McClatchy

SUNDAY, MARCH 20, 2011

ONLINE AT: www.mcclatchydc.com/2011/03/20/110551/army-slow-to-act-as-crime-lab.html

Army slow to act as crime-lab worker falsified, botched tests

By Marisa Taylor and Michael Doyle
McClatchy Newspapers

WASHINGTON — For nearly three years, the military held the key to Roger House's exoneration and didn't tell him: A forensics examiner had botched a crucial lab test used in the Navy lieutenant's court-martial.

In fact, the military had begun second-guessing a decade's worth of tests conducted by its one-time star lab analyst, Phillip Mills.

Investigators discovered that Mills had cut corners and even falsified reports in one case. He found DNA where it didn't exist, and failed to find it where it did. His mistakes may have let the guilty go free while the innocent, such as House, were convicted.

"It cost him his family and it cost him his Navy career," House's attorney, John Wells, said in an interview. "It's certainly outrageous and unconscionable; it's the kind of action that makes you want to scream."

But the problem was bigger than just a lone analyst.

While a McClatchy investigation revealed that Mills' mistakes undermined hundreds of criminal cases brought against military personnel, it also found that the U.S. Army Criminal Investigation Laboratory, near Atlanta, was lax in supervising Mills, slow to re-examine his work and slipshod about informing defendants. Officials appeared intent on containing the scandal that threatened to discredit the military's most important forensics facility, which handles more than 3,000 criminal cases a year.

The military has never publicly acknowledged the extent of Mills' mistakes nor the lab's culpability. McClatchy pieced together the untold story by conducting dozens of interviews and reviewing internal investigations, transcripts and other documents.

The McClatchy investigation shows:

- Mills made many mistakes. In an extensive review of his work, lab officials disagreed with his DNA results 55 percent of the time in cases they could retest. Law enforcement officials, following military policy at the time, had destroyed evidence in 83 percent of Mills' cases before it could be retested. Those 388 cases include rape and other serious crimes.
- Military officials tried to avert a public scandal and protect criminal cases from outside legal attack, in part by keeping their inquiry of Mills in-house. The lab was supposed to alert a prosecutor about its final investigation in 2008, but he says he was never notified.
- Even today, more than two years after the lab's review was completed, some defendants remain in the dark. Mills' supervisor also impeded the lab's investigation by failing to produce evidence, adding to delays that hurt military defendants, who faced strictly enforced appeal deadlines.

Taken together, the mistakes shocked veteran military officials.

"My confidence in your entire lab is shattered," Navy Capt. Bruce MacKenzie, a military judge, told lab officials in 2008.

The lab's reputation matters because DNA and other forensics evidence are crucial even beyond solving crimes and exonerating suspects. Forensics evidence can embolden prosecutors to indict, and frighten defendants into confessing. The military's own inquiries have called all this into question.

"The result," prominent Penn State forensics analyst Robert Shaler summed up, after an independent review of the lab's mistakes, "might have led to a miscarriage of justice."

The U.S. Army Criminal Investigation Command, which oversees the lab's 180 employees, declined to grant a sit-down interview or to provide Mills-related documents.

In an extensive written statement, the Army defended its actions and maintained that Mills' conduct didn't reveal systematic problems at the U.S. Army Criminal Investigation Laboratory.

"It is important to point out that this was never a 'USACIL integrity' question per se, but an issue with an employee's integrity," the statement said.

The Army said its $1.4 million retesting of Mills' evidence demonstrated that the lab took the revelations seriously.

"Although this should never have happened, it did, and we feel very strongly that we took immediate corrective action and have done everything possible to prevent this from happening in the future," the statement said.

Mills couldn't be reached to comment, either by phone or mail, over several weeks. But in the past, he's defended his work.

"I've always followed the proper procedure in making sure that I do the same thing over and over in each case," he said at a 2008 court hearing.

SIGNS OF TROUBLE

For almost 30 years, the military trusted Mills and took him at his word, but lab officials overlooked danger signs that might have alerted them to a looming crisis.

In 2002, Mills failed a hair-analysis proficiency test. In 2003, he mixed up DNA samples. By then, he'd begun to get a reputation for sloppiness among those who signed off on the lab analysts' work.

"Too often the review of Mills' cases takes an extraordinary amount of time, and the reviewing examiner is ultimately performing some of the work Mills should have," lab biologist Thomas Overson wrote in a 2005 memo.

Overson reviewed Mills' work after the 2003 incident and thought it suggested a pattern of mistakes. He recommended a broader review. Mills' supervisor, Clement Smetana, suspended Mills, but declined to open a wider inquiry. Smetana and other lab officials saw Mills as one of their most productive and experienced analysts, which made them reluctant to confront him.

In another lapse, lab officials didn't tell defense attorneys. They reasoned that since the botched DNA test was caught, public notice wasn't necessary.

Since the military didn't preserve evidence, it also missed a chance to retest work that Mills might have gotten wrong.

Ivor Luke, for one, has been thwarted in his effort to challenge his 1999 conviction because of the destruction of evidence. An enlisted woman had accused the Navy hospital corpsman of sexually assaulting her aboard the USS Port Royal while he was conducting a medical exam.

"The government ... destroyed the physical evidence ... thereby precluding the type of retesting that might have restored some level of confidence in the process," Chief Judge Andrew Effron, of the U.S. Court of Appeals for the Armed Forces, noted earlier this year.

Despite the seriousness of the 2003 mix-up, Mills returned to casework the next year. Soon, his work was flagged again when co-worker Dr. Timothy Kalafut found that Mills falsified DNA paperwork, and Kalafut alerted supervisors.

Kalafut and other lab employees grew impatient with the pace of the lab's response, however. "We felt like it was taking an unacceptably long period of time to even confirm if a problem was found," Kalafut said.

Though they seemed slow to react, lab officials were deeply alarmed by Mills' errors.

