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We encourage readers of The Advocate to submit articles pertaining to legal issues which are of particular importance to trial defense counsel and warrant examination in the pages of this journal; your contributions, comments, and suggestions can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.

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OPENING STATEMENTS

The Guilty Plea: A Symposium

Part One

The practicalities of administering criminal law justify the traditional judicial power to accept a plea of guilty. That power may be exercised, however, only after the court insures that the plea is voluntarily entered by an accused who is aware of its consequences. Because the defense counsel's crucial responsibilities in this context can be met only if he is familiar with the legal precepts governing the entry and acceptance of the plea, as well as its ramifications on appellate review, the staff of The Advocate has prepared a two-part symposium on the obligations of a defense counsel whose client decides not to contest criminal charges pending against him.

The lead article provides a conceptual framework useful in ascertaining the types of legal errors which are waived by a provident guilty plea. The procedure for establishing providence is frequently the subject of appellate litigation, and the second article suggests ways in which the defense counsel can minimize the risk that his client will forfeit the benefits of a pretrial agreement. Once he has fully apprised the accused of the consequences of pleading guilty and has successfully guided him through the providence inquiry, the defense counsel's duties center around the court-martial's sentencing phase. The final article demarcates the permissible scope of prosecutorial arguments at this stage of the proceeding by cataloguing the errors which have been held prejudicial on appeal.

The second part of the symposium, which will be published in the next edition of The Advocate, will include a survey of the ethical problems attending the representation of accused who desire to plead guilty; an analysis of the military judge's obligation to determine the meaning and propriety of pretrial agreements in accordance with United States v. Green, 1 M.J. 453 (CMA 1976), United States v. King, 3 M.J. 458 (CMA 1977), and their progeny; and a checklist of specific legal issues which are waived by a provident guilty plea.

THE GUILTY PLEA'S IMPACT ON APPELLATE REVIEW

By Captain Richard W. Vitaris, JAGC*

Although many issues are waived by a guilty plea, trial defense counsel may reduce the impact of waiver upon appellant review. In this article, Captain Vitaris, after discussing the theoretical foundation of guilty plea waiver, suggests ways in which defense counsel may preserve issues for appeals despite the guilty plea. His proposals include the suggestion that counsel negotiate conditional guilty pleas. Captain Vitaris examines the conditional guilty plea under present law, and concludes that it can be an effective tool for defense counsel.

During the providence inquiry, the military judge must¹ inform an accused that by pleading guilty he waives the right against self-incrimination; the right to confront the witnesses against him; and the right to compel the government to prove its case beyond a reasonable doubt.² Because the accused probably knew beforehand that his guilty plea relinquished the right to a trial on the issue of guilt, problems rarely arise from the waiver of these rights.³ Other important rights, however,

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1. Paragraph 70b, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969]. This advice is also incorporated in the "boiler plate" providency inquiry set forth in para. 3-2, Department of Army, Pamphlet No. 27-9, Military Judges' Guide (1969).

2. United States v. Threadgill, 2 M.J. 1133, 1134-35 (CGCMR 1976).

3. Furthermore, "[i]f an accused . . . after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . the court shall proceed as though he had pleaded not guilty." Article 45(a), Uniform Code of Military Justice, 10 U.S.C. §845 (1976) [hereinafter cited as UCMJ].

some of which are of constitutional dimension, may also be waived by a guilty plea, including the right not to have evidence obtained through illegal confessions⁴ or searches and seizures⁵ admitted; the right to a speedy trial;⁶ and the right to a fair and impartial Article 32 investigation⁷ and Article 34 pretrial advice.⁸ Indeed, it is a "fundamental principle of federal criminal law that a plea of guilty waives all defects which are neither jurisdictional nor a deprivation of due process of law."⁹

I. An Emerging Theory of Guilty Plea Waiver

A guilty plea is by its nature the accused's judicial admission that he is factually guilty of the charged offense, but it admits no more than that. Even a (factually) guilty accused may, of course, plead not guilty and thereby require the government to prove guilt beyond a reasonable doubt. Occasionally, the government will not be able to meet its burden and the (factually) guilty defendant will be found (legally) not guilty. Accordingly, legal commentators refer to the former type of guilt as "factual guilt" and the latter as "legal guilt."¹⁰ Because it admits factual guilt, the guilty plea relieves the government of its responsibility to prove legal guilt. Legal guilt, on the other hand,

4. United States v. Dusenberry, 23 USCMA 287, 290, 49 CMR 536, 539 (1975).

5. Id.

6. United States v. Schalck, 14 USCMA 371, 34 CMR 151 (1964) (defendant did not raise timely objection and pled guilty). However, if raised at trial, a speedy trial issue will survive a guilty plea. United States v. Sloan, 22 USCMA 587, 48 CMR 211 (1974).

7. United States v. Rehorn, 9 USCMA 487, 488, 26 CMR 267, 268 (1958); United States v. Blakney, 2 M.J. 1135, 1139 (CGCMR 1976).

