New Developments on the Urinalysis Front: A *Green* Light in Naked Urinalysis Prosecutions?[1]

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Introduction

In the world of military drug testing, the importance of last year cannot be measured by the number of urinalysis cases decided by military appellate courts. Although there were only a handful of significant urinalysis cases, the decision of the Court of Appeals for the Armed Forces (CAAF) to "give fresh attention . . . to the applicable principles governing litigation of urinalysis cases" in *United States v. Green*[2] was front-page news. With *Green*, the CAAF put to rest most of the confusion generated by the court's decision in *United States v. Campbell*.[3] Despite the considerable amount of criticism of *Campbell* and the court's apparent "about face" in *Green*, there is a silver lining.[4] In all services, the twin *Campbell* opinions caused military justice practitioners and experts in forensic toxicology to take a hard look at how they were handling drug cases.

To put the significance of *Green* in perspective, a brief look at *Campbell I* & *II* is necessary. Although several good resources are available, Judge Sullivan's concurring opinion in *Green* provides the most current and concise treatment of the twin *Campbell* opinions.[5] Accordingly, practitioners are encouraged to read his summary.

Campbell I & II (Briefly)

> *[T]his standard . . . does not establish new law.*[6]
>
> *If* Campbell *does not establish new law, I would be forced to conclude that the many trial and appellate defense counsel who practiced before me were incompetent—for none of them ever raised the issue.*[7]

Private First Class (PFC) Christopher W. Campbell, U.S. Army, was charged with wrongful use of lysergic acid diethylamide (LSD).[8] The only evidence of wrongful use of LSD was the report of his urinalysis test results.[9] At trial, the defense moved to exclude the report on grounds that the novel testing procedure used by the government "did not meet the standards of reliability required by [Military Rule of Evidence] 702, and relevant case law."[10] After experts for both sides testified, the military judge ruled against the defense. Subsequently, Campbell was convicted and sentenced, and his conviction was affirmed by the Army Court of Criminal Appeals. The CAAF granted review on Campbell's petition based on the reliability

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1. Practitioners have used "naked" in the context of urinalysis prosecutions to identify drug cases in which "the only evidence of drug use is the scientific laboratory report." Major Charlie Johnson-Wright, *Put Some Clothes on that Naked Urinalysis Case*, THE REPORTER, Sept. 2001, at 29.

2. 55 M.J. 76, 80 (2001).

3. 50 M.J. 154 (1999) (*Campbell I*), *supplemented on reconsideration*, 52 M.J. 386 (2000) (*Campbell II*). In Judge Sullivan's concurring opinion in *Green*, he began, "In Belfast, during the height of the 'troubles' (the seemingly never-ending struggle between the Protestants and the Catholics in Northern Ireland), there was a popular saying: *Anyone who isn't confused here really doesn't understand what is going on.*" *Green*, 55 M.J. at 81 (emphasis added).

4. The opinion was more than just an "about face" or a 180° turnaround. In the spirit of the XIX Olympic Winter Games, the decision was more like Kelly Clark's "McTwist 540" (an inverted aerial consisting of a forward flip with a 540° twist performed by Clark during her gold-medal run in the women's halfpipe snowboard competition on 10 February 2002). Using simple math, 540° = 360° + 180°. The full explanation of why *Green* is more than an about face is discussed below in the section on judicial notice.

5. *See Green*, 55 M.J. at 81-85; *see also* Lieutenant Commander David A. Berger & Captain John E. Deaton, Campbell *and Its Progeny: The Death of the Urinalysis Case*, 47 NAVAL L. REV. 1 (2000); Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell*: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38.

6. *Campbell I*, 50 M.J. at 161 n.2 (1999).

7. United States v. Phillips, 53 M.J. 758, 764 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (concluding that the counsel were not incompetent because no previous case had ever "required the prosecution to establish the reasonable likelihood that the accused experienced the physical and psychological effects of the drug").