The Army criminal investigation lab's reputation was at stake. Officials feared that the lab's accreditation might be revoked. They worried that they might have to withdraw results from a forensics database.

Lab officials could have authorized an independent review. Instead, they decided that the lab would investigate itself.

"If perception is truly the paramount concern (and confirming Mills' results is essential), then USACIL needs to retain control of retesting decisions in each case as they come up," lab attorney Lisa Kreeger said in a 2005 e-mail.

Kreeger also floated the idea of hiring a former judge with DNA expertise to monitor the review, saying in an e-mail that the jurist would "make one hell of a government witness" and could "formidably pre-empt any unreliability argument" if defense attorneys challenged convictions.

Internal documents show that officials hoped to retain control of the inquiry, even as they hired Shaler, the Penn State expert. Shaler, who later proved very critical of the lab, was prohibited from speaking publicly about his work.

The lab originally envisioned a six-month review, but it grew into what one lab official called a "three-year research project on a worldwide scope."

One reason is that some investigators balked at reopening old cases.

Military higher-ups were reticent, too. They struggled with their legal obligation to share evidence that had the potential to clear defendants. Rather than individually notifying every defendant implicated by Mills' testimony, they took a narrow approach.

The lab sent a general notice to each military branch's legal division in August 2005, reasoning that individual notices were required only if all the evidence was to be destroyed by retesting.

The limited notification meant that many never learned of the retesting. Attorney Charles Gittins, for instance, didn't hear about evidence discrepancies involving his client Troy Jenkins, an enlisted man who pleaded guilty to charges of rape. Jenkins has claimed he felt pressure to admit his guilt because of the DNA. His co-defendant later went to trial and was convicted on lesser charges.

"I would have liked to have been told," Gittins said in an interview. "Isn't that something that you send a certified letter for? It raises questions about my client's guilty plea."

Others heard over the prison grapevine.

Former Marine Corps Gunnery Sgt. Steven Carlson was serving a 15-year sentence for charges related to sexual assault when he learned of the Mills debacle, but it wasn't the military that told him.

Carlson said another inmate informed him in September 2005 that there was a lab investigation and it involved Carlson's case. He took matters into his own hands.

"I paid for the memo, and made photocopies of it," Carlson said, adding, "Nothing in prison is free."

A CACHE OF LOST EVIDENCE

In interviews, lawyers said they were troubled that

many defendants weren't told of the lab's review. Military law generally allows only two years to petition for retrial based on new evidence, less time than in civilian courts.

It wasn't just the defense that was undermined by Mills' errors. Prosecutors might have missed the chance to detect the guilty. The lab review found 49 cases in which Mills' testing didn't identify stains or DNA. Investigators called these "questionable," because of his lack of thoroughness.

"It's absolutely possible that someone slipped through the cracks," said one military attorney who asked to remain anonymous because he might be disciplined for discussing the matter.

"The military should have said: 'Stop the presses. We've got a really big problem here,' " this attorney added. "They surely could have done more than just send out a memo."

Lab officials feared the fallout, though. Behind the scenes, documents show, they crafted talking points. Officials were instructed to respond to certain questions only if pressed. Lab officials spoke of ways to "mitigate some of the negative news."

"The military just wanted to make the Mills scandal go away as quickly and conveniently as possible," said attorney Peter Griesch, who formerly represented Luke.

But as lab officials were preparing to defend themselves, they were about to be undermined from within.

In April 2008, three years after Mills' falsified report, lab employees found a trove of lost evidence. In Mills' old locker, they found four containers of slides. Inside a closet, they found more slides. And in a refrigerator, they discovered evidence from 36 Mills cases.

Over many months — perhaps even years — lab supervisor Smetana had known about the material but never turned it over to investigators. Smetana, a lab employee of 30 years, resigned in July 2008, shortly after investigators found him "derelict" in his duty.

All the newly discovered evidence had to be retested, delaying the investigation.

In September 2008, the lab completed its review, and it was withering. Mills often "did not follow good scientific practice." His paperwork documenting his analyses was "lacking." He used up too much evidence, making it impossible to retest. In nearly one-quarter of the cases, reviewers identified problems.

Not every disagreement meant Mills got it wrong. Some evidence could have degraded over time. Technology has become more refined.

Still, Mills' errors cast doubt on every DNA profile he submitted to a national database. Lab officials had to withdraw 67 suspect profiles, complicating police work.

Shaler, the outside reviewer from Penn State, was even more critical, government documents show. He attributed Mills' errors, in part, to "an innate intellectual dishonesty." Shaler also blasted lab management. He warned that the lab lacked proper safeguards and permitted analysts to invent laboratory procedures that allowed mistakes to go unnoticed.

In its statement, the Army defended its handling of Mills' mistakes, disputed some of Shaler's criticisms and says it "took the situation very seriously." The lab has made changes, including replacing managers and imposing stricter case reviews.

The lab "has invested time, money, training and personnel to improve overall capabilities," the Army said, adding, "We have made more than 100 extensive changes and modifications."

But defense attorneys whom McClatchy interviewed said that the Army should have ensured that Mills was held fully accountable.

The lab committed to providing its final review to a federal prosecutor, David Leta, so he could determine whether Mills' conduct violated federal law, including the prohibition against making false statements to federal officials. Lab officials say they mailed the report in 2008. Leta, though, says he heard of it only in February, when McClatchy informed him.

He's now reviewing the case.

Some defendants implicated by Mills, meanwhile, are trying to seek justice on their own.

House, the Navy officer who was wrongfully convicted, filed a federal lawsuit seeking back pay and a promotion he was denied. Luke, the enlisted man whose evidence was destroyed, is preparing an appeal to the U.S. Supreme Court.

Others, such as former Gunnery Sgt. Carlson, appear close to giving up hope.

"I always thought the truth would prevail," Carlson said, "but after almost 12 years, my faith has dwindled."

