Military Justice Branch

PRACTICE ADVISORY

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Brady Notice in Urinalysis Cases

Background

On Friday, 15 June 2018, the Office of the Secretary of Defense (OSD) notified Judge Advocate Division of two recent internal studies conducted by the Air Force and Navy drug testing laboratories. After a brief review, OSD determined that the reports from the Air Force and Navy drug labs warranted disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and RCM 701(a)(6). On 18 June 2018, the Acting General Counsel of the Department of Defense, in close coordination with the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps, issued the written notice to the Services attached as Enclosure 1 (with Tabs A and B). Later that day Judge Advocate Division forwarded that notice to the Legal Service Support sections for immediate distribution to trial and defense counsel. In addition, OSD directed a temporary pause in separations involving urinalysis results in cases where those urinalysis results were the sole basis for the proceedings. The purpose of the suspension was to allow sufficient time for counsel, the accused, and respondents to assess potential impacts of the lab reports, and determine whether additional time was necessary to prepare or respond.

Disclosure Obligations

The disclosure obligations of trial counsel are rooted both in judicial precedents and in the Manual for Courts–Martial (MCM). In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held the prosecution must provide all exculpatory evidence to the defendant in a criminal case. The foundation on which the *Brady* Rule is built is also reflected in other provisions in the UCMJ (including Article 46), and in the MCM, which uses the more expansive terms of RCM 701(a)(6). That rule states trial counsel must, "as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment." This obligation is made broader still by the Military Justice Act of 2016, which added subparagraph (D), requiring disclosure of information which would "[a]dversely affect the credibility of any prosecution witness or evidence."

While government disclosure obligations are derived from Brady and subsequent cases and rules implementing that decision, the military justice system imposes broader and more robust duties to disclose. As noted by the Court of Appeals for the Armed Forces in *United States v. Stellato,* 74 M.J. 473 (C.A.A.F. 2015)

> "'Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial.' This Court has held that trial counsel's 'obligation under Article 46,' UCMJ, includes removing 'obstacles to defense access to information' and providing 'such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.'"

Stellato, 74 M.J. at 481 (internal quotation marks and citations omitted).

Current Status and the Way Ahead

Current cases involving positive urinalysis results may continue, pursuant to the various laws and regulations applicable to such cases. While the effect of the OSD notice and its enclosures will vary significantly with the facts and

circumstances of each individual case, the best means of addressing those effects and identifying any necessary corrective measures is a matter within the discretion of commanders executing their responsibilities as convening authorities. Commanders and counsel should continue processing courts–martial and administrative proceedings involving urinalysis results in accordance with law and regulation in consultation with their staff judge advocate, based on the facts and circumstances of each individual case and the commander's determination regarding the best interest of good order and discipline within a command.

For trial counsel, the disclosure obligations discussed in this Practice Advisory extend into the post-trial process as well. Rule 3.8 of JAGINST 5803.1E (Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General) sets forth among the "special responsibilities of a trial counsel" an obligation promptly to disclose "credible and material evidence creating a reasonable likelihood that a convicted accused did not commit an offense of which the accused was convicted[.]" It is far from certain that the OSD memo or its enclosures establish a "reasonable likelihood" that an accused did not commit an offense. However, a review of cases already tried may be necessary if, in the judgment of counsel handling a particular case, there is substantial cause to call into question the validity of any verdict obtained in whole or in part based on contaminated urinalysis results.

To that end, trial counsel and staff judge advocates should address the legal issues raised by the OSD *Brady* memo and its enclosures using existing rules in the MCM and in regulations governing the conduct of administrative proceedings. In those cases where a positive drug test is among the evidence against an accused or respondent, commanders and counsel should consider taking measures to document notification to the accused and respondent:

- Prior to execution of a pending administrative separation, Marines should be notified that they may consult with counsel about the recent drug lab experiments and the potential effect on their case. A recommended Page 11 form (approved by the Deputy Commandant, Marine & Reserve Affairs) is included as Enclosure 2.
- During administrative separation hearings, the recorder shall take steps to document in the record of those proceedings written notice to the respondent of Enclosure 1, and a signed copy of Enclosure 2.
- During courts–martial, trial counsel shall request the court attach Enclosures 1 (the OSD memo and its enclosures) as Appellate Exhibits. In cases involving pleas of guilty to one or more specifications involving urinalysis results, the trial counsel shall request the military judge make specific inquiry of the accused as to whether the accused has received notice of Enclosures 1, and whether the accused waives any objection to the proceedings or motions which could be pursued based on that evidence.

In addition to addressing these matters on a case-by-case basis with commanders, staff judge advocates should anticipate future requests for information as part of a broader DoD effort to identify potential effects of Enclosure 1. To that end, staff judge advocates should begin coordinating with the servicing LSSS in order to identify:

- All cases in which urinalysis evidence was considered in any proceedings pending or recently completed, including courts–martial, administrative separations, and cases involving pretrial agreements;
- All cases involving a positive urinalysis result for which a current Request for Legal Services is pending.

The Department of Defense designated the Secretary of the Navy to lead our joint efforts to determine the scope and impact of the disclosures made in the OSD memo and its enclosures. In the coming weeks, anticipate additional requests for information related to urinalysis cases, and know that these requests are an essential element of ensuring due process for every Marine and Sailor. Meanwhile, commanders and counsel should continue processing cases involving positive urinalysis results using the well-established due process and adjudicative mechanisms in the MCM and Marine Corps regulations, subject to the additional documentation requirements in this Practice Advisory.

Points of Contact

Direct any questions about this Practice Advisory to the JMJ Branch Head at (703) 693-9005, or the JMJ Deputy Branch Head at (703) 693-8901.