8. *Campbell I*, 50 M.J. at 155.

9. *Id*. at 156.

of the government's novel testing procedure and related additional issues.[11]

As to legal sufficiency, the CAAF held that the government failed at trial to present any evidence that "would reasonably exclude the possibility of a false positive and would indicate a reasonable likelihood that at some point a person would have experienced the physical and psychological effects of the drug."[12] After the government successfully petitioned for reconsideration, the CAAF essentially reiterated its previous holding, but added that "[i]t is sufficient if the expert testimony reasonably supports the [permissive] inference with respect to human beings as a class [as opposed to a particular individual accused]."[13]

The overwhelming consensus in the military justice community was that *Campbell* established new law.[14] *Campbell* literally transformed the landscape upon which counsel tried urinalysis cases. The decision had predictable results: considerable confusion and uncertainty.[15] Apparently recognizing it had created a monster, the CAAF filled the first two slots of the court's docket for the 2001 term with cases potentially affected by *Campbell*.[16] Although *Campbell* may be the ugliest case ever decided by the court, so what?[17] In retrospect, the significant amount of attention and critical thinking generated by *Campbell* led to a better understanding of a very important area of military law. In its relatively short (and controversial) life, *Campbell* caused many practitioners to "search for the truth" more vigorously before trial and, more importantly, in the crucible of the courtroom.

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10. *Id*. (citations omitted). The government used a civilian laboratory to conduct the confirmatory testing on Campbell's urine sample. According to the government's expert, the civilian lab was the only one in the country using the gas chromatography tandem mass spectrometry testing methodology. *Id*.

11. *Id*. at 154-55.

12. *Id*. at 161. In full, the court said that the government cannot rely on the permissive inference of wrongfulness in naked urinalysis cases unless the government presents expert testimony showing:

> (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question;
> (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug;" and,
> (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. at 160 (citations omitted).

13. *Campbell II*, 52 M.J. 386, 389 (2001). In addition, the court noted that "[i]f the test results, standing alone, do not provide a rational basis for inferring knowing use, then the prosecution must produce *other* direct or circumstantial evidence of knowing use in order to meet its burden of proof." *Id*. at 388 (emphasis added).

14. *See Campbell I*, 50 M.J. at 162-63 (Sullivan, J., dissenting) (referring to the "new rule" established by the case and the "new requirement" added by the majority); *Campbell II*, 52 M.J. at 389-90 (Sullivan, J., dissenting) (disagreeing with the "majority's creation of a new requirement in urinalysis cases" and arguing that the requirement is actually contrary to the court's decision in *United States v. Harper*, 22 M.J. 157, 163-64 (C.M.A. 1986), and subsequent cases from the court); United States v. Harris, 54 M.J. 749, 754 n.2 (N-M. Ct. Crim. App. 2001) (commenting that the "state of the law as understood by virtually all who practiced military law" before *Campbell* was different than the law as characterized by the majority in *Campbell*); United States v. Phillips, 53 M.J. 758, 764 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (criticizing Judge Effron's statement that *Campbell* was not new law); United States v. Barnes, 53 M.J. 624, 628 n.1 (N-M. Ct. Crim. App. 2000) (Anderson, J., *dubitante*) (referring to *Campbell* as appearing to be "a major shift in the treatment of urinalysis cases"); Berger & Deaton, *supra* note 5, at 60 (concluding that *Campbell* is new law and that the "traditional urinalysis case is dead"); Hudson & Ham, *supra* note 5, at 41 (commenting on the considerable confusion caused by *Campbell* and pointing out that Judge Effron's characterization of the decision as "well established case law" is not supported by precedent).

