14 October 2011

**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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| UNITED STATES,<br>*Appellee,* | ) | REPLY TO SUPPLEMENT TO<br>PETITION FOR GRANT OF REVIEW |
| v. | ) | USCA Dkt. No. 12-6001/AF |
| Airman First Class (E-3)<br>SCOTT M. DEASE,<br>USAF,<br>*Appellant.* | ) | Crim. App. Misc. Dkt. No.<br>2011-04 |

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**REPLY TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW**

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JOSEPH J. KUBLER, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 33341

LINELL A. LETENDRE, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 35346

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 27428

DON CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 35093

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

## ISSUE PRESENTED

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

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review a Court of Criminal Appeals' ruling on an Article 62 appeal. United States v. Lopez De Victoria, 66 M.J. 67 (C.A.A.F. 2008).

## STATEMENT OF THE CASE

Charges were referred and served on the Appellant on 6 April 2011. Appellant's squadron commander preferred four charges and two additional charges. Charge I consists of three specifications of Article 92 violations for wrongful use and

possession of intoxicating substances other than alcohol. Charge II alleged a violation of Article 111 for operating a vehicle while under the influence of cocaine. Charge III alleged wrongful use of cocaine under Article 112a, and Charge IV alleged two violations of Article 134 for wrongful use of spice. The first additional charge alleged a failure to obey an order by wrongfully possessing an intoxicating substance, and the second additional charge alleged two specifications of false official statements. (Charge Sheet; R. at 11.1-11.5.)

On 13 April 2011, defense filed a motion to suppress the results of a urinalysis test and evidence derived therefrom. (App. Ex. III.) The United States filed its response on 15 April 2011. (App. Ex. IV.)

On 22 April 2011, general court-martial proceedings began. (R. at 1.) On 23 April 2011, the military judge granted the defense motion to suppress the results of the urinalysis, the 26 August 2010 statement made by Appellant to security forces, and the evidence seized during the search conducted 26 August 2010. (R. at 316-17.) On 24 April 2011, the United States filed a motion to reconsider. (App. Ex. VII.) On 25 April 2011, motion practice resumed and after hearing additional testimony the military judge reconsidered his legal ruling and denied the government request to alter his legal conclusions. (R. at 426.) The government filed its notice of appeal with the Court that

same day and supplemented that filing later that day. (R. at 426; App. Ex. XVIII, XX.) The Air Force Court of Criminal Appeals heard this appeal pursuant to Article 62(a)(1)(B), UCMJ: "In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal . . . [a]n order or ruling that . . . excludes evidence that is substantial proof of a fact material in the proceedings." 10 U.S.C. § 862(a). On 29 September 2011, the Court granted the government appeal, vacated the ruling of the military judge and remanded the case for trial, which is set to resume on 20 December 2011 due to defense counsel availability.

Additional details regarding this motion practice and rulings are contained in the facts and argument below.

## STATEMENT OF FACTS

On 15 June 2010, the Suffolk Constabulary called MSgt Ortega–Llarena, 48th Security Squadron. (R. at 21-23.) Local law enforcement told him that they observed an exchange in a well-known drug area involving a car driven by Appellant. (Id.) Police Constable O'Brien conveyed this information to MSgt Ortega-Llarena. (R. at 103-06.) Law enforcement observed the exchange with closed circuit television, traced the vehicle back to Appellant, and MSgt Ortega-Llarena initiated a lookout for the vehicle. (R. at 24-25.) About an hour and a half later security forces stopped Appellant at Gate 2, RAF Lakenheath, in

the vehicle observed on video in the exchange. (R. at 25.) Local law enforcement recovered a bong from the passenger of the vehicle, a known criminal Mr. Clements who claimed that he just smoked marijuana that evening, and a decorative pipe from the glove box. (R. at 28-29.) When they took Mr. Clements out of the car, one of the drug dogs "picked up on a Coke can of recent drug use." (R. at 122-23; 186-87.) The drug dog indicated toward the front of the car. (R. at 187.) Police Constable Meddings stated they then searched the car and found a small three inch pipe with a metal bowl that was either used for smoking marijuana or crack cocaine but found no drugs. (R. at 187-88.)