(McClatchy researcher Tish Wells contributed to this report.)

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THURSDAY, JUNE 9, 2011

ONLINE AT: www.mcclatchydc.com/2011/06/09/115543/accused-sit-in-jail-as-military.html

Accused sit in jail as military courts drag feet on appeals

By Michael Doyle
McClatchy Newspapers

WASHINGTON — Marine Corps Gunnery Sgt. Brian W. Foster served nearly a decade in Leavenworth for a crime he didn't commit.

Foster is now free and serving his country once more. The military appeals system that failed him, meanwhile, is still trying to right itself.

"It's a terrible system," Foster said. "The judges and attorneys who had the opportunity to stand up and say 'this isn't right,' they didn't do that."

The court that finally freed Foster in 2009 called him a victim of "judicial negligence" and "intolerable" errors. The nine-year delay between conviction and appeal was "unacceptable," the U.S. Navy-Marine Corps Court of Criminal Appeals acknowledged.

While Foster's experiences were extreme, they were not entirely unique. Other soldiers, sailors, airmen and Marines have likewise languished in appellate limbo.

A McClatchy review of thousands of pages of court and military documents reveals persistent delays that have long frustrated repeated reform efforts. These appellate delays can interfere with the ability of veterans to find jobs, secure benefits and, sometimes, regain their freedom.

The delays happen at every stage. Records can get lost. Simple tasks, like trial transcriptions, can lag. Attorneys get distracted or are sent off to a war zone. Some judges have been indifferent or out of their depth.

"Serious post-trial processing problems persisted for at least the last two decades," the Defense Department Office of Inspector General noted last December, citing "consistent failures in leadership, supervision and oversight at all organizational levels."

And when the seemingly inevitable post-trial delays do recur, a McClatchy review shows, there's no guarantee judges will do anything about it.

But the McClatchy review also finds that the long-troubled military appeals system shows signs of getting better. Court backlogs are shrinking. New software tracks cases more efficiently. Supervision has improved. The Navy, which with the Marine Corps handles a majority of all courts-martial, has a new judicial oversight council and chief judge.

"The Department of the Navy is very confident that a situation like that involving Marine Corps Sgt. Brian Foster will never be repeated," said a spokesperson for the Navy's judge advocate general, providing written responses to questions on condition of anonymity as a matter of policy.

The Navy spokesperson added that "the post-trial processing mission has improved both at the local level...and at the appellate level." The average time between trial and appeal decision, for instance, has been cut in half since 2004.

Nonetheless, constant vigilance will now be needed, partly because military justice can seem so foreign to the civilian world. Backsliding would be easy since budgets are tight, attorneys are stretched thin and the memory of courtroom catastrophes, like Brian Foster's, fade over time.

In theory, post-trial delays can spur judges to offer relief, which can range from lower sentences to upgrades of dishonorable or bad conduct discharges to something less serious. In practice, this rarely happens.

"What merits relief and what doesn't, doesn't always make sense to me," said Michelle McCluer, the executive director of the National Institute of Military Justice.

Consider:

Navy Machinist's Mate Third Class Jacob N. Lavoy was convicted of smuggling immigrants in March 2006. It took 1,601 days for his appeal to reach the appellate court docket. Judges called the delay unreasonable. It didn't matter. In March, he was denied relief, which can be a reduced sentence or other compensation to make up for the delay.

Marine Lance Cpl. Robin A. Stagner was convicted of aggravated assault in July 2006. It took 1,459 days for his paperwork to reach the appellate court docket. Judges called the delay unreasonable. It didn't matter. In February, he was denied relief.

Marine Corps Cpl. Marshall L. Magincalda Jr., of Manteca, Calif., was convicted of conspiracy to murder an Iraqi civilian in August 2007. He was acquitted of murder. It took 857 days for superior officers to complete a formal review. Judges called the delay unreasonable. It didn't matter. Last August, he was denied relief.

"He's a little upset over things, which is understandable," said Magincalda's mother, Wendy Magincalda, of Fair Oaks, Calif.

Like clockwork, such post-trial delays have periodically infuriated the nation's highest military appeals court, now called the U.S. Court of Appeals for the Armed Forces.

In 1997, the court said "we continue to be troubled" by

post-trial delays. Three years later, the court insisted "this attitude has to change." Three years later, judges declared "we reject any suggestion that continued delay...should be tolerated." Three years later, noting that delays had become "the norm," the court spoke emphatically.

"Unreasonable delays that adversely impact an appellant's due process rights will no longer be tolerated," the court stated in May 2006.

The last straw came that month in a case involving rape allegations against Marine Corps Cpl. Javier A. Moreno Jr. Moreno waited four years, seven months and 14 days for the U.S. Navy-Marine Corps Court of Criminal Appeals to decide his appeal.

"He served years in prison before getting a chance to challenge his conviction," Moreno's attorney, Navy Lt. Cmdr. Brian L. Mizer said. "It was a pretty glaring error."

During the long delay, Mizer said, Navy investigators destroyed the evidence used against Moreno and thereby undermined his defense in the November 2007 retrial. The second trial also ended in a conviction, meaning Moreno must still register as a sex offender.

"It wasn't fair," Mizer said.

Still, the Moreno decision put the military appellate system on notice.

Deadlines were serious. The supervising officer, who is technically called the convening authority, has 120 days after the trial to approve the verdict and sentence. The initial appellate courts would finish their decisions within 18 months of getting an appeal.

If the government slacked off, defendants would get relief. The pivotal question, though, isn't simply whether there's an unreasonable delay, but whether judges think a delay merits action. Usually, judges don't.

A McClatchy review of U.S. Court of Appeals for the Armed Forces cases decided since Moreno's identified at least 24 dealing with excessive post-trial delay. In 19 cases, judges denied relief even for unreasonable delay.

A McClatchy review of lower-level appellate courts serving the Army, Navy, Air Force and Coast Guard identified at least 45 decisions dealing with post-trial appellate delays since May 2006. These cases didn't receive a full review by the higher court.

