UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**ACM 36785**
Appellee	**)**	
	)	
v.	**)**	
	)	**ORDER**
Senior Airman (E-4)	**)**	
ANDREW P. WITT,	**)**	
USAF,	**)**	
Appellant	**)**	***En Banc***

On 10 July 2008, counsel for the appellant, citing newly discovered evidence, submitted a Motion for a New Trial (Sentence Rehearing) with this Court. Specifically counsel avers that the following are newly discovered evidence warranting a new trial: (1) a post-trial declaration from Dr. Thomas Reidy opining, based in part on prison studies that were not in existence at the time of the appellant's court-martial, that "violent offenders, murderers, and capital murderers, as a group, are not a disproportionate risk for engaging in serious prison violence if confined for life, and indeed may be less of a risk"; (2) a post-trial declaration from Lieutenant Commander Jason Grover quoting Mr. Peter Grande's comment at a legal lecture that "USDB murder inmates are its better behaved inmates"; and a post-trial declaration from Mr. Thomas Markiewicz quoting Mr. Peter Grande's assessment that the appellant is a "good and compliant inmate who has had only one disciplinary infraction, for possessing an unauthorized item in his cell."

On 8 September 2008, counsel for the United States submitted an Opposition Brief to the appellant's motion for a new trial. Counsel for the United States essentially avers the appellant has not made the threshold showing of newly discovered evidence and has not met his burden of establishing such evidence would "probably produce a substantially more favorable result."

Petitions for new trials are disfavored in the law; relief is granted only to avoid a "manifest injustice." *United States v. Harris*, 61 M.J. 391, 394 (C.A.A.F. 2005) citing *United States v. Williams*, 37 M.J. 352, 356 (C.M.A.1993).

R.C.M. 1210(f)(2) provides that a new trial shall not be granted on the grounds of newly discovered evidence unless the petition demonstrates that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial. *State v. Nickerson*, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (N.C. Sep 03, 1987) *Cert. Denied, Nickerson v. Lee*, 507 U.S. 923, 113 S.Ct. 1289, 122 L.Ed.2d 681, 61 USLW 3582 (U.S.N.C. Feb 22, 1993); *U.S. v. Bolden*, 355 F.2d 453, 461 (7th Cir.(Ill.) Dec 29, 1965) *Cert. Denied, Bolden v. U.S.*, 384 U.S. 1012, 86 S.Ct. 1919, 16 L.Ed.2d 1018 (U.S.Ill. Jun 20, 1966); *State v. Reed*, 971 S.W.2d 344, 348 (Mo.App. W.D. Jul 14, 1998); and *U.S. v. Lafayette*, 983 F.2d 1102, 1105, 299 U.S.App.D.C. 288 (D.C.Cir. Jan 29, 1993).

Newly discovered evidence must pertain to facts which existed at the time of trial, not later events. *U.S. v. Welch*, 160 F.Supp.2d 830, 833 (N.D.Ohio Sep 04, 2001) citing *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 135 (6th Cir.1990); *United States v. Lafayette*, 983 F.2d 1102, 1105 (C.A.D.C.1993); and Moore's Federal Practice 3D Vol. 12 ¶ 60.81[4].

Post-conviction discovery of psychiatrist who reached a different conclusion on the same evidence presented at trial does not constitute newly discovered evidence warranting a new trial. *Booker v. State*, 413 So.2d 756, 757 (Fla. Apr 19, 1982) *Cert. Denied, Booker v. Florida*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (U.S.Fla. Oct 19, 1981).

Expert testimony may not be considered newly discovered for purposes of a new trial motion simply because recent studies may lend more credibility to expert testimony that was or could have been presented at trial. *Com. v. LeFave*, 430 Mass. 169, 181, 714 N.E.2d 805, 813 (Mass. Aug 18, 1999).

Against this backdrop, the evidence the appellant cites as the basis for its motion is not newly discovered evidence. First, with respect to the evidence Dr. Reidy would or would have offered, a portion of his opinion is based on resources that existed prior to the appellant's court-martial and the appellant has failed to highlight how he could not have obtained Dr. Reidy's opinion through due diligence. Second, Dr. Reidy's post-conviction opinion is precisely the type of evidence courts have routinely found not to be newly discovered evidence. *See Booker v. State*, 413 So.2d 756, 757 (Fla. Apr 19, 1982) *Cert. Denied, Booker v. Florida*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (U.S.Fla. Oct 19, 1981) and *Com. v. LeFave*, 430 Mass. 169, 181, 714 N.E.2d 805, 813 (Mass. Aug 18, 1999).

Concerning Mr. Grande's comments, as highlighted by Lieutenant Commander Grover and Mr. Markiewicz, if he made those comments they were made well after the appellant's court-martial and concern facts that did not exist at the time of the appellant's court-martial. Thus they are not newly discovered evidence. *See State v. Nickerson*, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (N.C. Sep 03, 1987) *Cert. Denied, Nickerson v. Lee*, 507 U.S. 923, 113 S.Ct. 1289, 122 L.Ed.2d 681, 61 USLW 3582 (U.S.N.C. Feb 22, 1993); *U.S. v. Bolden*, 355 F.2d 453, 461 (7th Cir.(Ill.) Dec 29, 1965) *Cert. Denied, Bolden v. U.S.*, 384 U.S. 1012, 86 S.Ct. 1919, 16 L.Ed.2d 1018 (U.S.Ill. Jun 20, 1966); *State v. Reed*, 971 S.W.2d 344, 348 (Mo.App. W.D. Jul 14, 1998); *U.S. v. Lafayette*, 983 F.2d 1102, 1105, 299 U.S.App.D.C. 288 (D.C.Cir. Jan 29, 1993); and *U.S. v. Welch*, 160 F.Supp.2d 830, 833 (N.D.Ohio Sep 04, 2001) citing *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 135 (6th Cir.1990); *United States v. Lafayette*, 983 F.2d 1102, 1105 (C.A.D.C.1993); and Moore's Federal Practice 3D Vol. 12 ¶ 60.81[4].

Lastly, concerning all the evidence the appellant cites as the basis for his motion for a new trial, and assuming that it is newly discovered evidence, the appellant has woefully failed to meet his burden of establishing that the evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for himself. In short, the appellant has failed to meet any of the petition for new trial prongs enunciated in R.C.M. 1210(f), the failure of which to meet any one prong warrants a denial of his motion.

Accordingly, it is by the Court on this 21st day of April, 2010,

ORDERED:

The appellant's Motion for a New Trial is hereby **DENIED**.

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court