Appellant waived his rights and agreed to talk with Msgt Ortega-Llarena. (R. at 31.) The Air Force Office of Special investigations (AFOSI) told MSgt Ortega-Llarena that Appellant was a person of interest. (R. at 34.) Appellant told MSgt Ortega-Llarena that he picked up Mr. Clements and drove him to buy crack cocaine in Cambridge. (R. at 35.) Appellant watched Mr. Clements buy crack cocaine, and Appellant claimed that he just drove around while Mr. Clements smoked the crack inside same vehicle. (R. at 35-36.) During the interview, MSgt Ortega Llarena noticed Appellant's eyes were bloodshot and both his cheeks and nose were red. (R. at 49-50.)

On 15 June 2010 at 2350, Appellant consented to a urinalysis. (App. Ex. VII; R. at 37-38.) Within a half an hour of providing consent, Appellant provided his urine specimen. (R. at 38.)

MSgt Ortega-Llarena would have asked for search authority if Appellant did not provide consent. (R. at 39.) MSgt Ortega-Llarena explained the reasons he would have sought search authority from the magistrate. Appellant's vehicle reported in a well-known drug area, a passenger in his car admitting to smoking marijuana with a bong and Appellant's claim that his passenger bought crack and smoked it in his car all contributed to his conclusion that he would have requested search authority. (R. at 39.)

Based on the testimony of the chief of military justice and the military magistrate, search authority for Appellant's urine would have been granted had Appellant not consented. Capt Kapoor, Chief of Military Justice at RAF Lakenheath from September 2009 to August 2010, testified that based on all of the facts he knew at the time, he would have made a recommendation to the military magistrate that probable cause for a search authorization existed if he had been asked. (R. at 142-43, 147.) Capt Kapoor described the facts that supported that recommendation and explained that Lt Col Cassie Barlow was the military magistrate at the time. (R. at 147.) Capt Kapoor

agreed that if Appellant was "acting as a confidential informant at the time" that would have affected his determination. (R. at 150.) Lt Col Barlow, the military magistrate for RAF Lakenheath was at Lakenheath during the month of June 2010. (R. at 204.) Lt Col Barlow learned about the incident on 15 June 2010 from the initial notification when security forces pulled over Appellant and later from the blotter. (R. at 204.) Lt Col Barlow testified that if she had been asked to grant search authority based upon the facts, she would have granted search authority for three reasons. (R. at 204-06.) First, Lt Col Barlow had experience with and confidence in the CCTV system that identified the drug transaction in which Appellant's vehicle was involved. (R. at 207.) Second, Appellant readily admitted that the passenger was smoking crack in his vehicle, and third law enforcement found two pipes in the car. (R. at 207.)

On 15 June 2010, during the interview Appellant explained his actions by stating that he was working as a confidential informant for AFOSI. (R. at 31-32.) MSgt Ortega-Llarena contacted AFOSI to verify this information. (R. at 32-33.) AFOSI denied that Appellant was a confidential informant, told MSgt Ortega-Llarena that they were unaware of Appellant's activities that night and instructed them to continue with their investigation. (R. at 32.)

Although part of the confidential informant program, Appellant was not acting as a confidential informant on 15 June 2010. Appellant had received specific training regarding how to conduct himself when acting as a confidential informant for AFOSI. (R. 324-25, 350-51; Pros. 1-4.) The training included detailed instructions on how to make a drug buy and an actual practice drug buy where Appellant made a simulated purchase following precise instructions from AFOSI. (Id.) Operations required detailed planning and authorization, and Appellant did not have permission to purchase narcotics on his own. (R. at 327.) AFOSI made it clear to Appellant that everything would be at their direction and that all drug buys would be completed, controlled, and monitored by AFOSI. (R. at 328, 367-69.) Additionally, on 21 May 2010, Appellant agreed in writing that he was not to partake in any drug buys without specific direction from AFOSI and that at no time was he to act on his own in regard to criminal investigations. (Pros. Ex. 2 at para. 12, 13.)

