight during such an inspection but may employ his other senses; and certain sense-enhancing aids, such as drug detection dogs, may also be used. *Id.* at 129.

to be searched or the purpose of the inspection<sup>6</sup> or if an expectation of privacy has attached to a place or object which was examined although not subject to inspection,<sup>7</sup> the search does not constitute a valid inspection and is subject to the proscriptions of the fourth amendment. For example, as a general rule, searches conducted specifically to locate evidence of a crime do not constitute valid inspections. Calling such a procedure an inspection will not alter the impermissible purpose of the search.<sup>8</sup>

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6. The United States Court of Military Appeals found that a valid inspection encompassed "all areas subject to it [which] were public to the commander and his inspection party." *United States v. Middleton*, 10 M.J. at 129. In *Middleton*, however, the court found that an intrusion into a locked wall-locker was not permissible absent probable cause and was "a search incident to a criminal investigation." *Id.* at 132.

7. The examination of areas to which an expectation of privacy attaches has proceeded on a case by case basis, but clearly not all possessions of servicemembers are subject to search during inspections. A small closed purse located in a chest of drawers could not be searched absent probable cause. *United States v. Garcia*, 10 M.J. 631 (ACMR 1980). Papers folded inside of the pocket of a jacket hanging in a serviceman's locker could not be inspected and seized if the stated purpose of the inspection was to locate explosives, contraband, and missing equipment. *United States v. Brown*, 12 M.J. 420 (CMA 1982).

8. In *United States v. Roberts*, 2 M.J. 31 (CMA 1976), the Court of Military Appeals held that room-by-room barracks inspection conducted with marijuana detection dogs at 0430 hours for the sole purpose of locating and prosecuting all persons in possession of contraband drugs was a "search" and not an inspection. Since *United States v. Roberts* was not specifically overruled by *Middleton*, the decision still has precedential value. The case of *United States v. Lange*, 15 USCMA 486, 35 CMR 458 (1967) provides another example of an inspection which on closer examination proved to be an impermissible search. On the same day a watch and wallet had been reported as stolen, the administrative officer sought to recover the stolen property by searching the barracks. The men were called to the barracks in groups of ten, starting with the men living in closest proximity to the victim, since it was believed more likely that the wallet would be found in this group. Three stolen wallets were discovered among the effects of the defendant, who was the roommate of the victim. See also *United States v. Grace*, 19 USCMA 409, 35 CMR 458 (1970).

## B. Urinalysis as a Valid Military Inspection

A recent change of Army Regulation 600-85,<sup>9</sup> purports to expand the permissible scope of a health and welfare inspection. This change allows urine samples to be obtained during a health and welfare inspection if done in compliance with the minimal privacy interests embodied in Military Rule of Evidence 313(b).<sup>10</sup> The inspections described in Rule 313(b)

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9. Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program, (Interim Change No. 101) [hereinafter cited as AR 600-85] implementing a 28 Dec 81 Deputy Secretary of Defense Memorandum, pertaining to use of evidence obtained from mandatory urinalysis tests in disciplinary proceedings and for administrative actions.

10. 313(b) Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command, the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or air worthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command. An examination made for the primary purposes of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Rule 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

are justified in terms of administrative regularity and therefore are not subject to a prior probable cause determination or a balancing of competing privacy interests. Accordingly, the change in AR 600-85 permits the nonconsensual collections of urine samples during routine health and welfare inspections without a probable cause determination.

### C. Urinalysis as a Violation of Article 31, UCMJ

Until 1980,<sup>11</sup> production of body fluids for use as evidence in a court-martial was challenged as a possible violation of Articles 31(a) or 31(b), UCMJ, rather than as a violation of the fourth amendment. An extensive body of military case law evolved to protect a servicemember from being ordered to produce evidence which could subsequently be used against him at a court-martial.<sup>12</sup> The privilege under Article 31, UCMJ, was broader than the protection afforded under the fifth amendment as applied in federal civilian courts. This protection recognized the vulnerability of soldiers to orders by superiors to produce samples and exemplars. Obedience to orders is a requisite of military service. Consequently, the Court of Military Appeals fashioned a remedy to protect soldiers from being ordered to produce incriminating evidence which would be admissible at court-martial.<sup>13</sup>

The government may argue that the servicemember cannot now assert a fourth amendment privilege against compulsory urinalysis because urinalysis has been routinely utilized in the past for the purpose of identifying and treating drug and alcohol abusers. This argument should be evaluated in light of the former Article 31, UCMJ, disqualification of

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11. *United States v. Armstrong*, 9 M.J. 374 (CMA 1980). *Armstrong* marked the reversal by the Court of its previous position that production of body fluids was self-incriminating.

12. *United States v. Minnifield*, 9 USCMA 373, 26 CMR 153 (1958); *United States v. Musquire*, 9 USCMA 67, 25 CMR 329 (1958); *United States v. Ruiz*, 23 USCMA 181, 48 CMR 797 (1974).

13. *Eckhardt, Intrusion into the Body*, 52 Mil. L. Rev. 141 (1971).

this form of evidence. The former disqualification of sample and exemplar evidence under Article 31, UCMJ, meant that fourth amendment questions were rarely reached, but it does not mean that the fourth amendment privilege did not exist. The issue was not litigated because the results of urinalysis could not be used as a basis for bringing court-martial charges<sup>14</sup> or adverse administrative elimination.<sup>15</sup>

The existence of the fourth amendment interest in production of body fluids was recognized by the Court of Military Appeals in Armstrong. The Court noted that the production of body fluids could be ordered only when there was probable cause to believe that an offense had been committed.<sup>16</sup> The holding is in accord with the Military Rule of Evidence 312.

The government should not be permitted to argue that the urinalysis procedure is performed primarily for the purpose of medical treatment and only secondarily for court-martial purposes. The new procedure directing that a chain of custody be maintained over specimens envisions only the apprehension and punishment of offenders. The purpose of the interim change is punitive in nature. If the change were entirely deleted, medical interests would be adequately protected, as they were before implementation of the change.

## II. The Procedure for Urinalysis

The new procedure, as established by AR 600-85, conflicts with the provisions of Military Rule of Evidence 312, entitled Bodily Views and Intrusions, which specifically refer to the nonconsensual seizure of body fluids. The proscriptive language of Military Rule of Evidence 312 provides only two bases for taking body fluids without consent. Fluids may be taken pursuant to a search warrant or an authorization issued under the authority of Military Rule of Evidence 315. However, the

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14. United States v. Ruiz, 23 USCMA 181, 48 CMR 797 (1974).