8. United States v. Packer, 8 M.J. 785, 788 (NCOMR 1980).

9. United States v. Schalck, supra note 6; United States v. Rehorn, supra note 7.

10. See Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 465 n.6 (1980).

must be proven in a manner consistent with a complex of constitutional and procedural requirements¹¹ which demand more than proof of factual guilt. These requirements impose a series of safeguards designed to protect such fundamental constitutional values as the presumption of innocence and the government's obligation to prove its case beyond a reasonable doubt in a manner consistent with the Constitution.¹² The legal guilt requirements also pertain to the investigative processes by which reliable final judgments are rendered.

Since the requirements imposed upon the government in a criminal trial stem from fundamental principles of constitutional law, they are imprecise, and remain as much the subject of litigation and evolving case law as constitutional law generally. The trial forum lends these requirements substance since the government must marshal its evidence, present it in accordance with constitutional and evidentiary safeguards, and prove guilt beyond a reasonable doubt.¹³ A gun with the accused's fingerprints upon it, for example, while highly probative of factual guilt, may be constitutionally inadmissible if it is the product of an illegal search and seizure.¹⁴ Since the accused who pleads guilty waives the right to be proven legally guilty in accordance with these "legal guilt" requirements, it is reasonable to contend that the plea waives appellate review of objections premised upon those requirements.¹⁵ There is no logical basis, however, for inferring a waiver of any other rights from the admission of factual guilt inherent in a plea of guilty.

11. Id. at 465.

12. Id. at 466-68.

13. Id.

14. See *Mapp v. Ohio*, 367 U.S. 643 (1961); Mil R. Evid. 311(d).

15. While it is reasonable, it may not reflect sound policy. For a compelling argument that considerations of judicial efficiency and economy as well as American constitutional values support an accused's assertion of fourth, fifth, and sixth amendment claims after a guilty plea, see Note, Conditional Guilty Pleas, 93 Harv. L. Rev. 564 (1980). The Military Rules of Evidence now mandate waiver of all issues under the fourth amendment and most other issues related to legal guilt. See Mil. R. Evid. 304(d)(5), 311(i) 321(g).

The Court of Military Appeals has recognized, in principle, this approach to the waiver doctrine in guilty plea cases. In United States v. Hamil,¹⁶ the Court addressed an alleged violation of the Fourth Amendment by noting that:

[T]he right to be free from unreasonable search and seizure is not judicially recognized as a mere abstract principle, but is vindicated by keeping out of evidence the results of the search or seizure. If a fact is judicially admitted by the accused, no legal or practical purpose can be served by reviewing the propriety of the search which produced some evidence of the conceded fact.¹⁷

A provident guilty plea generally waives appellate review of alleged violations of the legal guilt requirements in civilian practice,¹⁸ and the same rule apparently applies to the military.

Accordingly, it has been held that a provident guilty plea does not waive an objection to a fatally defective specification.¹⁹ In such a case, the accused's guilty plea logically represents no more than an admission of factual guilt as to the specifications charged. It is not an admission of the correctly specified offense. More importantly, the Court of Military Appeals has stated:

A plea of guilty may indicate a willingness to disregard an error in the proceedings that might otherwise have affected the findings of guilt as to offenses covered by the plea, but it does not signify surrender of an objection to the validity of findings not predicated upon a plea of guilty or as to sentence.²⁰

16. 15 USCMA 110, 35 CMR 82 (1964).

17. Id. at 111, 35 CMR at 83 (emphasis added). But see Note, supra note 15 (important policy interests would be served by allowing appeal of "legal guilt" issues after entry of guilty plea).

18. See Note, supra note 15, at 564-65.

19. United States v. Eslow, 1 M.J. 620, 633 (ACMR 1975).

20. United States v. Engle, 1 M.J. 387, 388 (CMA 1976).

Defense counsel must understand how this theory of guilty plea waiver applies to diverse situations, and in this connection two illustrative cases merit discussion. In United States v. McBride,²¹ the accused pled guilty to absence without leave. One of the court members who sentenced the accused should not have been on the panel because he had assisted the government in preparing its case. The Navy Board of Review reversed the findings and set aside the conviction. On certification from The Judge Advocate General of the Navy, the Court of Military Appeals reversed as to the findings of guilt and ordered a sentence rehearing. The court reasoned that by pleading guilty the accused waived his right to challenge the membership of the court in so far as the findings were concerned, but did not waive appellate review of the court's composition with regard to sentencing.²² The tribunal thus recognized--at least implicitly--that while a court composed of impartial adjudicators is one of the judicial system's foremost "legal guilt" requirements,²³ defects in the membership of the court-martial are waived for findings purposes by a judicial admission of factual guilt. On the other hand, such an admission is in no way related to procedural safeguards concerning sentencing: an accused is entitled under the Manual to sentencing by an impartial court²⁴ regardless of whether the finding of guilt resulted from a plea.

In United States v. Tharp,²⁵ the accused pled not guilty to larceny but guilty to the lesser included offense of wrongful appropriation. He was convicted of larceny and appealed. After concluding that certain statements were admitted in violation of the accused's sixth amendment rights, the Navy Board of Review dismissed the larceny conviction. On certification, the Court of Military Appeals held that the lower court erred, and stated that they should have ordered a rehearing or reduced the sentence to that applicable for wrongful appropriation.²⁶ Because

21. 6 USCMA 430, 20 CMR 146 (1955).