15. Specifically, the second prong of the *Campbell* standard caused nearly all of the uproar:

> *Campbell's* second prong requiring the Government to prove that the accused experienced the effects of the drug is absolutely irrelevant to the guilt or innocence of an accused charged with wrongful drug use. If a member of the armed forces intentionally and knowingly uses cocaine, but for whatever reason, experiences no effects, he is still guilty of the offense. Likewise, if a service member's drink is spiked with cocaine and he in fact does feel the effects of the drug, he is still not guilty of the offense. The CAAF's premise in *Campbell* that suggests a person who experiences the effects of the drug is more likely to be guilty makes no sense. Nor does it help discount unknowing ingestion. Under the CAAF's rationale, Article 112a criminalizes the "high" and not the wrongful use. Their position actually rewards the offender because he was unsuccessful in achieving his ultimate goal—enjoying the fruits of his criminal misconduct.

Berger & Deaton, *supra* note 5, at 56-57. Decisions from the Navy-Marine Corps Court of Criminal Appeals mainly evidenced this confusion and uncertainty. *See, e.g.*, United States v. Stark, No. 9901146 (N.M. Ct. Crim. App. Feb. 13, 2001) (unpublished) (Price, J., concurring) (commenting on the "logical weaknesses" of the *Campbell* opinions and that they raise "serious questions concerning the law of urinalysis in the military"); *see also* Hudson & Ham, *supra* note 5, at 38 (commenting that *Campbell* has "generated a tremendous number of questions and a fair amount of controversy").

16. *See* U.S. Court of Appeals for the Armed Forces, *Scheduled Hearings* (Oct. 2000) (listing United States v. Barnes, No. 00-5005/MC (2001), and United States v. Green, No. 00-0268/MC (2001), as the first scheduled hearings for the 2001 term of the CAAF), *at* http://www.armfor.uscourts.gov/calendar.htm.

17. Paraphrasing New York Yankees catcher Yogi Berra's famous quote, "So I'm ugly. So what? I never saw anyone hit with his face." BERT SUGAR, THE BOOK OF SPORTS QUOTES (1979), *reprinted in* JAMES B. SIMPSON'S CONTEMPORARY QUOTATIONS (1988).

United States v. Green: The Facts and Holding

Sergeant (Sgt.) Nolan P. Green, U.S. Marine Corps, was charged with a single specification of unauthorized absence and two specifications of wrongful use of cocaine.[18] Unlike PFC Campbell, Sgt. Green did not move to exclude the report of his positive urinalysis result or expert testimony explaining the report.[19] More importantly, the government used standard screening and confirmatory testing procedures to analyze Green's urine sample. The only concern of the government's case regarding the three-part test announced in *Campbell* was that Green's sample had tested at a relatively low level, 213 nanograms per millileter (ng/ml).[20] Sergeant Green was convicted of all charges and specifications and sentenced to sixty-eight days' confinement, reduction to E-1, and a bad-conduct discharge.[21]

On appeal, the Navy-Marine Corps Court of Appeals dismissed one of the findings of guilty to wrongful use of cocaine and reassessed Green's sentence.[22] The CAAF affirmed, holding that the evidence was "sufficient to support the permissive inference of knowing, wrongful use."[23] *Green* is important because it clarifies most of the confusion caused by *Campbell I* & *II*.

In *Green*, the CAAF effectively dissipated *Campbell*'s thick fog by placing the decision on the reliability and relevance of expert testimony squarely where it belongs—with the military judge as gatekeeper.[24] In addition, the court provided practitioners with a flexible standard for the admissibility of urinalysis results through expert testimony, emphasizing that this standard or approach is not exclusive or mandatory.[25] This new standard replaces the three-part test in *Campbell*. Finally, *Green* emphasizes the importance of trial defense counsel to preserve questions of reliability concerning government scientific evidence. To preserve the matter for appellate review, defense counsel must move to exclude or, at the very least, object to the admission of urinalysis test results and expert testimony which supports the results. Absent error, failure of defense counsel to object to the admissibility of the test results or expert testimony at trial will result in forfeiture of the issue on appeal.[26]

Judicial Notice: The "McTwist 540"[27]

As briefly mentioned earlier, the CAAF went well beyond just an "about face" in *Green*. The court's decision in *Campbell* effectively prevented the government from ever presenting sufficient expert testimony to draw the permissive inference of knowledge in a naked urinalysis case. In other words, the government could no longer prosecute naked urinalysis cases following *Campbell*.