15. Giles v. Secretary of the Army, 627 F.2d 554 (D.C. Cir. 1980).

16. United States v. Armstrong, 9 M.J. 374 at 383.

warrant or authorization requirement may be excused upon a finding of exigent circumstances tending to show that the passage of time would destroy the evidence.<sup>17</sup>

The new procedure embodied in the recent change to AR 600-85 is not governed by Rule 312, but draws upon Rule 313(b) as its implementing authority, even though Rule 313(b) does not mention bodily views or intrusions or the taking of body fluids. The privacy interest of an individual who must give a urine sample is counterbalanced only by the Rule 313(b) administrative regularity inquiry.

The regulation describes the manner of taking the urine sample and directs the maintenance of a chain of custody documentation over the sample. The inspection is conducted by the individual's section leader, who must be of the same sex and of the grade E-5 or above, and who must observe the "member urinating into specimen bottle and placing lid on bottle."<sup>18</sup> The recent change also authorizes the use of the results of tests performed upon the urine samples at court-martial. Individuals whose urine sample contains metabolites of controlled substances are liable for court-martial conviction for the use of controlled substances. The urine samples are to be meticulously maintained in order to preserve the chain of custody requirements.<sup>19</sup> The results of the urinalysis tests thus may serve as the basis for bringing court-martial charges.

The procedure described in AR 600-85 is not an inspection at all but an examination conducted for the primary purpose of discovering and preserving evidence for use at trial by court-martial. Given this purpose, AR 600-85 may suffer certain constitutional infirmities. The mandatory collection of urine samples during health and welfare inspections may contravene the fourth amendment since the forced production of body fluids violates the protected privacy interests of the service-member.

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17. Military Rule of Evidence 312(d).

18. Appendix H-5: Standard Operating Procedure for Chain-of-Custody for Command Directed Urinalysis I01, AR 600-85.

19. Id.

A. URINALYSIS AS VIOLATING A SERVICEMEMBER'S  
REASONABLE EXPECTATION OF PRIVACY

Two potential levels of fourth amendment violations are created by the collection of physical evidence.<sup>20</sup> The first occurs when the individual is seized. A police-citizen encounter which restricts the movement of the citizen against his will is a detention within the meaning of the fourth amendment.<sup>21</sup> The second seizure occurs when physical evidence is collected from that individual.

An initial seizure of the person is lawful if it occurs pursuant to lawful arrest<sup>22</sup> or a grand jury order to testify,<sup>23</sup> or upon a showing of probable cause.<sup>24</sup> The initial seizure is not lawful if it is the result of a dragnet detention by law enforcement personnel.<sup>25</sup> Thus, in the cases which have permitted the taking of physical evidence, the preceding seizure of the individual was not part of a wholesale detention of citizens for the purpose of discovering evidence of a crime. It can be argued that the improper seizure of the individual caused by the absence of probable cause to detain renders the urinalysis procedure defective from the moment the commander orders soldiers not to leave an area until a urine sample has been collected.

The next level of constitutional violation concerns the actual seizure of the evidence from the person. The threshold question in examining the constitutionality of collecting urine samples under AR 600-85 is whether the fourth amendment applies to this procedure. The answer to this question is dependent upon the expectation of privacy, if any, a

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20. *Schmerber v. California*, 384 U.S. 757 (1966).

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

22. *Schmerber v. California*, 384 U.S. 757 (1966).

23. *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973).

24. *Cupp v. Murphy*, 412 U.S. 291 (1973).

25. *Davis v. Mississippi*, 394 U.S. 721 (1969).

servicemember has in his body fluids. The reasonableness of the intrusion becomes an issue under the fourth amendment only if the challenged activity violates an individual's reasonable expectation of privacy. If a servicemember does have an expectation of privacy, the applicability of the fourth amendment will then turn upon whether the taking of body fluids without probable cause constituted a prohibited search within the meaning of the fourth amendment.

The primary privacy interest at issue in the context of taking urine samples is in protecting body fluids contained within one's person from seizure and chemical analysis. An intrusion into the body is recognized as being an intrusion upon the integrity and dignity of a human being. Body fluids such as urine are closely tied to bodily functions which are considered to be particularly intimate. A secondary interest concerns the manner in which the samples are obtained. Nonconsensual intrusions into the human body, outside of a hygienic, medical environment are particularly offensive to the values embodied within the fourth amendment.<sup>26</sup>

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26. See Cupp v. Murphy, 412 U.S. 291 (1973); Wyman v. James, 400 U.S. 309 (1971); Schmerber v. California, 384 U.S. 757 (1966). The fact that the urine samples are to be taken under the supervision of nonmedically trained personnel outside of a hospital environment is a factor which might weigh against this procedure. As the Supreme Court noted in Schmerber:

Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practice. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by the police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk or infection and pain.

384 U.S. at 772.

Searches which breach the body wall necessarily result in a greater intrusion than external searches of the body.<sup>27</sup>

The question of the degree of privacy interest possessed by service-members in their persons was tested in the Committee for G.I. Rights v. Callaway<sup>28</sup> Pursuant to USAREUR Cir. 600-85 (10 Sept. 1973), a drug prevention plan was devised to identify and rehabilitate drug abusers and eliminate the abusers from military service administratively if they could not be rehabilitated. Only soldiers with ranks of E-1 through E-5 were subject to USAREUR Cir. 600-85, and the results of the test were not used to institute court-martial proceedings. The drug prevention plan included an inspection program directed at checking soldiers' property, clothing, and exterior skin areas for drugs or indications of drug use. A groin or anal inspection could be conducted only by medical personnel and intrusions into the body were prohibited in the absence of probable cause or medical necessity.<sup>29</sup>

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27. Schmerber v. California, 384 U.S. at 769-770, recognized this greater privacy interest:

Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the fourth amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.

28. 518 F.2d 466 (D.C. Cir. 1975).