22. Id. at 436, 20 CMR at 152.

23. See Arenella, supra note 10, at 466.

24. See para. 62, MCM, 1969.

25. 11 USCMA 467, 29 CMR 283 (1960).

26. Id. at 469, 29 CMR at 285.

of the guilty plea to wrongful appropriation, the government had no burden to prove legal guilt with respect to that charge. Thus, the erroneous admission of certain statements did not impinge upon the validity of the finding of guilt as to wrongful appropriation. The court noted that "[w]hen an accused judicially confesses an offense . . . no particle of harm can result from the admission of his extrajudicial declarations, however obtained."²⁷

The McBride²⁸ and Tharp²⁹ opinions indicate that a provident guilty plea waives appellate review of alleged violations of "legal guilt" requirements—that package of constitutional and procedural safeguards designed to assure a full and fair judicial proceeding. The guilty plea does not waive appellate review of rights which are unrelated to these requirements.³⁰ Accordingly, the impact of a provident guilty plea on the scope of appellate review can be ascertained only after analyzing the rights at issue and the manner in which they relate to the adjudication of guilt. Such an analysis is essential since the scope of our system's legal guilt requirements is ambiguous³¹ and there is plainly room for argument as to whether a particular error relates to the adjudication of guilt. The violation of the right to a speedy trial, for example, does not relate to that adjudication, and consequently it is not waived by a provident plea of guilty.³² Importantly, this holding is based on policy grounds. As one court noted, "one of the principal purposes of the right to a speedy trial is to avoid oppressive

27. Id. But see Note, supra note 15.

28. United States v. McBride, supra note 21.

29. United States v. Tharp, supra note 25.

30. Although the guilty plea does not waive review of the denial of rights not related to legal guilt requirements, such rights may be waived in other ways. The failure to timely object, for example, will waive a speedy trial objection. See United States v. Hounshell, 7 USCMA 3, 21 CMR 1956. But cf. United States v. Schalck, supra note 9 (no waiver despite failure to make timely objection where delay amounts to violation of due process).

31. See text preceding note 13, supra.

32. United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959). See note 30 supra.

delay which might well lead a defendant to conclude that his best interests would be served by judicially confessing his guilt."³³ A similar argument may be made in other contexts.

Some courts have held that errors stemming from a defective pretrial investigation³⁴ or advice³⁵ are waived by a provident guilty plea because they relate to the adjudication of guilt. These decisions, however, may be interpreted more narrowly since not all such defects are necessarily related to adjudication. Thus, in United States v. Packer the court considered the accused's guilty plea to have waived his objection to a pretrial advice which erroneously suggested that the testimony of a government witness was more damaging than it actually was. The court reasoned that the guilty plea admitted the "ultimate issue to which the witness' testimony was relevant" and was "just the kind of deficiency which is properly waived by a guilty plea."³⁶ Where an accused can show that a faulty pretrial investigation or an erroneous pretrial advice resulted in prejudice not vitiated by the judicial admission of guilt, such as where, but for the misadvice, there was a substantial likelihood that charges would not have been preferred or that the charges would have been tried before a lower level of court-martial, no waiver should result from the mere entry of a guilty plea.

The government's obligation to conduct a thorough and impartial investigation constitutes an important safeguard for the accused, since no charge may be referred to a general court-martial without it.³⁷ The pretrial advice is also important since the convening authority may not refer a charge to a general court-martial unless he finds that it alleges an offense and is warranted by evidence reflected in the report of investigation.³⁸ He must refer the case to his staff judge advocate for

33. Id. at 504, 28 CMR at 70.

34. United States v. Rehorn, supra note 7; United States v. Williams, 1 M.J. 1042, 1044 (NCMR 1976).

35. United States v. Packer, supra note 8; United States v. Blakney, supra note 7.

36. United States v. Packer, supra note 8, at 788.

37. Article 34, UCMJ.

38. Id.

advice on this question before directing trial by general court-martial,³⁹ and he customarily accords great weight to the latter's recommendations. Indeed, the investigation and pretrial advice are so integral to the fair administration of military justice that a pretrial agreement conditioned upon the waiver of those rights is void as against public policy.⁴⁰ When an error involving Articles 32 or 34 offends the policy underlying those provisions--specifically, that charges not be referred to a general court-martial absent a thorough and impartial investigation--a subsequent plea of guilty should not constitute waiver.⁴¹ Where the faulty investigation does not violate this policy, however, and instead prejudices the accused by interfering with his rights in the guilt adjudication process, such as denying him the opportunity to secure favorable evidence or a witness, then the error pertains to a legal guilt requirement and is properly waived by a judicial admission of guilt.⁴²

II. Exceptions to Application of Waiver by Guilty Plea

Since waiver is "an intentional relinquishment or abandonment of a known right or privilege,"⁴³ it would be improper to deem appellate review

39. Id.

40. United States v. Holland, 1 M.J. 58, 60 (CMA 1975); United States v. Chinn, 2 M.J. 962 (ACMR 1976). But cf. United States v. Walls, 8 M.J. 666 (ACMR 1979) (condition in pretrial agreement in which accused waives Article 32 investigation may not violate public policy if proposed by accused).