Appellant spoke with AFOSI on 14 June 2010, the day before the incident. (R. at 370.) During that conversation, AFOSI did not tell him to perform a drug buy and the Appellant did not discuss plans to do anything as a confidential informant on 15 June 2010. (R. at 370-72.) When asked if Appellant was working for AFOSI, SA Slyz told security forces that he didn't know what

Appellant was doing out there and that he was not a confidential source. (R. at 375-76.) On 15 June 2010, Appellant's actions were not conducted at AFOSI's direction, and AFOSI was not aware of his actions. (R. at 380.)

The results of Appellant's urinalysis came back on 11 August 2010, and security forces questioned him and confronted him with those positive results on 26 August 2010. (R. at 41, 42, 43.) Appellant consented to the search of his room and to a second urinalysis. (R. at 50.) During the search of Appellant's room, investigators located a soda can with holes punched in it that contained residue and a synthetic form of spice. (R. at 54.)

On 21 June 2010, Appellant sent a standard notice of representation in this case. (App. Ex. III.) The notice used boilerplate language and stated "furthermore, any prior consent for search, samples or any other procedure is hereby withdrawn." (App. Ex. III)

Additional facts necessary for the disposition of this case are noted below.

## ARGUMENT

**THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY DETERMINED THAT THE MILITARY JUDGE ERRED BY DETERMINING THAT APPELLANT MAINTAINED AN EXPECTATION OF PRIVACY IN URINE AFTER PROVIDING IT TO THE GOVERNMENT PURSUANT TO VALIDLY OBTAINED CONSENT.**

***Standard of Review***

In ruling on an appeal under Article 62, UCMJ, this Court conducts a de novo review on matters of law and reviews fact-finding under the clearly erroneous standard. Article 62(b), UCMJ; R.C.M. 908(c) (2); United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

***Law and Analysis***

The taking of urine constitutes a search and seizure under the Fourth Amendment. Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D. N.J. 1986); McDonell v. Hunter 612 F. Supp 1122, 1127 (D.C. Iowa 1985). Fourth Amendment rights dealing with intrusions into the human body differ from "interferences with property relationships or private papers 'houses, papers and effects.'" Schmerber v. California, 384 U.S. 757, 767-68 (1966). The proper focus in this context is whether the taking of the bodily fluid was justified and whether the means employed in taking the bodily fluids respected Fourth Amendment reasonableness. Id. at 768.

In United States v. Bily, 406 F. Supp 726 (E.D. Pa. 1975) investigators conducted a search of a defendant's house and garage for films. After an investigation of about two hours during which certain films were discovered, the defendant stated "that's enough I want you to stop." Bily, 406 F. Supp. at 728. Agents had already picked up the films "Sweet Charity" and

"Marooned" prior to the defendant saying stop but the agent picked up the film "White Christmas" after the defendant told them to stop. Bily, 406 F.Supp. at 729. The Court determined the demand was a revocation of consent that took immediate effect and the seizure of "sweet Charity" and "Marooned" were valid but "White Christmas" was invalid because it took place after the revocation of consent. Bily, 406 F.Supp. at 729. Similarly, the seizure of urine that took place prior to Appellant making any revocation of consent remained valid. The taking of Appellant's urine in this case was completed prior to any claimed revocation of consent. In Bily, the viewing and examination of the evidence collected based upon consent was not affected by the immediate revocation of consent because the invasion of the privacy interest had already occurred before the Appellant said "stop." These same principles apply in this case.

United States v. Young, 471 F.3d 109 (7th cir. 1972), cert. denied, 412 U.S. 929 (1973), provides additional insight on this issue. In Young, when a defendant withdrew his consent, the search was stopped. More importantly, the revocation did not render the original consent invalid or preclude the use of incriminating evidence discovered before the withdrawal of consent was announced. Young, 473 F.3d at 111.

A close reading of Skinner v. Railway Labor Executives' Assn, 489 U.S. 602, 616 (1989), illuminates the military judge's error in this case. The military judge incorrectly read the case to mean that the collection and analysis of urine samples constitute separate searches. (App. Ex. XIX at para. 37.) Although Skinner states that "obtaining and examining the evidence may constitute a search," the separate levels of analysis for Fourth Amendment purposes are directed at the potential detention of a person, interference with freedom of movement and then the urinalysis process. Skinner at 616. Skinner states that the physical intrusion of a blood test infringes on an expectation of privacy and the chemical analysis is a further invasion of the privacy interest. Id. Nonetheless, it refers to the collection and testing as a single search and cites to a series of cases each of which describe the taking of a bodily fluid and testing as a single search for Fourth Amendment purposes. (Id. at 616-17, n. 4.)

