No. 99-362

In the Supreme Court of the United States

DARRIN L. SHORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner showed necessity for a requested independent expert in his court-martial.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (Pet. App. 1a-23a) is reported at 50 M.J. 370. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 24a-28a) is unreported.

JURISDICTION

The Court of Appeals for the Armed Forces entered its judgment on May 26, 1999. The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner was convicted by a general court-martial, composed of officer members, of wrongful use of a controlled substance, in violation of Article 112a of the Uniform Code of Military Justice, 10 U.S.C. 912a. He

was sentenced to a bad-conduct discharge and reduction to the lowest enlisted pay grade. Pet. App. 2a.

1. On March 23, 1995, petitioner provided a urine sample pursuant to a urinalysis inspection ordered by his commanding officer. Petitioner's sample contained 16 nanograms per milliliter of the metabolite of marijuana, one nanogram over the Department of Defense threshold for positive results. Pet. App. 2a.

Petitioner was charged under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, with the wrongful use of marijuana. Before trial, petitioner moved for the appointment, at government expense, of a specific forensic toxicologist to assist in the preparation of his defenses asserting passive inhalation and innocent ingestion. Pet. App. 2a. The government opposed the request on the ground that a suitable substitute was available at the Naval Drug Screening Laboratory, Jacksonville, Florida. *Ibid.* Before the convening authority ruled on petitioner's request, the court-martial began, and petitioner reiterated his request, expanding the scope of the request for assistance to include: interpreting the scientific testing performed in his case; understanding the documentation in the evidence packet; recognizing discrepancies in the documentation; comparing the documented testing process with the Department of Defense standard operating procedures; pointing out weaknesses in the government's case; and preparing an effective cross-examination of the government's witness. *Id.* at 3a-4a.

The government conceded before the military judge that petitioner was entitled to expert assistance, but disputed whether petitioner "was entitled to an independent expert, unaffiliated with the Navy Drug Screening Laboratory." Pet. App. 4a. The government instead maintained that petitioner could obtain assis-

tance from Mr. Cary Hall of the Navy Drug Screening Laboratory. Petitioner's counsel questioned the impartiality of Mr. Hall and, when asked by the military judge whether she had had an opportunity to talk to Mr. Hall, said: "Sir, I have not talked to him, nor do I intend to." *Id.* at 5a. The military judge suggested that petitioner's counsel also consult with other defense counsel with expertise in cases involving urinalysis reports. *Ibid.* The judge then found that Mr. Hall was available "to explain to defense counsel the meaning of the scientific reports involved in this case, to interpret and explain the standard operating procedure manuals and regulations applicable to the drug lab and the Department of the Navy drug testing." *Ibid.* He also determined that "Mr. Hall is made equally available to both the Government and defense and will explain the urinalysis lab testing process fully and completely, without shading his testimony to favor either side." *Ibid.* Finally, the military judge concluded that petitioner had the burden of showing the necessity of having the services of a different expert and that he had failed to meet that burden. *Id.* at 6a.

After petitioner's attempt to obtain a reversal of that decision in an interlocutory appeal was unsuccessful,[1]

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[1] Petitioner sought to take an interlocutory appeal from the denial under the All Writs Act, 28 U.S.C. 1651(a). Appellant Exh. XIX. The United States Navy-Marine Corps Court of Criminal Appeals found, as an interlocutory matter, that petitioner had failed to demonstrate necessity. Order Denying Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and Mandamus, August 15, 1995. Although the court expressed reservation regarding whether the government's expert could act as an adequate substitute for an independent expert, it held that petitioner had not "sustained his burden for expert assistance" in the first place. *Ibid.*

the court-martial subsequently convened for trial on the merits, at which Mr. Hall testified for the prosecution regarding petitioner's positive urinalysis. Pet. App. 6a. "Defense counsel cross-examined Mr. Hall extensively about testing methods, control procedures, the likelihood of false positives, and the chain of custody. Defense counsel elicited admissions from Mr. Hall that some Navy laboratories, including the laboratory that tested [petitioner's] sample, had experienced problems with testing accuracy. Defense counsel also elicited an admission that [petitioner's] nanogram level was consistent with unknowing ingestion." *Ibid.*

2. The Navy-Marine Corps Court of Criminal Appeals affirmed. Pet. App. 24a-28a. The court noted that, in its earlier ruling on petitioner's interlocutory appeal, it had determined that petitioner "has not sustained his burden for expert assistance under *United States* v. *Robinson*, 39 M.J. 88 (C.M.A. 1994) and *United States* v. *Garries*, 22 M.J. 288 (C.M.A. 1986)[, cert. denied, 479 U.S. 985 (1986)]." Pet. App. 26a. The court further noted that, after petitioner's trial counsel had cross-examined the government's expert (Mr. Hall), "it was incumbent on the defense to renew its request for independent expert assistance if it was still deemed necessary." *Ibid.* The court concluded that the record established that petitioner's counsel had "effectively and extensively cross-examined the Government's expert" and that petitioner "does not allege that the Government failed to disclose favorable [information]." *Id.* at 27a. Finally, the court determined that petitioner's trial was "fundamentally fair." *Ibid.*