41. This is analagous to the policy-based rationale for not considering a provident guilty plea to waive a speedy trial violation. See United States v. Brown, supra note 32. See also notes 32, 33 and accompanying text, supra.

42. This is analagous to the rationale for holding that a provident guilty plea waives fourth, fifth, and sixth amendment issues related to the admission of evidence. See United States v. Hamil, supra note 16; see also notes 16-18, and accompanying text, supra.

43. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).

of legal guilt issues to be waived if the accused or his attorney⁴⁴ did not know that the guilty plea would have that consequence. Accordingly, courts recognize two exceptions⁴⁵ to the general theory of waiver by guilty plea. Although the exceptions are analytically identical, they are dealt with somewhat differently by courts due to semantical problems, and will be treated separately here.

A. Induced Pleas

If the entry of a guilty plea was clearly induced by some representation, action, or omission by the military judge which led an accused or his counsel to believe that the plea would not waive appellate review on issues of legal guilt, courts will not apply the waiver doctrine.⁴⁶ This situation must be carefully distinguished from cases in which the accused's decision to plead guilty was prompted by the denial of a suppression or other pretrial motion relating to legal guilt. An

44. In cases involving the fourth and sixth amendments, it is commonplace for the defense attorney to waive objections through an intentional failure to make a timely objection. This is not impermissible when motivated by discernible considerations of trial strategy. See *Whitney v. United States*, 513 F.2d 326, 328-29 (8th Cir. 1974).

45. Since they are consistent with the emerging theory of waiver, see Section I supra, they are not really exceptions, but are referred to as such for convenience.

46. See *United States v. Dean*, 41 CMR 763 (NCOMR 1969); *United States v. Williams*, 41 CMR 426 (ACMR 1969). But see *United States v. Geraghty*, 40 CMR 499 (ABR 1968) (dictum). The "induced plea" exception traces its origin to language in the leading case of *United States v. Hamil*, supra note 16, wherein the Court addressed the facts before it noted:

The accused does not dispute the voluntariness of his plea; and there is nothing in the record to cast any doubt upon its providential nature. On the contrary, it affirmatively appears that the ruling on the motion to suppress "was not a factor in prompting the plea."

Id. at 112, 35 CMR at 84, citing *Amprister v. United States*, 256 F.2d 292 (4th Cir 1958).

accused may litigate many issues of legal guilt before entering a plea. Indeed, Military Rule of Evidence 311 departs from prior practice and provides that motions to suppress shall be tendered prior to entry of pleas.⁴⁷ The denial of a suppression motion does not render a subsequent guilty plea improvident, because the motion relates to the proof of legal guilt and the guilty plea is an admission of factual guilt. As noted above, the factually guilty defendant may contest his legal guilt, but even a blatantly erroneous ruling on an issue of legal guilt is irrelevant to the providence of a judicial admission of factual guilt.⁴⁸

One commentator has suggested that a guilty plea entered with the military judge's understanding that legal issues are reserved for appeal⁴⁹ is the equivalent of a "conditional plea" and that counsel should consider negotiating such a plea with the convening authority if a case involves only legal issues and the facts demonstrate the accused's guilt.⁵⁰ In such a case, the cost of a trial to prove factual guilt is saved and litigation of the central issue of legal guilt is expedited; indeed, the benefits of such pleas have been extolled by courts⁵¹ and commentators.⁵² No published opinion of the military courts has yet

47. Mil. R. Evid. 311. Prior to the promulgation of this rule, the decision to hear a motion to suppress before the entry of a plea or to defer the same until trial rested within the judge's sound discretion. See United States v. Allen, 6 M.J. 633 (CGCMR 1978); United States v. McIver, 4 M.J. 900 (NCMR 1978).

48. Compare United States v. Dean, supra note 46 (no waiver where defense counsel changed plea to guilty stating that he understands that the objection to the evidence will be reserved" and the law officer confirmed that erroneous understanding) with United States v. Ford, NCM 69-128 (22 May 1969) (unpublished) (after being told by law officer about waiver, defense counsel changes plea to guilty anyway "because of [law officer's] ruling [on the motion]").

49. See note 46, supra.

50. See 11 The Advocate 93 (1979).

51. See United States v. Moskow, 588 F.2d 882 (3d Cir. 1978); United States ex rel. Rogers v. Warden of Attica State Prison, 381 F.2d 209, 214 (2d Cir. 1967) (dictum). But see United States v. Sepe, 486 F.2d 1044 (5th Cir. 1973) (en banc) (per curium).