In *Green*, the majority wiped out the three-prong *Campbell* requirement and then took one big step in the opposite direction by commenting that, in some cases, "it may be appropriate to take judicial notice under [Military Rule of Evidence] 201 without further litigation."[28] Unfortunately for practitioners, the

18. United States v. Green, 55 M.J. 76 (2001).

19. *Id*. at 81.

20. *Id*. at 78 (the cutoff level for cocaine metabolite during confirmatory testing is 100 ng/ml). This low level is significant because, considering the current state of forensic toxicology, no expert would be able to opine whether an average person would have felt the effects of this particular drug at 213 ng/ml absent more information regarding the circumstances of Sgt. Green's cocaine use. *See* Berger & Deaton, *supra* note 5, at 29-34, 57.

21. *Green*, 55 M.J. at 77.

22. *Id*. at 77-78. The dismissal apparently was unrelated to any *Campbell* issues. One of the three issues granted by the CAAF for review was whether the lower court erred by ignoring *Campbell*. *Id.* at 78 n.2. According to Judge Sullivan, concurring, he believed the lower court "effectively ignored the majority decision in *Campbell I* on the basis that a motion for reconsideration was pending and affirmed this conviction using the cases cited in [his] dissent in *Campbell I*." *Id*. at 82.

23. *Id*. at 81.

24. *Id*. at 80. The court stated:

> The military judge, as gatekeeper, may determine, in "appropriate circumstances" that the test results, as explained by the expert testimony, permit consideration of the permissive inference that presence of the controlled substance demonstrates knowledge and wrongful use. In making this determination, the military judge may consider factors such as whether the evidence reasonably discounts the likelihood of unknowing ingestion, or that a human being at some time would have experienced the physical and psychological effects of the drug, but these factors are not mandatory.

Id. (citations omitted).

25. *See id*. The major change is to the second prong of *Campbell*. The new standard gives the military judge "discretion to determine [admissibility] by considering whether . . . (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors." *Id*. Compare this with the second prong in *Campbell*, *supra* note 12.

26. *Green*, 55 M.J. at 81.

27. *See supra* note 4.

court did not elaborate upon *when* it would be appropriate to take judicial notice. Trial counsel would be wise to consider the court's comment with the understanding that expert testimony remains a necessary component in all urinalysis "use" cases. For the government to get the permissive inference, trial counsel still must establish the significance of a particular metabolite concentration level in all contested urinalysis cases. Establishing the reliability and relevance of novel or proven testing procedures is not enough, with or without judicial notice.[29] At the very least, judicial notice will only satisfy the first and third prongs of the *Green* standard.[30] Because no two urinalysis cases are alike, a military judge cannot take judicial notice of case-specific facts, particularly when one of the facts is the accused's reported metabolite concentration.

Judge Gierke's Dissent

Finally, Judge Gierke, dissenting, argued that the "majority has offended the Due Process Clause of the Constitution, transformed Article 112a into an absolute-liability offense, and modified the test for admissibility of scientific evidence."[31] He made a very compelling argument that application of the permissive inference of knowledge in naked urinalysis cases violates a core principle of our justice system—the presumption of innocence. Judge Gierke contended that "[t]he majority opinion permits the trier of fact to infer drug use from the presence of the metabolite in the body, and then to use the same evidence to infer knowing use, without any other evidence from which knowing use may be inferred."[32] Supporting legal precedent provides considerable merit to Judge Gierke's argument.[33] In essence, allowing the trier of fact in *Green* to rely on the permissive inference without any other direct or circumstantial evidence of knowledge circumvents the requirement to prove every element beyond a reasonable doubt. The only fact that the government had to prove was that Sgt. Green's urine sample contained cocaine metabolite.[34]

On a side note, Judge Gierke also considered it "significant that the Government has failed to present any evidence to support its argument that this [the three-prong standard in *Campbell*] is an impossible evidentiary burden."[35] In fact, substantial evidence indicates that no forensic toxicologist could satisfy either part of the second prong of the standard, at least at low reported concentration levels.[36]

28. *Green*, 55 M.J. at 81. The court's comment is limited at least to cases that do not involve "a novel scientific procedure." *Id*.