29. Paragraph 14(d)(5), USAREUR Cir. 600-85.

The Court held that inspection of all clothing, equipment, and arms located in a unit did not violate the fourth amendment. The court drew no distinctions between possessions located in areas accessible to the public and places where a soldier might store personal possessions. Under current law, Committee for G.I. Rights was incorrectly decided. Committee for G.I. Rights upheld the inspection of all possessions of the servicemember wherever located in the barracks and held that the servicemember could not assert an expectation of privacy in property maintained in the barracks. This view has not been followed by the Court of Military Appeals.<sup>30</sup> Additionally, Committee for G.I. Rights permitted a viewing of the skin surfaces of arms and legs because of the "different" expectation of privacy possessed by the military member as opposed to his civilian counterpart. The Committee for G.I. Rights holding can be further distinguished from the procedure for collecting urine samples because these health and welfare inspections intrude within the confines of the body wall without a prior probable cause determination.

The intrusion permitted by Committee for G.I. Rights was a visual inspection of the outer skin surfaces of the body for needle marks or other indicia of drug usage. The intimate body parts of every member of the unit were not subject to inspection, but individuals suspected of drug usage could be inspected by medical personnel. If indicia of drug usage were found, urinalysis could be ordered. This level of intrusion differs from an intrusion which orders members not suspected of drug usage to urinate into a specimen bottle in the presence of a second person. The extraction of body fluids without a prior showing of probable cause is a greater intrusion into the privacy and dignity of the human being and must be offset by a greater showing of necessity in order to be upheld.

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30. See United States v. Brown, 12 M.J. 420 (CMA 1982); United States v. Middleton, 10 M.J. 123 (CMA 1981); United States v. Roberts, 2 M.J. 31 (CMA 1976); United States v. Miller, 24 USCMA 192, 1 M.J. 367, 51 CMR 437 (1976); United States v. Ruiz, 23 USCMA 181, 48 CMR 797 (1974); United States v. Whittler, 23 USCMA 121, 48 CMR 682 (1974); United States v. Garcia, 10 M.J. 631 (ACMR 1980).

The greater expectation of privacy against searches which intrude into the personal and private areas has been acknowledged in other contexts where the fourth amendment does not afford protection against the government intrusion. Even when the searches are upheld, however, a distinction has been made between searching the possessions and searching the person when the search occurs in the schoolyard, at the border, and in prison.

### 1. Schoolyard Searches

Searches performed without probable cause on school grounds have been justified under the theory that such searches are regulatory in nature and therefore may be performed without violation of the fourth amendment. Searches, sometimes with drug detection dogs, have been performed without probable cause of students' possessions and their lockers. A split of authority exists regarding the use of the drug detection dogs in the public schools. The case law is extremely scanty, but the Court of Appeals for the Seventh Circuit in Doe v. Renfrow<sup>31</sup> held that the use of dogs to sniff children and their belongings is not a search in light of the diminished expectation of privacy a student enrolled in school possesses and in view of the lack of intrusion. Renfrow held there was no search of the person since the dog merely sniffed the air around a student, and the students had no expectation of privacy in the air.<sup>32</sup> The Fifth Circuit has concluded that the use of dogs to sniff a student's belongings is permissible, but that the dogs' sniffing the children violated the fourth amendment because "(t)he students' persons certainly are not the subject of lowered expectations of privacy."<sup>33</sup>

31. 475 F. Supp. 1012, op. adopted on this issue and rev'd on other grounds, 631 F.2d 91 (7th Cir. 1980) (per. curiam), cert. denied, 451 U.S. 1022 (1981). See also Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

32. The school officials in Renfrow performed a subsequent nude body search upon a 13 year old girl whom the dog had sniffed and alerted upon. Although the sniffing was held to be no search, the subsequent nude inspection was termed "an invasion of constitutional rights of some magnitude" and "a violation of any known principle of human dignity." 631 F.2d at 93.

33. Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982). Accord Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

## 2. Border Searches

In the cases involving border searches, the courts have found that no justification is required to search an individual's possessions and belongings. The individual has no expectation of privacy in belongings transported over an international boundary. The reasonableness of the searches inheres in the fact that they occur at the border.<sup>34</sup> Even within the context of the border searches, however, the courts recognize that a search of the person cannot be sustained without some level of probable cause. At least a "mere suspicion" of the presence of narcotics or contraband is required to justify a pat-down search.<sup>35</sup> For a strip search to be performed, the fourth amendment requires the existence of a "real suspicion" supported by objective, articulable facts engendered in the mind of a experienced, prudent customs official that a person attempting to cross the border is concealing contraband in his body.<sup>36</sup>

## 3. Prison Searches

Searches performed in prison are often made without probable cause. Prisoners retain only those fourth amendment rights which are consistent with the legitimate demands of prison security. The Supreme Court in Bell v. Wolfish<sup>37</sup> recently held that pretrial confinees in detention facilities could be subjected to visual body cavity searches following contact visits. The Court determined that the security interests of the institution outweighed the privacy interests of the inmates. Justice Rehnquist, writing for the majority, found there was no less intrusive means readily available to combat the introduction of contraband smuggled into the detention facility after contact visits. The four dissenters to the majority opinion rejected this premise as "unthinking deference to administrative convenience", noting that alternative measures were available.<sup>38</sup>

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34. United States v. Ramsey, 431 U.S. 606 (1977); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

35. United States v. Carter, 563 F.2d 1360 (9th Cir. 1977); Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967).

36. United States v. Holtz, 479 F.2d 89 (9th Cir. 1973).

37. 441 U.S. 520 (1979)

38. Id. at 579.

The Wolfish decision is limited to the prison setting since certain rights and privileges are lost when a person is incarcerated. Not all constitutional rights and privileges are forfeited by convicted prisoners, but security considerations may limit or eliminate the constitutional rights which are retained; and courts give deference to institutional assessments of the need for internal security. The majority decision in Wolfish indicates that many constitutional rights, of even a pretrial detainee, may be lost or limited by virtue of his incarcerated status and that security reasons may dictate further curtailment of protected interests. The Wolfish decision permitted strip searches of prisoners returning from contact visits because contraband was often located after such visits. Therefore, the searches were reasonably related to a legitimate institutional goal. Strip searches conducted on less than probable cause are still subject to a test of reasonableness. The search is unreasonable if it serves no rational purpose.<sup>39</sup> The panoply of rights guaranteed the servicemember stand in marked contrast to the rights retained by a prisoner. Moreover, the serious security dangers which were cited as the prerequisite for full body searches following contact visits in prisons are not analogous to conditions in military service.