52. 3 W. La Fave, Search and Seizure § 11.1(d) (1978); Note, supra note 15, at 565 n.9.

to formally endorse such a plea. In the reported cases of induced pleas, the military judge probably did not intend to reserve the "legal guilt" issues for appeal, or to lead the defense to believe that the issues were so reserved. Nevertheless, all members of the military bench and bar should consider the advantages of the conditional plea.⁵³

B. Improvident Pleas

Analytically similar to the "induced plea" exception to the waiver doctrine is the rule that if an accused can show that he did not know that his guilty plea waived appellate review, his plea may be deemed improvident.⁵⁴ At least in the reported decisions, however, no accused

53. The new Military Rules of Evidence raise a potential problem with permitting conditional guilty pleas. Mil. R. Evid. 311(i) provides that "[a] plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the constitution" with respect to that offense whether or not raised prior to plea. There are, however, reasons why this new rule should not deter a convening authority from authorizing a conditional plea. First, a conditional guilty plea would not result in a finding of guilty until the legal guilt issues have been completely litigated. Second, the analysis of Mil. R. Evid. 311(i) notes that "Rule 311(i) restates present law" and cites United States v. Hamil, supra note 16. It was Hamil which gave rise to the "induced plea" exception. See note 47 supra. The enactment of Mil. R. Evid. 311 raises the question of whether objection to the failure of a military judge to properly entertain a suppression motion before the entry of a plea is waived by Mil. R. Evid. 311 (i). The prior practice was that a provident guilty plea waived objection to the exercise of judicial discretion in postponing consideration of the motion. See United States v. McIver, 4 M.J. 900 (NCOMR 1980); United States v. Hartzell, 3 M.J. 549 (ACMR 1977).

54. Unfortunately, there is a semantical problem with this methodology. Principled analysis would suggest that if an accused (or his counsel) did not know that a guilty plea waives appellate review, there would have been no "intentional relinquishment or abandonment of a known right," and hence no waiver. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). That, however, is not the usage. If, for example, an accused pleads guilty not knowing that his plea waives appellate review of a denied suppression motion, there is no "waiver," and the accused must challenge the "providence" of his plea. Where the accused pled guilty after losing

(Continued)

has met this burden. In United States v. Dusenberry,⁵⁵ the Court of Military Appeals concluded that the accused understood the impact of his plea on appellate review. The court explained that even though the military judge did not specifically address this issue during the providence inquiry,⁵⁶ the defense counsel responded affirmatively when asked whether he had fully explained the import of the plea to the accused. Moreover, upon questioning by the military judge, the accused stated that he had discussed all possible defenses with his attorney. Accordingly, the court held that given the totality of the circumstances, the military judge's failure to individually question the accused did not render the plea improvident.⁵⁷

The Army Court of Military Review faced a case in which neither the accused nor his counsel was asked about the impact of the guilty plea upon appellate review of suppression motions during the providence inquiry.⁵⁸ The court adhered to the Dusenberry rationale and assessed the totality of the circumstances in evaluating the providence of the plea, and declined to hold the plea per se improvident because of the judge's failure to discuss waiver. The court concluded that the appellant's plea was provident because he obtained the benefit of a pretrial agreement,⁵⁹ and there was a 2-week delay between the ruling on the suppression motion

54 (Continued)

a motion to suppress, the guilt plea is not rendered improvident by the mere fact that it is subsequently determined that the statement should not have been admitted. United States v. Capps, 1 M.J. 1184 (AFCMR 1976).

55. United States v. Dusenberry, supra note 4.

56. United States v. Care, 18 USQMA 535, 40 CMR 247 (1969). See United States v. Green, 1 M.J. 453 (CMA 1976).

57. United States v. Dusenberry, supra note 4, at 290.

58. United States v. Jackson, 7 M.J. 647 (ACMR 1979).

59. The court observed that while it may be a hard choice to decide whether to obtain the benefit of a pretrial agreement rather than plead not guilty and contest the admissibility of the confession, "[t]he fact that he had to make a hard choice does not mean that his plea was coerced, unknowing, or not intelligently made." Id. at 649.

and the entry of the plea.⁶⁰ Moreover, the court has suggested that an accused's knowledge of waiver will be presumed absent a showing of incompetence on the part of defense counsel⁶¹ or unless the accused pleaded guilty without the assistance of counsel.⁶² While it will often be difficult to make the requisite showing, appellate counsel should nevertheless argue that a guilty plea is improvident if the record is silent concerning the accused's knowledge of waiver, and if it does not appear from the totality of the circumstances that the defense counsel probably discussed the impact of waiver with the accused.

The possibility of raising this question successfully on appeal poses a serious ethical dilemma for the defense counsel.⁶³ By not informing the accused of waiver, the defense attorney may lay a foundation

60. Id.

61. The court relied heavily on the fact that the accused had been "ably defended by two defense counsel," one with extensive trial experience and the other with extensive appellate experience. Id. Language in Jackson can be read as severely limiting attempts to challenge the providency of a guilty plea due to a lack of understanding of its impact on waiver; the court noted that "[unless] appellant was uncounselled or can show that he received incompetent advice from his counsel, or unless the circumstances that allegedly made his confession involuntary were so oppressive and pervasive as to carry over to the plea, he cannot now attack his plea of guilty." Id.

62. Id. at 649 n. 3. The court cannot mean literally "in the absence of an attorney" since a guilty plea will not be received if the accused has refused counsel. Para. 70b(1), MCM, 1969. Thus, the language may be fairly read as meaning "where the defense attorney has not counselled the accused on the import of a guilty plea on waiver." Since the record in Jackson was silent as to whether the accused was or was not "counselled" on waiver, the result, coupled with the court's observation that the accused was "ably defended", indicates a willingness to presume "counselling" absent evidence to the contrary.