The Air Force Court of Criminal Appeals agreed with the military judge's finding that the analysis of the urine constituted a search. United States v. Dease, Msc. Dkt. No. 2011-04 AF, Slip op. at 2 (A.F. Ct. Crim. App. 29 Sep 2011). However, the Court also found that the search or analysis was conducted when Appellant no longer had any expectation of privacy in the urine. Id. Thus, the Court concluded there was

no violation of the Fourth Amendment using reasoning that differed from the Government's interpretation of this particular case. The United States believes there was no second search, whereas the Court held there was no expectation of privacy when the second search occurred.

These issues are further clarified in a series of cases that addressed the Fourth Amendment concerns related to the collection and testing of blood samples. In Dodd v. Jones, 623 F.3d 563 (8th Cir. 2010), the Court rejected the notion that the extraction of blood and the testing of blood required separate analysis under the Fourth Amendment. The taking and later analysis of the blood are "a single event for Fourth Amendment purposes." Id. at 569 (citing United States v. Snyder, 852 F.2d. 471, 474 (9th Cir. 1988)). "A search is completed upon the drawing of the blood." Id. (citing Johnson v. Quander, 440 F.3d 489, 500 (D.C. Cir. 2006)). "Therefore, once Jones had sufficient grounds to draw blood . . . the subsequent testing has no independent significance for fourth amendment purposes." Id. (citing Snyder, 852 F.2d at 474). A "search is complete upon the drawing of the blood: Any future test on a stored blood sample will not 'discern [any] human activity,' nor will it constitute a 'physical intrusion.'" Johnson v. Quander, 440 F.3d 489, 500 (D.C. Cir. 2006) (citations omitted).

The Ninth Circuit discussed the "flaw" in an appellant's argument that is illustrative in this case. In Snyder, blood was seized under exigent circumstances, and the appellant argued that though the seizure was valid the subsequent warrantless testing was a violation of his Fourth Amendment rights. Snyder, 852 F.2d at 473. "The flaw in Snyder's argument is his attempt to divide his arrest and subsequent extraction and testing of his blood, into too many separate incidents, each to be given independent significance for fourth amendment purposes." Id. That Court held the seizure and the separate search of that blood was a single event for Fourth Amendment purposes. Id. at 474.

Appellant voluntarily relinquished his urine when he consented to provide a urine sample for testing. Appellant had an absolute right to revoke his consent up until the time that he provided his urine sample to the government; consent for search is never complete up until the point of seizure. United States v. Pellman, 24 M.J. 672, 675 (A.F.C.M.R. 1987). The removal of the bodily fluid constituted the search of Appellant's "person." The urine is the object found in the search not the area or container being searched. Just as in the case of a computer, once the hard drive is copied the subsequent analysis of the data removed onto the copy does not constitute a second search. The further analysis is of the data already

properly seized does not constitute an additional search each time the evidence is looked at, considered, or reanalyzed. United States v. Cote, Misc Dkt. No. 2009-15 (A.F. Ct. Crim. App. 2010). The extraction of the data from the computer onto the mirror image ends the Fourth Amendment analysis just as the collection of the urine ends the Fourth Amendment analysis in this case. This is in complete accord with the line of cases holding that the subsequent analysis of blood had no independent Fourth Amendment significance.