In 34 of the 45 cases, the lower-level appellate courts said the defendants would receive no relief even for unreasonable delay. The military considers this a sign of success, as relatively few delays are deemed so outrageous that they require relief.

Skeptics fear it's evidence that foot-dragging is still countenanced.

"Post-trial delays have certainly gotten a lot more high-level attention, but it doesn't seem as if we have gotten rid of all the issues," noted McCluer, of the National Institute of Military Justice.

Senior Airman Alfredo Preciado, for instance, was convicted of indecent acts in September 2004. At one point, prosecutors took 793 days to return the case to the U.S. Air Force Court of Criminal Appeals.

The delay was "definitely outrageous and cannot be tolerated," the Air Force appellate court concluded in 2008.

Nonetheless, judges tolerated it. Citing his crime, among other reasons, they denied Preciado relief.

Manpower shortages contribute to delays. An independent review committee concluded in 2010 that the Navy needed 950 active-duty judge advocates. There are currently about 811, posing what the committee called an "unacceptable legal risk."

Moreover, judges have sometimes faltered.

Appointment to the U.S. Navy-Marine Corps Court of Criminal Appeals was "not viewed as an appointment based on expertise in military justice, litigation expertise, and judicial temperament," the Navy noted in a 2009 assessment. Instead, the Washington-based court sometimes became a pre-retirement transition or a lifestyle choice.

"This detailing process did not produce a bench of highly qualified judges," the Navy's 2009 study noted.

There have since been improvements, with the Navy spokesperson enumerating the "highly qualified senior officers" now serving as judges.

"Many significant improvements have been instituted," the Defense Department's inspector general office acknowledged, while warning that "issues remain that could preclude enduring reform."

It helps that fewer courts-martial are taking place, decongesting the appeals pipeline. In Fiscal 2002, the military conducted 8,100 courts-martial. By 2009, this fell to 5,841.

But for all the improvements, the Brian Foster debacle reminds everyone of what can go wrong.

Everything moved slowly after Foster's 1999 conviction for spousal rape. It took a year for Foster's commanding officer to sign off on the court martial. Another 291 days passed before authorities placed Foster's appeal on the docket. The case bounced from judge to judge. Attorneys kept asking for time extensions.

Foster's appeal languished until he was finally exonerated in 2009. The Pentagon, stung by the judicial negligence, then undertook the studies and reforms whose consequences are still unfolding.

"Change sometimes comes about from something like this," Foster said. "All this might bring about a change that helps the military."

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SUNDAY, AUG. 28, 2011

ONLINE AT: www.mcclatchydc.com/2011/08/28/121849/many-death-sentences-in-us-military.html

Many death sentences in U.S. military overturned

By Marisa Taylor
McClatchy Newspapers

WASHINGTON — In December 2008, former Army Pvt. Ronald Gray was on the brink of becoming the first military execution in almost 50 years.

The rapist and murderer of four women had sat on death row for two decades by the time President George W. Bush approved his death warrant.

But the week before Gray was to receive a lethal injection, a federal judge halted the execution because of a new appeal.

Now, federal defenders who took over his case say they've found new evidence that his original military lawyers should have discovered. If they're successful, Gray could join a growing number of soldiers, airman and marines who have been spared execution.

Of the 16 men sentenced to death since the military overhauled its system in 1984, 10 have been taken off death row. The military's appeals courts have overturned most of the sentences, not because of a change in heart about the death penalty or questions about the men's guilt, but because of mistakes made at every level of the military's judicial system.

The problems included defense attorneys who bungled representation, judges who didn't know how to properly instruct a jury and prosecutors who mishandled evidence.

In all of the cases, the men have been resentenced to life in prison. Eventually, they could be eligible for parole.

Yet by many measures, they're the military's worst of the worst. Convicted of crimes such as serial murder and rape, they're the kinds of criminals that many people would agree the death penalty should be reserved for.

Then why have they been spared?

Critics say the military botched the cases because its judicial system lags behind civilian courts and isn't equipped to handle the complex legal and moral questions that capital cases raise.

Civilian courts have demanded that experienced lawyers be appointed in capital cases and have pushed for a more uniform application of the death penalty. The military, however, hasn't made any major institutional changes to address such problems in more than 25 years.

At almost every level — from trial to appeals — young, inexperienced lawyers routinely have been appointed to represent capital defendants.

"If you have a system where it's always amateur hour and where the lawyers are always trying their first capital case, you're going to guarantee the same kinds of mistakes that have resulted in many, many cases being reversed — because of ineffective assistance of counsel — for the last 30 years are going to be made over and over again," said David Bruck, the director of the Virginia Capital Case Clearinghouse, a legal aid clinic.

"Even worse, you may have cases where the person is not only sentenced to death because of their lawyers' mistakes but because the courts will say that it's close enough for government work."

Even though the military has assigned more seasoned lawyers in some recent high-profile cases, the efforts are inconsistent and often can depend on the branch.

For instance, Charles Gittins, a civilian lawyer who hadn't tried a capital case, asked the Army earlier this year to appoint qualified counsel to help him represent a client who was eligible for the death penalty. Gittins was turned down.

In contrast, the Guantanamo detainee who's accused of masterminding the 2000 suicide attack on an American Navy warship recently was appointed a civilian attorney with decades of capital experience. In fact, all six Guantanamo detainees likely to face the death penalty before a separate military commissions system are guaranteed experienced attorneys.

That's because a 2009 law requires the military to appoint qualified attorneys or "learned counsel" for the terrorism suspects. No such provision exists for the regular courts-martial where service members face criminal charges.

"Khalid Sheikh Mohammed can expect to get learned counsel, but your average military guy can't," said Gittins, a former military lawyer. "It's really bizarre to me that a terrorist who attacked the country can get qualified counsel but a U.S. citizen and soldier can't."