Little authority exists concerning the nonconsensual extraction of body fluids from prisoners. One case, Ferguson v. Cardwell,<sup>40</sup> has held that blood may be extracted from prisoners when substantial suspicion exists that a particular inmate is taking drugs, but only if such extraction is made without force in a sanitary setting and is performed by medically trained personnel.<sup>41</sup> One treatise on the fourth amendment questions whether prisoners could be subjected to a prisonwide taking of blood samples in order to determine which prisoners were taking drugs.<sup>42</sup>

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39. Hurley v. Ward, 549 F. Supp. 174 (S.D.N.Y. 1982). See also Logal v. Shealey, 660 F.2d 1007 (4th Cir. 1981) (sheriff's policy of strip searching DWI detainees was unconstitutional when there was no reason to believe that detainee was in possession of contraband, and a pat-down search would have been sufficient.)

40. 392 F. Supp. 750 (D. Ariz. 1975).

41. Id. at 752.

42. W. LaFave, 3 Search and Seizure § 109 (1978).

## B. Urinalysis as an Unreasonable Search

Assuming a strong privacy interest in body fluids and bodily functions is recognized, the next step is to consider the reasonableness of the government intrusion. The fourth amendment is not a blanket prohibition against any specific type of search but is a safeguard against "unreasonable search and seizures."<sup>43</sup> An unreasonable search is found when the reasonable expectations of privacy of the person asserting the claim are violated by a governmental intrusion.<sup>44</sup>

The significant privacy interest a person maintains in his body fluids and bodily functions must be measured against the particularized need to control the use of drugs in the military and to combat the inroads upon obedience and discipline occasioned by the use of drugs. Clearly mandatory urinalysis is an effective means of identifying drug users. The question remains whether the degree and nature of the intrusion are reasonable when the privacy interests of servicemembers are balanced against the efficacy of this procedure in combatting the drug problem in the military.

### 1. A balancing test

The right of Congress has been recognized to formulate different rules applicable to military society which reflect interests unrelated to protected constitutional interests, in the area of the first amendment i.e. duty and discipline.<sup>45</sup> Nonetheless, a protected interest does not invariably yield whenever governmental necessity is invoked.<sup>46</sup> A balancing test is employed to determine whether the intrusion is no more than

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43. United States v. Middleton, 10 M.J. 123 (CMA 1981).

44. Rawlings v. Kentucky, 448 U.S. 98 (1980); Smith v. Maryland, 442 U.S. 735 (1979); Rakas v. Illinois, 439 U.S. 128 (1979); Katz v. United States, 389 U.S. 347 (1967).

45. Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974).

46. United States v. Robel, 389 U.S. 258 (1967).

reasonably necessary to protect a substantial government interest. Although the Supreme Court has granted wide-ranging deference to the needs of military security when they are invoked in a first amendment constitutional balancing equation,<sup>47</sup> the Court has not yet developed a standard for the evaluation of military necessity in balancing the fourth amendment claims of military personnel. The United States Court of Military Appeals has recognized the danger of fourth amendment violations during military inspections, and in Middleton warned that safeguards were necessary to assure that inspections were limited to areas open to public inspection rather than to "merely provide a subterfuge for avoiding limitations that apply to a search and seizure in a criminal investigation."<sup>48</sup>

The framers of the fourth amendment sought to prevent wholesale intrusions upon the privacy of private citizens by banning unfocused, generalized, or dragnet searches.<sup>49</sup> Searches of sweeping and indiscriminate scope have been suspiciously scrutinized by the Supreme Court in the past, particularly searches performed by law enforcement personnel without specific evidence of wrongdoing by the targeted individuals.<sup>50</sup> The effectiveness of the procedure employed is not a viable consideration in determining whether that procedure may be employed. No matter how "relevant and trustworthy the seized evidence may be as an item of proof,"<sup>51</sup> a dragnet search without probable cause that has the sole purpose of identifying evidence for use at criminal proceedings is an unreasonable search.

## 2. Practical Considerations for Litigation

Until the courts rule on the permissibility of requiring mandatory urine samples, one challenge to the admissibility of evidence acquired by the procedure in AR 600-85 will turn upon a balancing of fourth amendment protections against the government interest in creating a drug-free military society. A heavy burden will be placed upon the government to

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47. Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974).

48. 10 M.J. at 132.

49. Ybarra v. Illinois, 444 U.S. 85 (1979).

50. Davis v. Mississippi, 394 U.S. 721 (1969).

51. Id. at 724.

show that a protected privacy interest should yield. An inspector (the commander) must demonstrate that an inspection was the appropriate response to a need. In order to show military necessity, the extent of the drug problem must be established. Although the abuse of drugs is generally accepted as posing a threat to military security, the extent of the drug problem is typically undocumented. While it is within the purview of command responsibility to respond to military necessity, the need first must be affirmatively proven. The Department of Defense has not issued any policy statements documenting the extent of the need to control drug abuse in the military. Even if the abuse of drugs as an Army-wide problem were documented and, even if policy can be introduced to that effect, the extent of the problem within the individual command must also be proven. Commanders should be required to testify as to the extent of the problem within their command and should be closely questioned concerning whether the problem is worse now than in former periods when urinalysis was not employed.

After the need is documented, commanders must justify the intrusion required by the mandatory urinalysis procedure. Commanders must demonstrate that the means used are the least obtrusive available. The alternate avenues of inspection for drugs should be extensively inquired into, including the permissible inspections of barracks, possessions, gate searches and use of drug detection dogs. With alternative measures available for discovering the presence of drugs, it may be difficult to show why urinalysis should be permitted, given the degree of intrusion involved.

Additionally, the scientific reliability of the method employed to perform the urinalysis should be attacked to demonstrate that the procedure is not a reasonable one because it is neither scientifically reliable nor the most accurate test available. Further discussion on the scientific reliability of the tests employed will appear in future editions of The Advocate. Defense counsel should require the government to affirmatively establish the scientific reliability of the test.<sup>52</sup> In order to establish the reasonableness of the procedure employed the government should be forced to negate the possibility of false positive identification of drug usage.

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52. Military Rules of Evidence 702 and 703 concerning testimony by experts and the basis of opinion testimony by experts suggest that testimony by experts is admissible if their opinions are based upon scientific procedures generally accepted in the scientific community. See Fry v. United States, 293 F. 1013 (D.C. Cir. 1923).