29. In *United States v. Phillips*, Chief Judge Young advocated taking judicial notice of the reliability of testing procedures without expert testimony. 53 M.J. 758, 767 (A.F. Ct. Crim. App. 2000); *see also* Berger & Deaton, *supra* note 5, at 22-23 (discussing Chief Judge Young's concurring opinion in *Phillips* and tacitly approving of his suggestion that judicial notice can and should be used to establish the foundation for the permissive inference in urinalysis cases).

30. *Campbell*'s three-pronged test appears *supra* note 12.

31. *Green*, 55 M.J. at 85.

32. *Id.* at 86.

33. *See* EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI, FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURTROOM CRIMINAL EVIDENCE § 2920, at 1109 (3d ed. 1998). The treatise states that "[t]he foundational fact must prove the inferred fact's existence beyond a reasonable doubt only if the inference is the only possible basis in the record for a guilty finding in the case." *Id*. (citing Ulster County Court v. Allen, 442 U.S. 140, 158 (1979)). *See also* Barnes v. United States, 412 U.S. 837, 840 (1973) (holding that permissive inference instruction comported with due process in that it allowed the jury to infer possession by petitioner of stolen mail after they found predicate facts beyond a reasonable doubt).

34. A possible solution would be to add language in Article 112(a), UCMJ, that would direct the military judge to allow the permissive inference in naked urinalysis cases only after finding beyond a reasonable doubt that the particular metabolite was present in the accused's urine sample. Modifying the current permissive inference instruction would provide an additional safeguard. As modified (for the cocaine metabolite), the instruction would read, in part:

> Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of the metabolite for cocaine in the accused's urine that the accused knew he used cocaine. *In order for you to infer the accused knew he used cocaine, you must find beyond a reasonable doubt that the metabolite for cocaine was present in the accused's urine.* However, the drawing of any inference is not required.

U.S. DEP'T OF THE ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 3-37-2.d. (1 Apr. 2001) (modifying language italicized). The additional language in UCMJ art. 112(a) and this instruction, as modified, would satisfy *Allen* and conform with the instruction used in *Barnes*, discussed *supra* note 33.

35. *Green*, 55 M.J. at 87.

36. *See* Berger & Deaton, *supra* note 5, at 29-34. In addition, the author participated in the Department of Defense Forensic Toxicology Drug Testing Conference in San Antonio, Texas, during the week of 11 June 2001. Judge advocates and forensic toxicologists from several services attended the conference which was, in part, held to evaluate the current state of forensic toxicology in light of the CAAF's holding in *Campbell I* & *II*. Ironically, the CAAF published *Green* on the first day of the conference, 11 June 2001 (a copy of the decision was not available until the next day). During a session with all participants in attendance, the consensus among forensic toxicologists was that, considering the current state of the science, the second prong of *Campbell* could not be satisfied, at least for low reported concentration levels (for example, less than 200 ng/ml for THC and 1000 ng/ml for BE, the metabolites for marijuana and cocaine, respectively). *See also* United States v. Barnes, 53 M.J. 624, 629 (N-M. Ct. Crim. App. 2000) (Anderson, J., *dubitante*) (concluding that the cutoff level requirement in *Campbell* cannot be satisfied and that the metabolite concentration level in all positive urine samples will have to be "very high" to satisfy the remaining portion of the second prong).