Military officials could argue, and often do, that they can't provide the kinds of expert attorneys that most civilian courts now require. Defense attorneys and prosecutors generally rotate out of their jobs after a couple of years, and many are unlikely to get experience in capital cases.

The military also shrugs off its 80 percent overall sentence-reversal rate as a natural part of the appeals process in highly scrutinized cases. The civilian court system, however, has responded to a 47 percent reversal rate as a sign of the need for reform.

"Each outcome was entirely case-specific," said Jennifer Zeldis, a spokeswoman for the Navy's Office of the Judge Advocate General, which had four of its five capital cases overturned on appeal. "Attempting to draw conclusions as to systemic issues is problematic because of the small number of death penalty cases tried over a wide number of years."

In January, the Army launched a review of its handling of capital cases, but officials said it wasn't prompted by any specific concerns.

"Any good criminal justice system worth its salt is constantly looking at how it does business," said Col. Chuck Pede, who oversees criminal law policy for the Army's Office of the Judge Advocate General.

Pede, who has experience as a prosecutor and defense attorney over a 24-year legal career, said the Army has teamed up less experienced lawyers with more seasoned attorneys or supervisors in more complex cases.

"I don't see any major systemic issues that cry out for action on the part of the armed forces," he said of capital cases.

But for at least a decade, military judges and lawyers have called on the U.S. military to fix its capital system.

Critics say the military has resisted broader changes because it views its court system as separate and unique. Created by Congress to keep order in the military ranks, the military has a judicial system where all the constitutional rights taken for granted in civilian courts don't always apply, experts said. The system is decentralized and each branch operates independently, making sweeping criminal-justice reform difficult.

"If you look at the strength of the military, it's an admirable quality in our military men and women that they have a can-do, make-do attitude. It's a recognition that military conditions are not always ideal and a real leader steps up and figures things out," said Denny LeBoeuf, the director of the American Civil Liberties Union's Capital Punishment Project. "That's a great attitude in a lot of situations, but it is not protective of the standards that are necessary in capital cases."

Further, the Pentagon is consumed with two wars and facing the hard choices of cost cutting. The criminal justice system isn't as much of a priority.

But experts said there were alarming signs of the need for reform, including a racial disparity that's worse in some ways than in civilian courts. Ten of the 16 men who've been sentenced to death since 1984 were minorities. Of those, six had their sentences overturned.

According to one recent study obtained by McClatchy, minorities are twice as likely to be sentenced to death in courts-martial as their white counterparts, a statistic that's higher than is known to exist in most civilian court systems.

Almost 40 years ago, the U.S. Supreme Court recognized that sentencing in capital cases resulted in stark disparities, often along racial lines. The landmark ruling, Furman v. Georgia, invalidated much of the civilian capital system and ushered in a string of other capital decisions, including recognizing the importance of qualified defense attorneys.

The military has tried to improve the quality of its attorneys appointed in all criminal cases. In 2007, for instance, the Navy established a program that allows a group of more than 50 lawyers to remain in criminal justice throughout their military careers. The Army has revamped its training.

However, the new attorney for the only Navy defendant whose sentence hasn't been reversed is five years out of law school and has no experience with death penalty cases. To prepare for litigation that the Supreme Court has concluded is among the most difficult, the attorney attended a three-day conference offered by a nonprofit group.

Over the course of his appeal, the defendant, Kenneth Parker, who was convicted of killing two fellow Marines, has had at least seven lawyers. They've written so many different briefs that the courts recently ordered his new lawyer to start from scratch and file one appeals brief, as is customary in a capital case.

"The case is dazzlingly complex," said the lawyer, Maj. Kirk Sripinyo. "Anyone at any experience level would say it's difficult."

The judge who's overseeing a crucial issue in Parker's appeal — questions about whether Parker is mentally retarded and therefore ineligible for the death penalty — was discovered to have discussed the case with one of the experts in the case without the knowledge of the lawyers. Such discussions are seen as improper and could be a sign that even the judge was out of his depth, experts said.

Making matters more complicated, Parker's evidence was tested by a discredited North Carolina bloodstain pattern analyst who recently was accused in other cases of hiding or manipulating evidence to ensure a win for prosecutors

In the meantime, an appeals court overturned part of the conviction of Parker's accomplice three years ago because the judge mishandled an expert's misconduct at trial. At a new trial last year, the other defendant was sentenced to life.

Yet almost two decades after Parker's conviction, his case hasn't even completed the first level of appeal, a delay that's striking even in a capital case and that "has not been explained to me," his lawyer said.

Such examples have prompted even some former prosecutors and military lawyers who favor the death penalty to conclude that the military could do more to improve its handling of capital cases.

Charles Feldmann, who prosecuted Jessie Quintanilla, a Marine sergeant convicted of murdering his superior officer and almost killing another, said he was too inexperienced to be the lead prosecutor in the case when it was tried in 1996.

In his 20s with less than three years of experience as a lawyer, he ended up making mistakes, he said. One of them, he said, was to keep the murder weapon, a gun, as a trophy and to hang it on the wall of his office.

"It was the action of an extremely emotional and overaggressive prosecutor who did not see the big picture," Feldmann said of his behavior. "I can't describe to you how easy it is to get rolled into the passion and the emotion of some of these cases. You can lose some of your judgment."

A military appeals court overturned Quintanilla's sentence because of the judge's mishandling of the jury selection.

Separately, the court excoriated Feldmann and the other prosecutors for "unethical" behavior, saying it had "besmirched the military justice system."

After the trial, one of the other prosecutors had given the surviving victim the bullet that had pierced his chest. The same prosecutor also kept a knife from the crime for himself.

"There is a line between zealous prosecution infused with righteous indignation, on the one hand, and unethical conduct, on the other," the Navy-Marine Corps Court of Criminal Appeals wrote. "These two judge advocates crossed that line on several occasions in this capital court-martial."