### III. Conclusion

Ridding military society of drugs and drug users may be undertaken in the less intrusive manner as currently endorsed by the Court of Military Appeals in Middleton and as previously embodied in AR 600-85. The dragnet searches for evidence performed under the aegis of a health and welfare inspection is prohibited both under the fourth amendment and the language of Rule 313(b) itself.

Donna Chapin Maizel

## SIDEBAR

### Object With Specificity

The need to object with specificity to the introduction of a lab report is exemplified by two recent cases. In United States V. Foust, M.J. (ACMR 5 Nov 1982), the defense counsel's general objection that he lacked the opportunity to cross-examine the chemist was determined to lack sufficient specificity to warrant consideration of the confrontation issue on appeal. However, in United States v. Davis, M.J. (ACMR 29 Oct 1982) the defense counsel specifically sought to produce the lab analyst as a witness on the basis that the chemist "did not perform the most reliable test and because the known standard has never been authenticated." The defense motion was denied at trial. ACMR held that the offered testimony tended to disprove the accuracy of the chemical analysis, and as a result set aside the findings of guilty.

### What is a Unit Commander?

The accused "has an inviolable right to proper pretrial procedure [which] includes the exercise of discretion by inferior commanders in disposing of a case." United States v. Sims, 22 CMR 591, 597 (ACMR 1956). This principle extends to nonjudicial punishment, in that the authority to exercise disciplinary powers under Article 15, UCMJ is limited to commanders. Para. 3-7, Army Reg. 27-10, Military Justice (1 Sept. 1982) [hereinafter cited as AR 27-10].

In the situation where the accused is left behind with the rear detachment when his unit deploys, the question may arise as to whether the rear detachment commander can take action pursuant to Paragraphs 30c and 32 of the Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as Manual] as the accused's immediate commander, with regard to criminal charges. This question is currently before the Army Court of Military Review. However, the answer appears to be no. A commander is one who "exercises primary command authority over a military organization . . . that under pertinent official directives is recognized as a command." Para 3-7a (1), AR 27-10. A rear detachment does not fit within this definition of military organization because it is not recognized under official directives as a command, and it lacks a table of organization and equipment. A unit is defined as "any military element whose structure is prescribed by competent authority, such as a table of organization and equipment; specifically, part of an organization." Joint Chiefs of Staff Publication No. 1, Dept. of Defense Dictionary of Military and Associated Terms 362 (1 June 1979). The rear detachment, however, is merely a makeshift creation for administrative convenience. Consequently, the officer in charge of a rear detachment is no more a commander than is a staff judge advocate or senior defense counsel.

Without a timely objection to the processing of court-martial charges or a record under Article 15 administered by an officer who is not a commander, it is unlikely that appellate counsel would ever know that such an issue exists. Counsel in the field are best situated to know who the commanders are, and are urged to preserve this issue at trial until the question is resolved at the appellate level.

#### Excusal of a Court Member After Assembly

After a court-martial has been assembled, no member may be absent thereafter except for good cause. The grounds for excusal are defined by paragraph 37b of the Manual.

Good Cause contemplates a critical situation such as emergency leave or military exigencies, as distinguished from the normal conditions of military life. The determination of facts which constitute good cause for the excuse from attendance or relief of a member rests within the discretion of the convening authority. The record of trial should detail the basis of absence or relief of any member after assembly and affirmately establish that the absence or relief falls within the provisions of Article 29(a). (emphasis added).

Paragraph 41d(4) of the Manual provides that the military judge may accept the statement of the trial counsel that the convening authority has excused the member and the reason for the excusal. However, the excusal may be challenged at trial. A convening authority does not have unlimited discretion to excuse a court member after the court has been assembled. Cf. United States v. Smith, 3 M.J. 490 (CMA 1975). Therefore, counsel should be alert to challenge the excusal on the basis that the good cause requirement has not been met. See United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953); United States v. Bashears, 23 CMR 737 (AFBR 1967). By doing so, counsel will require the trial counsel to affirmatively set forth the reasons for the excusal, and will build a record for adequate judicial review. United States v. Matthews, 17 USCMA 632, 38 CMR 430 (1968). In addition, counsel may call a witness to establish that a court-member was excused for routine duties (regular field training, duties on post, etc.) which are not of an exigent nature. Good cause is a very narrow exception which provides for a true military necessity in an unusual situation. See Morgan, The Background of The Uniform Code of Military Justice, 6 Vand. L. Rev. 169 (1953), reprinted with permission in 28 Mil. L. Rev. 17 (1965). Failure to object, however,

will result in waiver. United States v. Geraghty, 40 CMR 499 (ABR 1968).

Every servicemember has a due process right to be tried by properly appointed court members who, except under narrow circumstances, will see the case through to completion after assembly. In addition to the denial of the due process right, the excusal of a member after assembly may adversely affect counsel's numerical calculations concerning a tactical advantage in the court's composition. Thus, a careful review of the circumstances surrounding the absence of a court member is a vital part of the defense.

#### Preserving The Denial of a Challenge for Cause for Appeal

One of the "hotter" issues before the Court of Military Appeals involves the use of the peremptory challenge against a court member who was unsuccessfully challenged for cause by the defense counsel. In United States v. Harris, 13 M.J. 283 (CMA 1982), the Court found no prejudice in such a situation because the record did not reveal that the defense would have otherwise exercised a peremptory challenge against another member. Consequently, the improper denial of the challenge for cause by the trial judge was held to be non-prejudicial error. In dissent, Chief Judge Everett wrote: "One clear lesson may be drawn by a defense counsel from the principal opinion. If he makes a challenge for cause which he believes has merit, in order to preserve that challenge on appeal he should exhaust his peremptory challenge and then 'evidence' in some way that he still would wish to exercise another peremptory challenge if it were available." This issue is presently before the Court in United States v. Davenport, CM 441370, pet. granted, \_\_\_ 14 \_\_\_ (12 November 1982). Until that case is decided, counsel would be well advised to heed the Chief Judge's suggestion, if in fact the exercise of another peremptory challenge is desired.