63. While this article does not purport to deal fully with this ethical problem, defense counsel should be aware of it.

for appeal.⁶⁴ When he does not advise the accused of waiver, the attorney is, in effect, imposing his judgment that waiver is preferable to litigating legal guilt.⁶⁵ That practice may violate Ethical Consideration 7 to Canon 7 of the ABA Code of Professional Responsibility, which reads in pertinent part:

A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.⁶⁶

Ethical considerations, of course, are aspirational rather than mandatory in character, and there is no reference to the question of artificially creating grounds for appeal in the Disciplinary Rules.⁶⁷

Conclusion

To properly advise their clients, it is essential that defense counsel understand that a provident guilty plea only waives appellate review of rights connected with the adjudication of legal guilt. Thus, a two-pronged attack on the application of waiver is possible on appeal. First, it can be argued that the right at issue is not waived because it implicates more than the fair adjudication of legal guilt. It was, of

64. The Army Court of Military Review has recognized such a possibility. In *United States v. Lay*, 10 M.J. 618, 684 (ACMR 1981), the court observed, in connection with a violation of the mandate of *United States v. Green*, 1 M.J. 453 (CMA 1976), that "[t]he responsibility for judicial scrutiny and acceptance of a negotiated plea submitted by an accused should be shared by the judge and counsel for both parties to the agreement. A per se rule does little more than encourage counsel to lie back and hope for a deficiency." Slip op. at 10.

65. Since the lawyer knows that a legal guilt question will probably not be preserved for appeal despite the potential for challenging providence, the lawyer determines that a plea is preferable to litigation by not counselling the client.

66. ABA Code of Professional Responsibility, Canon 7, EC 7-7.

67. ABA Code of Professional Responsibility, Preamble and Preliminary Statement.

course, such reasoning which prompted the holding that a guilty plea does not waive violation of the right to a speedy trial. Second, counsel may attack the providence of the accused's plea by demonstrating either that it was induced by some representation, act, or omission by the military judge, or that the plea was made without notice (or knowledge sufficient to put counsel or the accused on notice) that the plea would waive appellate review. There are compelling policy considerations supporting "conditional pleas." Such a plea promotes judicial efficiency because the accused admits factual guilt, and yet it preserves the central issues concerning legal guilt. Although the waiver doctrine, as it now stands, is contrary to the philosophy which supports these conditional pleas, military law does not appear to preclude them, and defense counsel should attempt to negotiate them in appropriate cases.

THE PROVIDENCE INQUIRY: A GUILTY PLEA GAUNTLET?

by Captain Paul J. Moriarty*

This article examines the obligations of the military judge and defense counsel when an accused makes equivocal statements during the providence inquiry. The article provides pragmatic guidance that should enable the military judge to resolve doubt as to the providence of the plea while affording the defense counsel the opportunity to aggressively challenge any potential abuse of the military judge's discretion to reject the plea.

The procedures governing the military judge's acceptance of a guilty plea proffered pursuant to Article 45, Uniform Code of Military Justice¹ are outlined in paragraph 70b of the Manual² and the United States Court

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1. Article 45, Uniform Code of Military Justice, 10 US.C. §845 (1976) [hereinafter cited as UCMJ] provides:

If an accused after an arraignment makes an irregular pleading, or after a plea of guilty sets up matters inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

2. Paragraph 70a, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969], provides that "[t]he term 'irregular pleading' includes such contradictory pleas as guilty without criminality" As with Article 45, UCMJ, this Article manifests a Congressional intent that guilt be acknowledged consistently from the plea through the sentence. See United States v. Thompson, 21 USQMA 526, 45 CMR 300 (1972).

of Military Appeals decision in United States v. Care.³ Many appellate cases have addressed the requirements that such a plea be knowing, voluntary, and intelligent, and that the accused personally relate sufficient factual circumstances to establish the elements of the charged offense.⁴ Few cases, however, have explored the exercise of the military judge's discretion to reject a proffered plea of guilty.⁵ The broad exercise of that discretion would arguably subvert the goals which the providence inquiry fosters; indeed, both policy factors and the unique nature of the military legal system highly circumscribe judicial discretion to reject a guilty plea.

In United States v. Alford,⁶ the United States Supreme Court recognized that due process allows an accused to plead guilty despite his protestations of innocence.⁷ The accused could avail himself of the

3. 18 USCMA 535, 40 CMR 247 (1969), enforcing United States v. Chancellor, 16 USCMA 297, 36 CMR 453 (1966). This requirement has traditionally required the application of the facts to the explained elements of the offense. See United States v. McCray, 5 M.J. 820 (ACMR 1978), aff'd 7 M.J. 191 (CMA 1979). The trial judge must explain a defense raised by the accused's responses. See United States v. Jemmings, 1 M.J. 414, 418 (CMA 1976).

4. For an excellent discussion of the case law addressing improvidence resulting from the accused's failure to admit his guilt or an accused's equivocal responses suggesting a defense or innocence, see Vickery, The Providency of Guilty Pleas: Does the Military Really Care, 58 Mil. L. L. 209 (1972); Tesler, The Guilty Plea is Innocent: Effects of North Carolina v. Alford on Pleading under the UCMJ, 26 JAG J. 15 (1971).