The Results (So Far): Cases Applying *Green*

Immediately after deciding *Green*, the CAAF reviewed a large number of service court cases. The CAAF set aside most of the cases from the Navy-Marine Corps Court of Criminal Appeals (NMCCA),[37] while the court affirmed a handful of cases from the Air Force Court of Criminal Appeals (AFCCA).[38] These results are significant. To illustrate, this section compares two published opinions from the AFCCA with two from the NMCCA.

In all four service court cases, the central issue was the legal sufficiency of evidence presented at trial in light of the three-prong standard in *Campbell*. In each case, the government expert did not satisfy the second prong of *Campbell*. In the two Air Force cases, *United States v. Phillips*[39] and *United States v. Tanner*,[40] the service court affirmed primarily because the government presented "other" circumstantial evidence of knowledge at trial. In the two Navy-Marine Corps cases, *United States v. Barnes*[41] and *United States v. Harris*,[42] the service court set aside the findings and sentences despite considerable "other" circumstantial and direct evidence of knowledge. Upon review, the CAAF affirmed *Phillips* and *Tanner*, but set aside *Barnes* and *Harris* and returned them to The Judge Advocate General of the Navy for remand to the NMCCA.[43] The CAAF based its summary disposition of all four cases on *Green*.

So what is the lesson to learn from these cases? In short, trial counsel need to "put some clothes on [their] naked urinalysis case[s]."[44] Although *Green* has significantly reduced the possibility that an appellate court will set aside the average naked urinalysis case, trial counsel should avoid walking into court without some "other" evidence of knowledge (besides just expert testimony and the permissive inference). The solution for trial counsel is to turn over every rock as soon as possible.[45] The same advice applies to trial defense counsel.

Finally, what have the service courts said so far about *Green*? At least from the AFCCA, the answer is that the CAAF accomplished its goal in *Green*—the *Campbell* confusion has cleared. In four recent unpublished opinions from the AFCCA, the court swiftly disposed of defense claims of factual and legal insufficiency, with relatively little ink.[46] In each case the court summarily dismissed all *Campbell*-related claims from the defense, citing *Green* as authority. At least so far, it seems that the fog has lifted.

Conclusion

The CAAF signaled a *Green* light in naked urinalysis prosecutions on 11 June 2001. Although Sgt. Green forfeited any objection to the test results or expert testimony on appeal, the CAAF used his case to clear up the confusion caused by the court's twin *Campbell* opinions. The CAAF's intent is shown by the court's disposition of the four published service court cases and the AFCCA's most recent urinalysis cases, discussed in the last section. What remains from *Campbell* is the require-

37. *See, e.g.*, United States v. Barnes, 53 M.J. 624 (N-M. Ct. Crim. App. 2000), *set aside by, remanded by* 55 M.J. 236 (2001); United States v. Harris, 54 M.J. 749 (N-M. Ct. Crim. App. 2001) *set aside by, remanded by* 55 M.J. 358 (2001).

38. *See, e.g.*, United States v. Phillips, 53 M.J. 758 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 242 (2001); United States v. Tanner, 53 M.J. 778 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 357 (2001). The CAAF also affirmed one ACCA case. *See* United States v. Pugh, No. 9600811 (Army Ct. Crim. App. Dec. 8, 1998) (unpublished), *aff'd*, 55 M.J. 357 (2001).

39. 53 M.J. at 758. The other evidence was the appellant's failure to report for his urinalysis, the appellant had to be ordered a second time to provide a sample, another instance of drug use that was charged, and rebuttal testimony from a government expert about traces of drug metabolite found in a hair sample from the appellant. *Id*. at 762-63.

40. 53 M.J. at 778. The government presented other evidence of knowledge consisting of a previous admission of the appellant that she used methamphetamine to lose weight and evidence describing the unusual behavior of the appellant at the testing location. *Id.* at 783.