#### Challenging the Validity of a General Regulation

The Court of Military Appeals recently dealt with the question of whether a lawful general regulation was "properly published" so that a service members knowledge of the regulation could be conclusively presumed in a prosecution under Article 92, UCMJ. In United States v. Tolkach, 14 M.J. 239 (CMA 1982), the regulation in question had been promulgated by the Eighth Air Force and then sent to the accused's base for distribution through normal channels. Evidence revealed, however, that some organizations on base had not received copies of the regulation prior to the alleged commission of the offenses by the accused. The Court held that "publication" occurs when the regulation is received at the official repository for such publications on the installation. In such a location, the regulation is available for reference to all personnel on the installation. Since there was no specific evidence to show when the regulation had been received at the repository, the

conviction was reversed. Defense counsel should be aware that there may exist circumstances under which a regulation may not have been properly published. A careful examination of the promulgation of the regulation may, therefore, reveal a viable defense at trial.

## USCMA WATCH

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

#### INTRODUCTION

By far the most significant group of issues placed before the court during this reporting period deals with the right to counsel at a pre-trial interrogation. In United States v. Hartsock, ACOMR 16545, certif. for rev. filed, 14 M.J. 282 (CMA 1982), the Court is requested to redefine the "functional equivalent of interrogation" when such "interrogation" occurs after an accused has requested counsel to assist him during custodial interrogation. How and when an accused may first request and have counsel to assist him during custodial interrogation will be considered in United States v. Goodson, 14 M.J. 542 (ACMR 1982), pet. granted \_\_\_ M.J. \_\_\_ (CMA 15 November 1982). Finally, the Court has also agreed to compare the holding in United States v. McOmber, 1 M.J. 380 (CMA 1976) with Mil. R. Evid. 305(e). The Court will decide if a defense counsel appointed for a specific court-martial must be notified if his client is to be interrogated concerning an investigation unrelated to the pending trial. United States v. Sutherland, NCMR 81-3049, pet. granted, 14 M.J. 282 (CMA 1982).

#### GRANTED AND CERTIFIED ISSUES

##### Providency: Variance

In United States v. Garcia-Lopez, ACOMr 441481, pet. granted, \_\_\_ M.J. \_\_\_ (CMA 26 April 1982), the appellant pled and was found guilty of, inter alia, escape from lawful custody when he fled from his room after being directed by a commissioned officer to stay in his room. The Court has agreed to examine the issue of whether the appellant's plea of guilty to escape from lawful custody was improvident because it was never established that the appellant was placed in lawful custody.

##### SENTENCE: Command Influence

##### Post-Trial Review: Rebuttal to Addendum

In United States v. Karlson, ACOMR 441336, pet. granted, 14 M.J.212 (CMA 1982), it was discovered that, while waiting for the sentencing portion of the trial, the members of the panel discussed a commander's

call presided over by the convening authority in which some commanders expressed dissatisfaction with the leniency of sentences currently being adjudged. This was brought to the attention of the convening authority as a rebuttal to the post-trial review. The Court will examine: (1) if appellant's trial was tainted by command influence; (2) if trial defense counsel should have had an opportunity to explain or rebut new information contained in an addendum to the post-trial review which discussed the standard for evaluating command influence announced in United States v. Narine, 14 M.J. 55 (CMA 1982); and (3) if the staff judge advocate informed the convening authority of the proper legal standard for command influence in his addendum to the post-trial review.

JURISDICTION: Assimilative Crimes Act

In United States v. Jackson, CM 441431 pet. granted, 14 M.J. 229 (CMA 1982), the Court will examine whether the prosecution must introduce evidence proving that the federal government had either exclusive or concurrent jurisdiction over the specific area of a military post upon which a crime occurred in order to uphold a conviction under the Assimilative Crimes Act, 18 U.S.C. § 13 (1976).

SENTENCE: Vacation Proceeding

In United States v. Castrillon-Moreno, ACMR 435777, pet. granted, 14 M.J. 235 (CMA 1982), the Court will decide if an appellate court can increase a suspension period beyond that contained in the pretrial agreement. After a reversal of appellant's initial conviction, United States v. Castrillon-Moreno, 3 M.J. 894 (ACMR 1977), reversed, 7 M.J. 414 (CMA 1979), and a re-conviction on rehearing, the convening authority vacated the suspension of the discharge. The Army Court of Military Review affirmed the findings and sentence but set aside the Article 72 vacation proceedings and returned the record for another vacation proceeding. This subsequent vacation proceeding was conducted 17 months after the rehearing and nearly four months after the suspension period had run. ACMR again affirmed and the Court of Military Appeals granted the appellant's petition on whether the second vacation proceeding was a nullity because it was conducted outside the suspension period. Government appellate counsel and ACMR had taken the novel position that notwithstanding the suspension period for a time certain, once a vacation proceeding is held, even if it fails to comply with elemental due process, the running of the suspension period is tolled for the entire time the case is on appeal.

COURT MEMBERS: Denial of Challenge for Cause

In United States v. Davenport, 14 M.J. 547 (ACMR 1982), pet. granted, \_\_\_ M.J. \_\_\_ (CMA 12 November 1982), the Court must resolve two issues. First, did the military judge abuse his discretion in denying a defense challenge for cause of a member who exhibited an inelastic attitude toward the imposition of a punitive discharge. See United States v. Lenoir, 13 M.J. 452 (CMA 1982). Second, assuming that the judge's ruling was correct, was the error waived by counsel's decision to challenge that member peremptorally, even though he stated that he would have exercised his peremptory challenge against another member had the military judge granted the challenge for cause. See United States v. Harris, 13 M.J. 288 (CMA 1982).

EVIDENCE: Striking of Testimony

In United States v. Williams, ACMR 441286, pet. granted, 14 M.J. 230 (CMA 1982), the Court will consider whether the military judge violated the appellant's rights under the confrontation clause of the sixth amendment when he refused to strike the testimony of the alleged victim of an assault with intent to commit murder after that "victim" invoked his fifth amendment rights on the witness stand. The witness refused to answer defense counsel's questions on cross-examination concerning two prior assaults the "victim" allegedly perpetrated upon the appellant. The defense counsel argued that inquiry regarding the assaults the victim had allegedly committed upon the appellant was necessary to determine if appellant's actions were occasioned by the heat of passion caused by adequate provocation. Such a determination could have resulted in a finding of guilty to the lesser included offense of assault with intent to commit voluntary manslaughter.