Instead of retrying him, the military sentenced Quintanilla to life in prison. He's eligible for parole, although the families of his victims had wanted him to be executed.

"This guy is a monster and deserves to be on death row," said Feldmann, who's now a civilian attorney and volunteers his time to help teach military lawyers, partly because of what happened in the case. "But because I didn't know how to handle death penalty cases, I failed. I failed the Marine Corps and I failed the family of the victims."

Despite such high-profile screw-ups, the military has chosen not to follow the lead of civilian courts.

Last year, Navy Lt. Cmdr. Stephen Reyes surveyed capital systems in the country and found that 80 percent of all state systems, plus the federal court system, have set up minimum standards for the quality of the defense appointed in death penalty cases. The military has no such requirement for its courts-martial, and Reyes thinks it should.

Experts said the military could create an office for complex cases such as capital trials made up of lawyers from all the military services, similar to what was created for the separate military commissions system for Guantanamo detainees. Or the military could hire more seasoned civilian lawyers, a phenomenon that's already occurring in a limited way across the military's justice system in general.

"We've already seen massive transformations in the civilian courts when it comes to defense counsel," said Reyes, who's represented military defendants accused of capital crimes. "Now it's time for the military courts-martial to get on track, before a miscarriage of justice occurs."

(Tish Wells contributed to this article.)

McClatchy

WEDNESDAY, SEPT. 21, 2011

ONLINE AT: www.mcclatchydc.com/2011/09/21/124823/flawed-new-rape-law-roils-military.html

'Flawed' new rape law roils military justice system

By Michael Doyle and Marisa Taylor
McClatchy Newspapers

WASHINGTON _ Six years ago, Congress tried cracking down on rape in the military. Prompted by disturbing reports of sexual assaults in military academies and war zones, lawmakers rewrote the rules. They wanted to protect victims and help prosecutors.

Now it's clear that the effort backfired.

The politically attractive but poorly understood legal changes have incited courtroom confusion, judicial frustration and constitutional conflict. Extensive interviews and a McClatchy review of thousands of pages of court documents and internal studies find a congressionally caused crisis of military justice that few civilians know anything about.

The rewritten sexual assault law puts judges "in an impossible position," the top military appellate court warned. Military lawyers find it "cumbersome and confusing," a Pentagon task force noted. It leads to "unwarranted acquittals," Defense Department officials added. And some judges call it unconstitutional.

"The law is an abomination as it is now written," said Charles Gittins, a former military judge advocate who's now a defense attorney.

Individual military judges likewise assail the new law. One, Marine Corps Lt. Col. Raymond Beal II, called it "horribly flawed." Another, J.A. Maksym of the U.S. Navy-Marine Corps Court of Criminal Appeals, blasted it as "poorly written, confusing and arguably absurd." Yet another, Air Force Col. Don Christensen, called it "almost incomprehensible."

"If you had 100 monkeys with a typewriter, they'd probably come up with something like this," Christensen declared during a 2009 aggravated sexual assault case.

A Senate bill introduced in June and proposed by the Defense Department tries to fix the problems that the earlier congressional action created. The bill is pending.

The present law now under fire has particularly complicated trials that involve intoxicated victims and those who say they've been assaulted by acquaintances, two common allegations in the military. The confusion about the law can lead to injustice.

Consider the case of a former Air Force enlisted man stationed at California's Travis Air Force Base.

Stephen Prather, 23, had been accused of aggravated sexual assault by an intoxicated guest of a party that Prather and his wife threw in October 2007.

Prather said he and the guest had engaged in consensual sex. The woman, though, testified that she fell asleep and woke briefly to find Prather on top of her. When she awoke again, she said, she found semen on her underwear.

Prather had raised the woman's alleged consent as a defense. Prosecutors countered that the woman, whom court documents didn't identify, was too intoxicated to give consent.

The problem was that the rewritten law had shifted the burden of proof involving consent, appeals court judges concluded. Prather, as the defendant, had the burden to prove that the alleged victim was capable of consenting. Under the Constitution, though, it's the prosecution that's supposed to shoulder the burden of proof.

This "results in an unconstitutional burden shift to the accused," the U.S. Court of Appeals for the Armed Forces said of the new law in its February 2011 decision dismissing Prather's conviction.

Prather already had served almost 11 months of a two-and-a-half year prison sentence. He's awaiting his discharge papers.

"I just want Congress to know this law has messed up a lot of people's lives," he said in a telephone interview from his home in Houston.

"My wife left me. I can't get a good job. I had to register as a sex offender. My life is ruined. All for something that should have never been a crime to begin with," Prather added.

Recently, the military decided not to reprosecute Prather. For other military defendants, the legal ambiguity will continue as challenges inundate appeals courts. The Court of Appeals for the Armed Forces will review several challenges to the law in coming months.

Meanwhile, sexual assaults in the military continue.

More than 4 percent of active-duty women and almost 1 percent of active-duty men reported unwanted sexual contact in 2009, according to the latest annual study from the Pentagon's Sexual Assault Prevention and Response Office.

All told, the military services completed investigations of more than 3,200 suspects in sex-related crimes in fiscal year 2010. Of these, 16 percent faced court-martial.

Heightened political scrutiny of the military's handling of sexual misbehavior dates at least to the 1991 Tailhook affair, in which Navy aviators aggressively groped women at a convention in Las Vegas.

Congressional involvement accelerated in early 2004, after reports of sexual assaults on female troops in Iraq.

A year later, the Pentagon established an office dedicated to responding to and preventing sexual assault. Lawmakers also directed the Pentagon to review the military's laws, known as the Uniform Code of Military Justice.

In an 826-page report, the Pentagon ultimately advised that no changes were necessary. Congress thought otherwise and rewrote the sexual assault provisions as part of a fiscal 2006 defense authorization bill. The intention was clear: Lawmakers wanted to assist prosecutors and shield victims.