As discussed in the Air Force Court's well reasoned opinion, the nature of the substance at issue, urine, further supports this point. Unlike a computer or a container, the owner has no further possessory interest in urine. Urine once excreted does not qualify as a "person, place, or property" -- the categories protected from unreasonable searches. Mil. R. Evid. 311(2). Once urine leaves the body, it is the very definition of waste, and an individual loses any expectation of privacy in it in much the same way an individual would lose any expectation of privacy in trash which has been abandoned. *See* California v. Greenwood, 486 U.S. 35 (1988) (holding that an expectation of privacy in discarded items of trash is not objectively reasonable.) The material in the trash may reveal private information that may once have been protected by the Fourth Amendment but the expectation of privacy over the very

same material no longer exists once it is discarded. Individuals have an undeniable expectation of privacy in their urine before it leaves the body but not after it has been voluntarily provided to the government for testing.[1]

For these reasons, the Air Force Court of Criminal Appeals correctly concluded that there was no continuing reasonable expectation of privacy in the urine sample or human waste provided by Appellant pursuant to consent and thus no violation of the Fourth Amendment. Dease, Slip op. at 4-5. They properly vacated the ruling of the military judge and remanded the case for further proceedings. Id. at 5. This Court should deny the petition for review and review this case in the ordinary course of review.

**"Additional Issue of Inevitable Discovery."**
(App. Br. at 22)

**THE DOCTRINE OF INEVITABLE DISCOVERY FURTHER SUPPORTED THE ADMISSION OF THE DRUG TESTING EVIDENCE.**

[1] Though AFCCA overturned the military judge's ruling on other grounds consent Appellant did not provide clear notice of a revocation of consent in this case. If consent could be withdrawn after Appellant provided the urine sample for testing, the revocation was ineffective because the consent needed to "provide clear notice that this consent has been withdrawn." United States v. Stoecker, 17 M.J. 158, 162 (C.M.A. 1984.) In this case, the non-specific form letter presented would lead a reasonable individual to believe that the form letter merely served to notify individuals that Appellant was represented and discourage attempts to conduct unexecuted searches. An attempt to undo a search already completed if even possible would require a more explicit terms to be considered "clear notice." *See also* United States v. Holliday, No. ACM 34814 (A.F. Ct. Crim. App. 11 Dec 2002)(Unpub. Op.).

## Standard of Review

In ruling on an appeal under Article 62, UCMJ, this Court conducts a de novo review on matters of law and reviews fact-finding under the clearly erroneous standard. Article 62(b), UCMJ; R.C.M. 908(c) (2); United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

## Law and Analysis

Having found no violation of the Fourth Amendment the Air Force Court of Criminal Appeals did not address inevitable discovery raised by the United States in its government appeal. However, Appellant addresses inevitable discovery in their petition under the caption "additional issue of inevitable discovery." The Air Force Court of Criminal Appeals correctly determined that there was no violation of Appellant's expectation of privacy and therefore did not need to address inevitable discovery. Assuming arguendo this Court disagreed with that conclusion, the inevitable discovery also supported the admission of the evidence in this case and further justifies denial of Appellant's petition.

The doctrine of inevitable discovery is a well-settled exception to the exclusionary rule and states, "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." Mil. R. Evid.

311(b)(2); United States v. Kozak, 12 M.J. 389, 394 (C.M.A. 1982). The Supreme Court explained that applying the inevitable discovery exception puts police in the same position in which they would have been -- not a better one -- because the police would have eventually obtained the evidence legally, absent the illegal conduct. United States v. Nix, 467 U.S. 431, 443-44 (1984). The burden is on the prosecution to show "by a preponderance of the evidence that when the illegality occurred, government agents possessed (or were actively pursuing) evidence or leads that would inevitably have led to the discovery of the evidence and that the evidence would have been discovered in a lawful manner but for the illegality." United States v. Chick, 30 M.J. 658 (A.F.C.M.R. 1990) (*citing* Kozak, 12 M.J. at 394).

"When the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation." United States v. Owens, 51 M.J. 204, (C.A.A.F. 1999). In Owens, though consent to search the car was found invalid, the evidence showing the presence of probable cause to search the car supported the admission of the items found in the car under the doctrine of inevitable discovery. In United States v. Wallace, 66 M.J. 5 (C.A.A.F. 2008), the Court held that inevitable discovery supported the admission of computer

evidence despite a valid revocation of consent, where there was sufficient probable cause to support a search authorization.[2]