EVIDENCE: Medical Testimony

JURISDICTION: Assimilative Crimes Act

Whether rules allowing admission of expert medical testimony also permit a physician to testify that a child was physically abused by his caretaker without justifiable excuse will be decided in United States v. Irvin, 13 M.J. 749 (AFCMR 1982), pet. granted, \_\_\_ M.J. \_\_\_ (CMA 12 November 1982). The Court has also agreed to determine whether the use of the assimilative crimes act requires either formal judicial notice or actual proof of federal jurisdiction over the situs of the offense.

SENTENCING: Prior Convictions

In United States v. Alsup, NCMR 81-3184, certif. for rev. filed, 14 M.J. 288 (CMA 1982), The Judge Advocate General of the Navy has certified the question of whether the admissibility of a record of sum-

mary courtmartial is defeated where, although the accused has waived the right to counsel at the prior trial, he had never been advised of the right to consult with counsel before choosing trial in lieu of non-judicial punishment.

TRIALS: Inconsistent Findings

EVIDENCE: Credibility of Witnesses

In trials by judge alone, federal judges are not permitted to make inconsistent findings. See United States v. Mayburg, 274 F.2d 899 (2d. Cir. 1960). In United States v. Snipes, AFOMR 2330, pet. granted, 14 M.J. 296 (CMA 1982), the Court will decide whether this rule should be followed in the situation where only one witness testified as to the accused's guilt of two crimes and the military judge acquitted the accused of one charge but not the other. The Court will also decide whether social workers should be allowed to bolster the credibility of an alleged victim of child molestation by comparing her reactions to the reactions of other minors whom the social workers believed were molested.

MILITARY JUDGE: Instructions

EVIDENCE: Hearsay Statements Against Interest

In United States v. Dillon, NCMR 80-2842, pet. granted, 14 M.J. 299 (CMA 1982), several issues arose out of a conviction for involuntary manslaughter where the death resulted from the accused's giving the victim a poisonous, noncontrolled substance which he believed to be cocaine. The Court will examine both the propriety of failing to instruct, sua sponte, on the defense of good faith mistake of fact and the propriety of instructing that the attempted transfer of cocaine was an offense directly affecting the person of the victim, as contemplated by Article 119(b)(2), UCMJ. In addition, the Court requested briefs on the rule which requires corroboration of statements against penal interest which exculpate the accused. Mil. R. Evid. 304(b)(3). In this case uncorroborated hearsay statements of the dead victim that he had used the accused as a source of cocaine were admitted, but uncorroborated hearsay statements by the dead victim that he also had purchased cocaine from another source during the same time period were excluded.

SEARCH AND SEIZURE: Reliability of Informant

The issue pending before the Court in United States v. Tipton, ACOMR 16450, pet. granted, 14 M.J. 236 (CMA 1982), concerns the reliability of an informant who was relied upon by the CID to obtain a search authorization from a commander. The Court will also look at the facts given the

commander prior to authorizing a search. In Tipton, the informant told the CID that he was out to get the accused. The appellant argued that this bias should have been disclosed to the authorizing official so that he could determine the trustworthiness of the informant. In addition, appellant's brief attacks the sufficiency of the details disclosed to the authorizing official, dealing with whether the informant was in fact reliable and the informant's lack of prior experience in providing information to the CID.

EVIDENCE: Rape Shield

In United States v. Dorsey, 14 M.J. 536 (ACMR 1982), pet. granted, \_\_\_ M.J. \_\_\_ (CMA 1 November 1982), the Court will decide whether Mil. R. Evid. 412 was improperly used to exclude evidence of an alleged rape victim's adulterous relationship with another man. In Dorsey, the defense theory was that the woman had fabricated the charge after the accused had accused her of the adulterous activity and spurned her advances. A similar issue is to be addressed in United States v. Elvine, ACMR 441233, pet. granted, 14 M.J. 235 (CMA 1982). In that case, the court excluded evidence of unusually promiscuous behavior (multiple sex partners in one night) and the absence of any post-rape trauma.

MILITARY JUDGE: Instructions

In United States v. Cooke, ACMR 441428, pet. granted, \_\_\_ M.J. \_\_\_ (CMA 12 November 1982), the Court will decide whether an accused charged with involuntary manslaughter and drunk driving is entitled to instructions on the contributory negligence of the victim and on proximate cause.

INTERROGATION: Right to Counsel

The Court will decide whether the military judge erred by ruling that the accused voluntarily and validly waived his right to counsel during interrogation after he had been detained for nine or ten hours awaiting interrogation in the military police station and after clearly articulating, on three separate occasions, requests for counsel which were denied. United States v. Goodson, 14 M.J. 542 (ACMR 1982), pet. granted, \_\_\_ M.J. \_\_\_ (CMA 15 November 1982).

The Judge Advocate General certified the question of whether the Army Court of Military Review was correct in ruling that the accused had improperly been subjected to the "functional equivalent" of interrogation where an accused retracted a request for the aid of counsel during interrogation after he was told that if he did not "cop a plea" or "make a deal" quickly, he could lose his best chance to make a deal with the prosecution. United States v. Hartsock, ACMR 16545, certif. for rev. filed, 14 M.J. 282 (CMA 1982).

INTERROGATION: Right to Counsel

The Court has also agreed to address the question of whether the mandate in United States v. McOmber, 1 M.J. 380 (CMA 1976), and Mil. R. Evid. 305(e), requiring notice to counsel prior to interrogation of a suspect, extends to offenses for which the counsel was not originally appointed. United States v. Sutherland, NCMR 81-3049, pet. granted, 14 M.J. 282 (CMA 1982).

## CASE NOTES

### *Synopses of Selected Military, Federal and State Court Decisions*

#### COURTS OF MILITARY REVIEW DECISIONS

##### GUILTY PLEAS: Rejection of Plea

United States v. Williams, CM 442055 (30 November 1982)  
ADC: CPT Bloom

Williams was charged with attempted murder of D and aggravated assault on R arising out of him firing a pistol at their car. He attempted to plead guilty to wrongful discharge of a firearm as a lesser included offense of the attempted murder. The military judge refused to accept the plea because: (1) he thought that the plea of guilty would establish some elements of the separate, contested charge; and (2) he anticipated having trouble instructing the members on the legal effect of pleas which appeared factually in conflict. Williams then pleaded guilty to lesser included offenses under both charges and argued on appeal that the judge's ruling had compelled an involuntary plea to the second charge. The court rejected this argument and perceived the issue to be whether the judge abused his discretion in rejecting the original plea rather than his compelling the latter one. The court held that the military judge's first reason was unfounded but the second reason for not accepting the plea was legitimate. The effect of this mixture of correct and incorrect reasoning was not reached by the court because the offense to which Williams had originally pled not guilty was dismissed as multiplicitous.