3. The Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-23a. Noting that petitioner had "offered nothing to show that [petitioner's] case was

not 'the usual case,'" the court explained that petitioner had failed to show necessity for the requested expert and that the military judge had not abused his discretion in denying petitioner's request. *Id.* at 8a. The court reasoned that the military judge had provided petitioner's trial counsel with helpful advice when he recommended that she interview Mr. Hall, something she had not done, and that she educate herself regarding the scientific procedures involved in the case. *Ibid.* The court stated that, even though "the military judge gave defense counsel the tools potentially to gather evidence to lay a foundation for the necessity of an independent assistant," it was unclear whether petitioner's counsel had availed herself of those tools, since the request for expert assistance was never renewed following the denial of the interlocutory appeal. *Id.* at 8a-9a. The court also noted that petitioner's counsel "elicited potentially damaging admissions about problems with testing accuracy in [Mr. Hall's] laboratory, and elicited scientific support for the defense theory of innocent ingestion." *Id.* at 9a.

Judge Sullivan dissented, concluding that government counsel had conceded petitioner's need for expert assistance and that the court should not have upheld the military judge's decision to "offer as the only expert to the defense a conflicted one, *i.e.*, the principal prosecution expert witness." Pet. App. 10a. Judge Effron filed a separate dissent expressing similar views. *Id.* at 21a-23a.

ARGUMENT

Petitioner contends that his rights under the Due Process Clause and military rules of procedure were violated by the denial of his request for the assistance of an independent forensic toxicologist. Pet. 5. Both

military appellate courts correctly ruled that petitioner had failed to demonstrate necessity for the employment of his requested expert. Further review is not warranted.

1. This Court has never held that a defendant has a constitutional due process right to expert assistance beyond the circumstances described in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). In that case, a defendant charged with first-degree murder had been denied an expert psychiatrist to testify in mitigation of his punishment and he was sentenced to death. There the Court reasoned that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a factor at trial, the government is obliged by the Constitution to provide an indigent defendant with access to a psychiatrist's assistance. *Id.* at 83. The Court subsequently made clear that *Ake* should not be construed to compel the government to provide an indigent with the assistance of an expert outside the limited circumstances at issue in that case. See *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 n.1 (1985) (stating that "[w]e therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought," *i.e.*, a criminal investigator, a fingerprint expert, and a ballistics expert). In both *Ake* and *Caldwell*, the Court emphasized that, at a minimum, a defendant must show necessity for the expert assistance. See *Caldwell*, 472 U.S. at 323 n.1 (a defendant must offer more than "undeveloped assertions that the requested assistance would be beneficial."); *Ake*, 470 U.S. at 78-83 (discussing the balance to be struck among private interests, governmental interests, and probative value of testimony sought and noting that, when mental condition is relevant to culpability,

psychiatric assistance may be "crucial to the defendant's ability to marshal his defense").

In applying this Court's decisions, the courts of appeals have required a defendant to show the necessity for expert assistance and that the lack of such assistance would result in a fundamentally unfair trial. See, *e.g.*, *Moore* v. *Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc), cert. denied, 481 U.S. 1054 (1987); see also *Gray* v. *Thompson*, 58 F.3d 59, 66-67 (4th Cir. 1995), cert. granted in part *sub. nom. Gray* v. *Netherland*, 516 U.S. 1037 (1996), vacated and remanded on other grounds, 518 U.S. 152, 171, on remand, 99 F.3d 158 (4th Cir. 1996), cert. denied, 519 U.S. 1157 (1997); *Little* v. *Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987), cert. denied, 487 U.S. 1210 (1988).

Petitioner's assertion of a conflict with other federal courts of appeals' decisions is incorrect. See Pet. 10-11. In *Smith* v. *McCormick*, 914 F.2d 1153 (9th Cir. 1990), the court held that a capital sentence for murder violated defendant's due process rights when the defendant was denied the right to psychiatric assistance. *Id.* at 1157. That case simply applied *Ake* in holding that a defendant had "the right to use the services of a psychiatrist in whatever capacity defense deems appropriate." *Ibid.* Similarly, in *United States* v. *Crews*, 781 F.2d 826 (10th Cir. 1986), the sanity of the defendant was at issue in the government's charge that the defendant had attempted to murder President Reagan. The court held that the defendant had the right to a psychiatrist who would assist the defendant in the presentation of his defense. *Id.* at 834. See also *United States* v. *Chavis*, 486 F.2d 1290 (D.C. Cir. 1973) (right to psychiatric assistance where competency to stand trial is at issue and sanity is defense). Like *Ake*, those cases do not stand for the more general proposition asserted

by petitioner of a right to government-funded expert assistance of the defendant's choice without a showing of necessity.

