

Test Results Not Mandatory for Drug Convictions

By Mathew B. Tully Q. Can I be convicted for using illegal drugs without the results of a urinalysis or blood test?

A.

Short of catching a service member in the act, the government usually prefers to rely on scientific testing when prosecuting drug abuse cases. But that doesn't mean positive urinalysis and blood test results are mandatory for a conviction of wrongful use of a controlled substance in violation of Article 112a of the Uniform Code of Military Justice. Service members who illicitly use synthetic drugs, such as spice, in the belief that a urinalysis will not detect it, need to know the government can convict them anyway with the assistance of witness testimony. And I'm not talking about expert testimony from someone who works in a laboratory; the testimony of another service member or a civilian who saw you smoking spice and can state that you knew what you were consuming may be sufficient proof for nonjudicial punishment or a court-martial conviction. That's what happened this year in *U.S. v. Hornback*. A Marine Corps private was found guilty at a special court-martial of using spice. In the presence of others, he smoked a substance that looked like marijuana through a glass pipe and told them it was spice. He claimed it was undetectable to urine tests. To convict him, the government largely relied on testimony from two witnesses. The private appealed his case to the U.S. Navy-Marine Corps Court of Criminal Appeals, claiming the lack of scientific or forensic evidence against him was insufficient to convict him. The court disagreed. Military courts have long held that "a user of a habit-forming drug may express an opinion on its identity." The U.S. Court of Military Appeals relied on this principle when upholding an Air Force staff sergeant's conviction of using and selling cocaine in *U.S. v. John Taylor* (1984). The airman appealed his conviction, stating the testimony of the person to whom he sold the substance did not prove the identity of the substance beyond a reasonable doubt. The witness had used cocaine only once before and took it with a large quantity of alcohol. But the court ruled witnesses don't have to be habitual users to testify to the identity of a drug; their testimony can carry weight even if they used a drug once or twice, or even if they never used a drug but were merely exposed to its scent when burning. The court compared it to a lay person who "may testify as to whether or not a person was drunk." Recognizing a substance's scent may be considered such an "observation" under the law.