Assuming, arguendo, the search was illegal based upon a valid revocation of consent, the evidence would have inevitably been discovered. To establish this, the United States must show that "when the illegality occurred, the government agents possessed or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence . . . in a lawful manner." Kozak, 12 M.J. at 394. If illegality existed, it occurred 21 June 2010 when the Appellant claims he revoked his consent and the testing of his validly seized urine did not stop. At that time, the United States was in possession of Appellant's urine sample properly obtained on 15 June 2010 along with sufficient evidence to support probable cause. Probable cause "requires more than mere suspicion but something less than a preponderance of the evidence." United States v. Weston, 67 M.J. 390 (C.A.A.F. 2009)(citing United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007))

Contrary to the judge's ruling, the facts in this case overwhelmingly support a legal determination of probable cause. Appellant's vehicle was observed in a known drug area and a

[2] In Wallace, the revocation of consent occurred before law enforcement left the premises with the computer and certainly before the data was extracted from the computer. That distinguishes the impact of a revocation of consent from our case where the urine has already left the body. It is, however, useful in analyzing the proper framework to analyze inevitable discovery in this case.

person in that vehicle was seen on closed circuit television making an exchange. (R. at 21-23.) Approximately an hour and a half later, Appellant was stopped at Gate 2, RAF Lakenheath, with one passenger. (R. at 25.) That passenger admitted to smoking marijuana, and Appellant claimed that the passenger smoked crack cocaine while he drove around for over an hour in the car with him. (R. at 28-19, 35-36.) A pipe was seized from the car, and there was conflicting testimony about the presence of a second pipe. (R. 28-29, 187-88.) Considering that Appellant admitted that his passenger smoked crack cocaine in the car for an hour, the discovery of a second pipe or lack thereof does not alter the landscape of probable cause here. It is clear that there was an apparatus in the car with the passenger and Appellant, which made it possible to smoke crack cocaine; alone or together with Appellant, we can be certain the passenger did not smoke crack in his bare hands. The search of the vehicle an hour after a drug transaction with no drugs present supported a finding that there was probable cause to believe the bodily fluids of the occupants of the vehicle would yield evidence of drug use. This is particularly true in this case where Appellant admitted the drugs were purchased in the location observed by law enforcement, possessed in Appellant's car, and consumed in his car. Pointing his finger toward the passenger seat and claiming Mr. Clements smoked it all after

being involved in a drug buy, possession, and use may undermine a finding that establishes Appellant used cocaine beyond a reasonable doubt but not the clear probable cause the facts provide. Indeed, such a "Cheech not Chong" defense would forever prevent probable cause for occupants of a vehicle with drug use and more than one person.

Appellant's association with AFOSI reinforces the well established probable cause in this case. Appellant's association with AFOSI only increases the probable cause because his actions on 15 June 2010 were not directed by AFOSI, Appellant was directed not to carry out such an operation independently, and he disregarded his training and instructions. If the information was revealed that Appellant was disobeying AFOSI instructions through his activities, probable cause only would have been strengthened. Whether this information would have been revealed or not is an open question as pointed out by the military judge. (App. Ex. XIX.) AFOSI had already informed law enforcement that AFOSI did not know what Appellant was doing 15 June 2010 and that it was not done at their direction. The information that this was not an AFOSI operation further supported probable cause.

Finally, the record is clear that search authority would have been sought and obtained in this case. MSgt Ortega-Llarena testified that absent consent he would have sought search

authority. (R. at 39.) The chief of military justice at RAF Lakenheath at the time testified about his familiarity with the facts of the case and stated that he would have advised the military magistrate that based upon these fact there was probable cause. (R. at 142-43, 147.) Lt Col Barlow, the military magistrate at RAF Lakenheath during the relevant time frame, also testified. (R. at 204.) Lt Col Barlow described her familiarity with the incident that occurred 15 June 2010 and stated that she would have granted search authority if it were requested based upon the facts. (R. at 204-07.) As such, Appellant's urine, constituted inevitably discovered evidence.

## CONCLUSION

WHEREFORE the United States respectfully request this Court deny Appellant's petition and allow Appellant's trial to proceed where his full Appellate rights will be protected.

JOSEPH J. KUBLER, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 33341

LINELL A. LETENDRE, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 35346

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 27428

For 

DON CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 35093

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to The Appellate Defense Division, on 14 October 2010.

JOSEPH J. KUBLER, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 33341