#### FEDERAL COURT DECISIONS

##### SEARCH AND SEIZURE: REDUCTION OF WARRANT

United States v. Christine, 687 F.2d 749 (3rd Cir. 1982).

The government obtained a warrant to search the defendant's offices for certain specified types of property. The trial judge held that, although there was probable cause to search for some evidence, the warrant authorized search for items for which there was no probable cause. Therefore, the warrant was overbroad and all of the evidence was suppressed. The government appealed and won a remand for reconsideration. The court held that, where it was possible to separate those portions of the warrant supported by probable cause from those which were unlawful, the evidence lawfully seized

need not be suppressed. The Third Circuit joined the Fifth, Ninth, and perhaps the Fourth Circuits in adopting the principle of reduction of search warrants so that only that evidence seized without probable cause is suppressed.

SEARCH AND SEIZURE: Hair Samples

Appeal of Mills, 686 F.2d 135 (3rd Cir. 1982).

Mills was subpoenaed to appear before a grand jury and produce facial and scalp hair for laboratory analysis. The court held that these items of evidence were more akin to fingerprints or voice and handwriting exemplars than blood samples or fingernail scrapings. They are therefore outside the ambit of fourth amendment protection and probable cause is not necessary for their seizure. The court observed that "at times, constitutional distinctions are as thin as a razor's edge," and that a living hair root might fall within the fourth amendment's protections.

STATUTE OF LIMITATIONS: Waiver

United States v. Williams, 684 F.2d 296 (4th Cir. 1982).

Williams was tried for first degree murder more than five years after the commission of the offense. He requested, and received, an instruction on the lesser included offense of second degree murder, which had a three year statute of limitation. He did not indicate whether or not he wished to waive the statute of limitations as to this offense and was subsequently convicted of the lesser charge. The court held that the statute of limitation was waived by the request for the instruction and affirmed. A dissent argued that Askins v. United States, 251 F.2d 909 (D.C. Cir. 1958), which required the dismissal of a conviction for a lesser included offense over which the statute of limitations had run, was indistinguishable. It was, according to the dissent, only in situations where the statute of limitations had also run as to the offense upon which the indictment was based, that a failure to object would constitute a waiver. In Williams there was no statute of limitations as to the greater offense.

EVIDENCE: Permissible Inference; Sufficiency

Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982).

Cosby was convicted of burglary based on a permissible inference instruction, the inference arising from evidence that he pawned stolen property two days after it was taken in a burglary. No other evidence connected Cosby to the burglary. Despite some "distant Supreme Court precedents" on

point, the court held that this inference alone will not satisfy the constitutional standard of proof beyond a reasonable doubt in the absence of some corroborating evidence. Habeas corpus relief was therefore granted.

#### STATE DECISIONS

##### EVIDENCE: Rape Shield

State v. Younger, 295 S.E. 2d 453 (N.C. 1982)

Younger was tried and convicted of rape. Prior to trial, the prosecutrix had made inconsistent statements concerning the time of her most recent sexual encounter with a third person prior to the alleged rape. The defense sought to elicit both of these statements to impeach her by prior inconsistent statements, but was precluded by the applicable rape shield statute. Although none of the four exceptions to that statute provided for admission of prior statements about an independent act of sexual intercourse, the court reversed holding that the statute was not designed to "shield the prosecutrix from her own actions which have a direct bearing on the alleged sexual offense."

#### NOTICE

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## ON THE RECORD

or

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

(Accused on the stand testifying about a charge of indecent assault)

ACC: I started messing with her hair and everything, and then that's when I touched her on her hind leg and then I touched her on her front leg, you know, and then that's when she slapped me.

\* \* \*

MJ: Now, knowing and understanding the differences between a trial with members, and a trial by judge alone, what is your request? What are your desires?

ACC: Trial by a lawyer, Your Honor.

\* \* \*

DC: Do you know PFC A's . . . reputation in reference to sex?

WIT: Very much so I would say.

DC: What kind of reputation does she have?

WIT: I would say a very low standard.

DC: What does that mean?

WIT: Say again, sir?

DC: What does that mean when you say that she has a low standard?

WIT: I mean everybody got it except me I would say.

\* \* \*

TC: Did [the accused] assault you during that time?

WIT: No, he just grabbed me and threw me in the locker.

\* \* \*

(Defense Counsel to member during voir dire)

DC: Aside from Vietnam, sir, is this your first time in Germany?

\* \* \*

(MJ announcing that accused was guilty of aggravated assault with a means likely rather than intentional infliction as had been alleged)

MJ: To explain my findings, I did not find that grievous bodily harm was actually inflicted. Although they [razor cuts] are long, they weren't that deep, and the doctor's stipulated testimony reflects that they went only through the fat layer, and the victim here as shown by the photographs and in court is a rather pudgy young lady, and I think had quite a layer of fat to protect her.

\* \* \*

MJ: Do you have any questions about any of your rights to counsel?

ACC: No, Your Honor.

MJ: Okay. By whom do you desire to be represented here today?  
(A pause.)

MJ: Who do you want as your counsel?

ACC: Major B.

MJ: Okay. When did you decide you wanted Major B.

ACC: About two days ago, Your Honor, when Captain R. [detailed counsel] spoke to me on the phone and told me that there was no way he could get me off and that I was guilty no matter what.

\* \* \*

TC: But he didn't say if you report your divorce I'll tell everybody you -- you're a homosexual.

WIT: He said he'd kill me, sir, that's even worse.

\* \* \*

MJ: You say you're innocent, yet five people sworn that they saw you steal a watch.

ACC: Your Honor, I can produce 500 people who didn't see me steal it.

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Volume 14, Numbers 1-3, 5-6

Volume 14, Number 4 which was a special project on the administrative consequences of courts-martial is not included in this index.

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Subjects are arranged in accordance with the West Publishing Company's Key Number System. Within each topic the articles (underlined) are listed first in reverse chronological order followed by everything else in reverse chronological order. The page references are by volume: number: page number.

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