41. 53 M.J. at 624. In the government's rebuttal, other evidence of knowledge consisted of the appellant being present four or five times with his neighbor while his neighbor smoked marijuana, the appellant's failure to leave during these occasions while his neighbor smoked marijuana, and the appellant's requests for marijuana from his neighbor before and after his urinalysis test. *Id*. at 627.

42. 54 M.J. at 749. The other evidence was the appellant's roommate's testimony that he smoked marijuana with the appellant, testimony from other witnesses that they smelled marijuana smoke in the appellant's room, and the presence of the appellant in the room just after the marijuana smoke was detected. *Id.* at 753.

43. *Phillips*, 55 M.J. at 242; *Tanner*, 55 M.J. at 357; *Barnes*, 55 M.J. at 236; *Harris*, 55 M.J. at 358. Following the court's decision in *Green*, appellants petitioned for writs of certiorari in a number of cases. The Supreme Court denied all of these petitions, including one from Sgt. Green. *See, e.g.*, Green v. United States, 122 S. Ct. 469 (2001).

44. Johnson-Wright, *supra* note 1. Major Johnson-Wright's article is an excellent primer on how to avoid taking naked urinalysis cases into court. A copy of her article is a must read for all trial practitioners.

45. *Id*. at 31.

46. *See* United States v. Calef, No. ACM 34163, 2002 CCA LEXIS 16 (A.F. Ct. Crim. App. Jan. 25, 2002) (unpublished); United States v. Stallens, No. ACM 34203, 2002 CCA LEXIS 27 (A.F. Ct. Crim. App. Jan. 15, 2002) (unpublished); United States v. Mahoney, No. ACM 34209, 2001 CCA LEXIS 352 (A.F. Ct. Crim. App. Dec. 13, 2001) (unpublished); United States v. Dawson, No. ACM 33757, 2001 CCA LEXIS 344 (A.F. Ct. Crim. App. Dec. 7, 2001) (unpublished).

ment to subject novel testing procedures to a higher reliability standard; however, this new standard is flexible and provides military judges with broad discretion to handle relevance and reliability questions concerning the admission of scientific evidence in urinalysis cases. In the very near future, the true effectiveness of this standard will be tested in a courtroom.

In addition to changes affecting naked urinalysis cases, counsel should heed developments in other facets of drug-use prosecutions. Beginning this year, all services will begin using new testing procedures for ecstasy and LSD.[47] Practitioners should also know that the U.S. Drug Enforcement Agency published an interim ruling in the *Federal Register* stating that "under the Controlled Substances Act (CSA) and DEA regulations, any product that contains any amount of [THC] is a schedule I controlled substance."[48] Finally, Army practitioners need to review changes to *Army Regulation 600-85*.[49] The revised regulation contains some major changes in the text and, listed in appendix E, procedural changes at the unit drug collection level. For example, one significant change in the text of the regulation is the prohibition of "the ingestion of hemp seed oil or products made with hemp seed oil."[50]

47. *See* Christopher Munsey, *More Sensitive Drug Test Planned to Screen Sailors for Ecstasy Use*, NAVY TIMES, Dec. 24, 2001, at 13; Major Margaret B. Baines, New Developments in Drug Testing (unpublished manuscript) (on file with author).

48. Interpretation and Clarification of Listing of "Tetrahydrocannobinols" in Schedule I; Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant; Final Rules and Proposed Rule, 66 Fed. Reg. 51,530 (Oct. 9, 2001) (to be codified at 21 C.F.R. pt. 1308). This ruling potentially impacts the use of the hemp-product defense. As of the date this article was submitted for publication, however, there was a stay on this ruling until 18 March 2002 according to the Department of Justice Web site, http://http:www.usdoj.gov/dea.

49. U.S. DEP'T OF THE ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (1 Oct. 2001).

50. *Id*. para. 1-35d. The paragraph adds, "Failure to comply with the prohibition . . . is a violation of Article 92, UCMJ." *Id*.