2. A military defendant's right to the employment of a requested expert is guaranteed by Rule for Courts-Martial (R.C.M.) 703, which requires the military trial judge to determine that the "testimony of the expert is relevant and necessary." R.C.M. 703(d).[2] Only when the military trial judge makes such a determination of relevance and necessity does the government have the obligation to offer to provide an "adequate substitute." *Ibid.*[3] The Court of Appeals for the Armed Forces has

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[2] Rule for Courts-Martial 703(d) provides:

> (d) *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

[3] The provision allowing for an adequate government substitute in place of a requested expert responds to differences between military and civilian criminal procedure. As recognized by the Court of Appeals for the Armed Forces, "[u]nlike the civilian defendant * * * the military accused has the resources of

interpreted the R.C.M. 703(d) necessity requirement as a three-part test that a military defendant must satisfy:

> First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

Pet. App. 7a. While recognizing that defense counsel may be untrained in the subject-matter area in which expert assistance is sought, military courts have required that counsel educate themselves sufficiently to lay a foundation for a request for expert assistance. *Id.* at 7a, 9a; accord *Moore*, 809 F.2d at 712.

In this case, two tiers of military appellate courts reviewed petitioner's justification for expert assistance, and they correctly concluded that petitioner had failed to demonstrate necessity for the employment of the requested expert. Pet App. 2a, 8a-9a. Despite the judicial warnings before trial of both the military trial judge and the Navy-Marine Corps Court of Criminal Appeals that petitioner had failed to demonstrate necessity, he never attempted to articulate anything beyond "undeveloped assertions that the requested assistance would be beneficial." *Caldwell*, 472 U.S. at 323 n.1. The Court of Appeals for the Armed Forces noted that petitioner's counsel had "a week to heed the military judge's advice," but she still failed to renew

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the Government at his disposal. In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." *United States* v. *Garries*, 22 M.J. 288, 290-291 (C.M.A.) (internal citations omitted), cert. denied, 479 U.S. 985 (1986); see Pet. App. 8a (stating that petitioner "offered nothing to show that [his] case was not 'the usual case.' ") (citation omitted).

her request when petitioner's trial on the merits began. Pet. App. 8a-9a. After holding that the military trial judge did not abuse his discretion in denying petitioner's requested expert, the court conducted its own "post-trial hindsight" assessment and determined that petitioner had not established necessity. *Id.* at 9a. Because petitioner did not establish his antecedent claim of necessity, his arguments that his rights were denied under the Constitution and the Rules for Courts-Martial are unpersuasive.

3. Petitioner claims (Pet. 12) that the government conceded that he was entitled to expert assistance, and that the military judge erred in finding that the government's expert was an adequate substitute. Those claims are misplaced. First, the record does not support petitioner's assertion of a concession by government counsel at the court-martial. At trial, the prosecution stated that "the government does not contest in any way[,] shape or form that the accused is entitled to expert assistance. * * * [I]n order for the defense to ask for an expert witness, * * * they must show necessity by showing reasonable probability that the expert would be of assistance, and that the denial of expert assistance would result in a fundamentally unfair trial." Trial Tr. 22. Even if those words could be construed as a concession, Rule for Courts-Martial 703(d) requires the military judge independently to "determine whether the testimony of the expert is relevant and necessary," and in this case ruled that "the accused has failed to meet [the] burden of" showing "the necessity for services of an expert assistant by showing the reasonable probability that the expert would be of assistance and that denial of expert assistance would result in a fundamentally unfair trial." Trial Tr. 25. That ruling was affirmed by the Navy-

Marine Corps Court of Criminal Appeals on interlocutory appeal. See Pet. App. 6a, 26a. Accordingly, before the trial on the merits began, any concession by the government had already been rejected by the military trial judge and the intermediate military appellate court.

Second, despite an invitation by the military judge, petitioner did nothing to supplement his already rejected claim of necessity. Pet. App. 5a. Thus, petitioner's failure to make the threshold showing of necessity renders irrelevant any analysis of the military trial judge's conclusion that the government's expert was an adequate substitute.[4]

Finally, both military appellate courts concluded that the record did not support a conclusion that petitioner's trial was unfair. Pet. App. 9a, 27a. The record reflected that trial defense counsel cross-examined the government expert exhaustively, eliciting "potentially damaging admissions about problems with testing accuracy," and a concession that petitioner's "urinalysis results were consistent with passive inhalation or innocent ingestion." *Id.* at 8a-9a. Petitioner has identified nothing that happened at trial that would support a finding of a violation of petitioner's rights under the Constitution or Rules for Courts-Martial. Petitioner's claim thus does not warrant further review.

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[4] The Court of Appeals for the Armed Forces did not rest its decision on the government's offer of its own witness as an adequate substitute for the requested expert, but on petitioner's failure to demonstrate necessity. Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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