Rep. Loretta Sanchez, D-Calif., a key proponent of the changes, called them a "major step" in convicting rapists. Skeptics feared otherwise.

"I'm not a member of Congress, and that's their job to do what they think is necessary," Christensen, the Air Force judge, said during a trial. "I just think it's a prime example of what happens when legislation is influenced by what they see on 'Oprah' and what advocacy seekers propose, as opposed to what's really necessary."

Sanchez's office didn't respond to questions this week.

The Pentagon, in a statement to McClatchy on Wednesday, said it was proposing changes "based on trial court lessons learned and appellate court rulings." The changes were included in a Senate defense authorization bill that was introduced in June.

The current statute includes the crime of "aggravated sexual contact." This includes sex acts with a victim who's "substantially incapacitated," which lawyers say is ill defined. The Pentagon's proposed changes remove the word "aggravated," for example, and more extensively define "substantially incapacitated."

The proposed changes also include eliminating controversial provisions that shift burdens to the defense.

Under the old military code, prosecutors had to prove that the victim hadn't consented. The present measure removed that consent provision. This was supposed to help focus attention on the defendant rather than the alleged victim.

The accused can still claim that the victim consented, by relying on what's called a preponderance of evidence. This has a lower threshold than the prosecution needs to win a criminal conviction. However, prosecutors can still defeat this so-called affirmative defense if they can show beyond a reasonable doubt that the victim didn't consent.

This burden-shifting poses several problems. It defies logic, for one. If the defense has enough evidence to show consent, then by definition it's raised a reasonable doubt. One military appeals court called this conundrum a "legal impossibility."

The other potential problem is constitutional. The Constitution puts the burden of proof on the government, but the new law, in certain circumstances, seemed to shift this burden to the defense.

Consequently, the new rules that took effect Oct. 1, 2007, have been causing trouble just as some had warned they would.

"The guys who didn't want to change the law said, 'This is going to happen,' " said retired Army Brig. Gen. Thomas Cuthbert, who thought that some changes were appropriate. "And, for the most part, it did happen."

Cuthbert assisted the subsequent Defense Task Force on Sexual Assault in the Military Services, which urged Congress in a December 2009 report to go back and fix the problems with the new law.

For now, the military has directed military judges to essentially ignore the troublesome portions of the law when they instruct juries. This still leaves judges in what an appellate court called an "impossible position" as they choose between the law Congress wrote and the instructions the military provides.

This is what happened in San Diego with Marine Corps Staff Sgt. Jose M. Medina.

A Marine lance corporal alleged that Medina, a friend, had sex with her in October 2007 while she was incapacitated from drinking. Medina said she'd consented. After he was convicted, he challenged the law.

Unlike in Prather's case, Medina's judge hadn't instructed the jury based on the law Congress wrote. Instead, the judge read what amounted to old instructions. In doing so, he sidestepped the questionable law but upheld the Constitution. The conviction stood.

"The only course left open, it appears, is for military judges to continue giving 'erroneous' instructions," noted Judge James Baker of the Court of Appeals for the Armed Forces.

McClatchy

SUNDAY, MAY 15, 2011

ONLINE AT: www.mcclatchydc.com/2011/05/15/114221/more-errors-surface-at-military.html

More errors surface at military crime lab as Senate seeks inquiry

By Marisa Taylor and Michael Doyle
McClatchy Newspapers

WASHINGTON — The military's premier crime lab has botched more of its evidence testing than has been previously known, raising broader questions about the quality of the forensic work relied on to convict soldiers, sailors, airmen and Marines.

Now, the Supreme Court could weigh in, while two senators want the Pentagon to open a full-blown investigation. If they start looking, Pentagon officials will find that the crime lab's problems extend beyond one discredited analyst.

The scrutiny comes after McClatchy published a series of stories detailing how a former long-time forensics analyst at the Army Criminal Investigation Laboratory made false statements and mishandled dozens of tests.

A follow-up McClatchy investigation reveals that a second lab analyst, responsible for firearms, was quietly fired for making a false statement and destroying evidence. The lab subsequently had to review 541 firearms cases to make sure they were thorough, properly conducted and met legal requirements. Ultimately, officials determined that none of them needed full retesting.

More recently, a third lab analyst, who handles fingerprints, was found to have erred in at least three cases, one involving murder.

But the previously undisclosed problems go beyond discredited or flawed individual analysts. Some lab employees "do not like...(the) leadership style" of a top lab manager, an Army official conceded in a court deposition in March. Six formal discrimination or retaliation complaints have been filed against lab management in the past three years. One was filed by the lab's former chief attorney, who had helped oversee prior internal investigations into the lab's mistakes.

"The problem is not with just one person, but systemic," said David Sheldon, an attorney for a former Navy man who's challenging the lab's work in an appeal to the Supreme Court. "It's as if (the lab) has had no oversight, and one has to seriously question whether or not it can effectively police itself."

The Atlanta-based lab, commonly known as USACIL, serves all the military branches, handling evidence in more than 3,000 cases annually. The director, Larry Chelko, has been in charge since 1993.

On May 12, the Senate Judiciary Committee chairman, a Democrat, joined a Republican member of the committee in asking the Defense Department's inspector general to investigate the alleged misconduct of one analyst, Phillip Mills.

"Falsified lab tests could have contributed to criminals remaining free and innocent people being wrongfully convicted," wrote Democratic Sen. Patrick Leahy of Vermont and Republican Sen. Charles Grassley of Iowa. "The failure to address these issues in a timely manner could damage the nation's trust in the military justice system."

Lab officials have vigorously defended their oversight and the handling of mistakes and misconduct.

"As with all crime labs across the county, human error does occur from time to time," the Army's Criminal Investigation Command, which oversees the lab, said in a statement. "The control mechanisms designed to identify and correct those issues have proven very effective."

The Army added that the lab's leadership, including Chelko, handled the problems appropriately.

Still, lab officials have been close-mouthed with the news media and slow to inform defense attorneys about mistakes.

The lab never publicly acknowledged the extent of the problem with Mills' work. Many defense attorneys never learned of the massive retesting effort. When McClatchy asked whether other analysts had made mistakes, the military initially refused to say, acknowledging problems only when confronted with details obtained from outside sources.

The military also turned down or responded narrowly to numerous open records requests McClatchy filed that sought more information about Mills' cases, citing privacy rights.

Military officials say they can't comment in detail about the most recent mistakes for fear of tainting jurors. They also can't discuss the discrimination allegations because of privacy laws.

McClatchy pieced together a fuller picture after independently obtaining military documents and conducting dozens of interviews.

In March, McClatchy revealed the military's three-year, $1.4 million internal review of Mills' work. The reviewers disagreed with Mills' DNA results 55 percent of the time. More broadly, they found that Mills neglected tests and overlooked evidence. Making matters worse, officials found that evidence had been routinely destroyed by investigators in hundreds of other cases and therefore

couldn't be retested. The investigators had been following policy at the time.

"The result," forensics analyst Robert Shaler noted in an independent review of the lab, "might have led to a miscarriage of justice."

While investigating Mills, lab officials learned of firearms analyst Michael Brooks' mistake.

Brooks had said he'd examined a hat for gunshot residue and concluded that the weapon had been fired at close range. His supervisor, however, later discovered the hat hadn't been tested. The victim allegedly had shot himself in the right temple, but the hole in the hat was on the left side.

Brooks, who could not be reached for comment, later destroyed evidence from the case file and lied about his actions, investigators concluded.

The lab fired him in 2006.

More recently, a latent fingerprint examiner has been found to have missed several fingerprints. The examiner isn't accused of misconduct, but her mistakes could cast doubt on the overall quality of the lab's work.

The examiner's mistakes came up earlier this year in a pre-indictment hearing of Army Spc. Neftaly Platero. He's accused of killing two of his 3rd Infantry Division roommates and wounding a third in Iraq last year.

The forensic evidence is especially important in Platero's case because the victim who survived doesn't remember the events, said Platero's attorney Guy Womack.

Womack received two separate fingerprint reports with troubling differences prepared by lab examiner Shauna Steffan. In the second report, she identified Platero's prints where she hadn't noticed them before. The lab wasn't required to directly inform Womack of the reasons for the disparity, but he uncovered it during cross-examination.

"I asked why it was retested," Womack said, "and she started squirming."

A review of Steffan's other work found that she'd made similar mistakes in two other cases, Womack said.

When contacted by McClatchy, Steffan said she was instructed not to talk to the media. The Army later said that Steffan didn't wish to be interviewed.

Known as "missed identifications," Steffan's mistakes are an "inevitable part of forensic latent-print casework in all laboratories," the Army said in a statement. Military officials stressed that Steffan didn't make the more serious error in the murder case of misidentifying prints and a corrected report was issued before trial.

As it happens, Womack also represented one of two convicted murderers whose evidence Mills examined.

Mills was found to have missed bloodstains in the 2002 murder trial of Army Pfcs. Jonathan Schroeder and Andrew Humiston, who pleaded guilty to beating a fellow soldier to death. The lapse called into question the quality of Mills' work and the lab's thoroughness in informing defendants of what had gone wrong.

Womack, Humiston's attorney, said he didn't know about the long-ago retesting of the evidence until McClatchy informed him recently.

"It's shady dealing on their part," Womack said. "If the lab was a standup organization, you would have thought they would have reported that."

Womack isn't the only one who's been left in the dark.

As McClatchy revealed in March, naval officers Samuel Harris and Roger House were convicted of charges related to a sexual misconduct case and later exonerated by the Mills retesting effort, but they learned about the retesting only by chance.

Military officials said the lab followed proper evidence-sharing requirements in Brooks' and Mills' cases by sending advisory memos to each military service's legal division.

Nonetheless, the nonpartisan National Institute of Military Justice worries that the military hasn't made enough of an effort to inform defendants.

The institute recently asked the Pentagon's top lawyers to track down all former service members who were convicted with evidence Mills handled. From 1995 to 2005, Mills handled evidence in some 465 cases.

On Thursday, the Pentagon declined the request.

"A system that purports to be just must bring sunlight to this issue in order to put it to rest," said Michelle Lindo McCluer, the institute's executive director.

Despite the Pentagon's reluctance to take a closer look at the lab, others might.

Lab worker Albert Bell has filed a discrimination complaint with the Equal Employment Opportunity Commission contending that lab supervisors engaged in a campaign of "harassment and intimidation" because he's African-American.

"My experience with the lab overwhelmingly tells me that the primary mode is to cover up any misfeasance," his attorney Pete Lown said.

And on May 27, Supreme Court justices will decide whether to hear an appeal that attorney Sheldon filed on behalf of Ivor Luke, a former Navy hospital corpsman second class.

Luke was convicted of indecent assault in 1999, in part with the help of Mills' testimony. Luke served his prison term. Because the evidence in his case had been destroyed, it couldn't be retested after Mills' errors emerged.

Although Luke's appeal could be a long shot, it raises a fundamental question about the military crime lab: How many mistakes can any one analyst, or any one lab, make before all the results must be second-guessed?

The U.S. Court of Appeals for the Armed Forces offered one answer when it rejected Luke's appeal last Janu-

ary. The court reasoned that there was no indication Mills botched Luke's specific case.

Luke's lawyer, though, argues that some government witnesses can be so thoroughly discredited that they can't be relied on at all.

In a 1956 Supreme Court ruling, for instance, the justices threw out convictions based on the testimony of an anti-communist informant who officials later came to believe had made false and "bizarre" claims in other cases.

The witness "by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity," Chief Justice Earl Warren wrote.

(Tish Wells contributed to this report.)