5. See United States v. Reese, SPCM 15453 (ACMR 20 Mar. 81) (unpub.); United States v. Williams, 43 CMR 579 (ACMR 1970); United States v. Clevenger, 42 CMR 895 (ACMR 1970); United States v. Skinner, 24 CMR 427 (ABR 1957); United States v. Bearden, 48 CMR 377, 378 (NCOMR 1973).

6. United States v. Alford, 400 U.S. 25 (1970).

7. Id. at 37. Although many states allow an Alford plea, many require that the defendant admit his guilt. Compare Miller v. State, 617 P.2d 516 (Alaska 1980) with Haynes v. State, 565 S.W.2d 191 (Mo. App. 1977).

advantages of a plea⁸ and the government would benefit from judicial economy⁹ if the record satisfied the systemic due process interest that the plea he entered intelligently and voluntarily.¹⁰ Military jurisprudence mandates both that the accused admit that he is "in fact" guilty¹¹ and that his plea accord with the actual facts.¹² The admission of factual guilt inherent in a military guilty plea, combined with case law

8. An individual may plead guilty, for example, to expeditiously resolve the controversy or to avoid the expense and embarrassment of trial. See Blackledge v. Allison, 431 U.S. 63, 71 (1977).

9. The Supreme Court has invariably extolled the plea as an integral component of the modern criminal justice system. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978). Many commentators have considered the jurisprudential propriety of the plea. See e.g., Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387 (1970).

10. "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." United States v. Alford, supra note 6, at 31. See also Boykin v. Alabama, 395 U.S. 238 (1969) (record must document these requirements). The Court at times has also referred to a "knowing" waiver, see Brady v. United States, 397 U.S. 742, 748 (1970), a semantical variation synonymous with "intelligent." Westin and Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Cal. L. Rev. 471, 477 n.18 (1978). The inquiry must address all relevant circumstances to satisfy these requirements. See, e.g., Brady v. United States, supra. An increasing concern is the prosecutorial misconduct of overcharging to induce a plea. See Blackledge v. Perry, 417 U.S. 21, 24-29 (1974) (threat of higher sentence enables accused to challenge plea to lesser offense). A potential Constitutional violation exists when the pretrial agreement is so lenient that a factually innocent accused will plead guilty. Westin and Westin, supra at 494.

11. Article 45, UCMJ; Para. 70, MCM, 1969.

12. Para. 70b(3), MCM, 1969. Congressional paternalism and a desire to avoid the appearance of any impropriety in the military justice system explain the statutory requirement. See Vickery, supra note 4, at 58-59 and related text. With the current provision for counsel, these safeguards are archaic.

requiring a strict adherence to a ritualistic providence inquiry,¹³ has engendered a judicial perception of a guilty plea "gauntlet."¹⁴

Recent Court of Military Appeals decisions dispel the fear that a hypertechnical enforcement of the plea inquiry requirements renders appellate reversal the concomitant of the exercise of judicial discretion to accept a guilty plea.¹⁵ A plea will remain provident although the military judge fails to itemize and discuss the precise terms of the pretrial agreement.¹⁶ These decisions comport with the weight of authority requiring only substantial compliance with providence inquiry procedures.¹⁷ A plea will withstand appellate challenge absent a fundamental

13. United States v. King, 3 M.J. 458, 459 (CMA 1977), enforcing United States v. Green, 1 M.J. 453 (CMA 1976) (trial judge must inquire whether accused understands each term of the pretrial agreement, assure that there are no sub silentio agreements, and secure counsel's concurrence with his interpretation of agreement).

14. This metaphor is found in United States v. Parker, 10 M.J. 849, 851 (NCOMR 1981).

15. Provisions for automatic appellate review, combined with the difficulty of rehearing cases tried worldwide, would engender automatic reversal in a destabilizing number of cases. This article does not impute bad faith to the military judge, who may be trying to protect the accused from waiver of possibly valid issues.

16. See, e.g., United States v. Griego, 10 M.J. 385 (CMA 1981) (failure of military judge to ask if counsel concurred with his interpretation of pretrial agreement); United States v. Hunt, 10 M.J. 222 (CMA 1981) (erroneous advice as to maximum sentence held nonprejudicial); United States v. Hinton, 10 M.J. 136 (CMA 1981) (failure of military judge to itemize exact terms of pretrial agreement).

17. In United States v. Lay, 10 M.J. 678 (ACMR 1981), pet. denied 11 M.J. 347 (17 June 1981), Senior Judge Clause incisively discussed the applicable law and found that "adequate" compliance with the Green-King inquiry was sufficient or, in the alternative, that the omissions were nonprejudicial. The Court of Military Appeals has eschewed any incisive discussion as to whether "substantial" compliance is sufficient. United States v. Cruz, 10 M.J. 32, 33 n.1 (per curiam). But see United
(Continued)

injustice which subverts the constitutional requirement that it be entered intelligently and voluntarily.¹⁸

In United States v. Crouch,¹⁹ the Court applied this rationale to the Care inquiry. Contrary to existing precedent requiring the military judge to explain all elements of an offense, the judge's failure to explain the requisite intent did not prejudice the accused, whose revelation of facts demonstrating his guilt precluded any possibility of innocence.²⁰ This logic adds renewed vitality to the precept that appellate courts refrain from holding a plea improvident when the accused's responses merely reveal a remote prospect of a viable defense.²¹ Only

17. (Continued)

States v. Crawford, 11 M.J. 336 (CMA 1981). Its decisions have either emphasized the duty of counsel to highlight ambiguities or held the oversights nonprejudicial. Equally, matters "collateral" to a factual adjudication of guilt are insufficient to render the plea improvident. See, e.g., McCann v. Richardson, 397 U.S. 759 (1970) (refusing to vacate plea when accused assumed validity of system for determining admissibility of confession subsequently deemed unconstitutional); United States v. Dusenberry, 23 USCMA 287, 49 CMR 536 (1975).

18. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not therefore raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received was not within the standards set forth in McCann." Tollett v. Henderson, 411 U.S. 258, 267 (1973).

19. 11 M.J. 128 (CMA 1981).

20. In United States v. Crouch, the military judge failed to explain that the aiding and abetting theory of criminal liability required that the accused have the intent to commit the substantive crime. See also United States v. Akin, 9 M.J. 886 (ACMR 1980), pet. denied 10 M.J. 191 (CMA 1980) (accused is not required to explain how his conduct satisfies a legal conclusion of guilt).

21. United States v. Logan, 22 USCMA 349, 350-51, 47 CMR 1, 2-3 (1973).

a substantial inconsistency triggers the judge's duty to conduct a searching inquiry into the potential defense.²²

The due process safeguards against improvident pleas focus in part on the distinction between factual and legal innocence.²³ An alleged

22. A conjectural "possibility" does not require inquiry. *Id.* This standard of appellate review obviously presumes the military judge had not merely elicited the accused's acquiescence or legal conclusions. *United States v. Buske*, 2 M.J. 465 (ACMR 1975), *United States v. Goins*, 2 M.J. 458 (ACMR 1975) (narrative response required).

23. The concern of many commentators and the Supreme Court has been that factually innocent defendants will plead guilty. See Westin and Westin, *supra* note 10, at 491 n.77. An intelligent and voluntary guilty plea "precludes federal habeas corpus relief not because a defendant thereby waives his right to seek it, but because a guilty plea admits factual guilt." *Journigan v. Duffy*, 552 F.2d 283, 287-88 (9th Cir. 1977), citing *Menna v. New York*, 423 U.S. 61 (1975) (per curiam):

Neither *Tollett v. Henderson* [citations omitted] nor our earlier cases on which it relied, e.g., *Brady v. United States* and *McMann v. Richardson* [citations omitted], stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations. . . . The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of logical guilt and which do not stand in the way of conviction if factual guilt is validly established.

Menna v. New York, *supra* at 62-63 n.2 [emphases added].

constitutional violation supporting an accused's legal innocence is irrelevant to the providence of his plea when he has satisfied the military judge of his factual guilt. For example, a complaint that an adverse ruling on an evidentiary motion has coerced the plea fails to implicate the due process requirement that the plea be intelligent and voluntary.²⁴ The providence of a guilty plea is jeopardized when the defense counsel's inadequacies render the appellant's decision to plead unintelligent or when impermissible government conduct overbears the appellant's volition.²⁵

The guilty plea is a substitute for factual adjudication of guilt. The systemic due process interest does not require (and the governmental need to dispose of overcrowded criminal dockets militates against) a judicial discretion to educate the accused that a subjective appraisal of

24. An accused's subjective belief that he could not receive a fair trial because the prospective jurors had seen him in chains was insufficient to set aside the plea when careful jury selection would have purged any potential constitutional violation. See Grantling v. Balkom, 623 F.2d 1261 (5th Cir. 1980). A focus on subjective expectations of justice would invariably require rejection of the plea. The Supreme Court of Maine in State v. Doucette, 398 A.2d 36, 38-39 (Me. 1978), clearly erred in finding no abuse of discretion when the trial judge rejected the plea of an accused who stated "you don't give me a chance" when conditioning sentence leniency on a plea of guilty. Being forced to make a difficult choice does not mean that a plea is invalid. United States v. Jackson, 7 M.J. 647, 648-49 (ACMR 1979). An accused's plea is valid if entered only to avoid the death penalty. Brady v. United States, supra note 10. For a more elaborate discussion of this issue, see Westin and Westin, supra note 10, at 473-511. The facts of United States v. Bethke, pet. granted, 10 M.J. 245 (1980), will allow the Court of Military Appeals to comment on this issue. The trial judge stated that he would hesitate to allow a plea if the accused moved to suppress a pretrial statement and lost. The accused did not tender his motion and pled guilty.

25. Absent an indication of a constitutional impediment precluding the accused's informed and voluntary decision, a trial judge should not supplant the accused's freedom of choice with his subjective assessment of the accused's "best interests." Cf. People v. Gaines, 21 Ill.App.3d 839, 316 N.E.2d 14, 20 (1974). An unfettered "best interests" scope of discretion denies the precepts of basic human dignity which reasoned choice represents and our legal system cherishes.

"moral" or "legal" innocence is no defense in a contested case.²⁶ Ex-tenuating circumstances which fall short of exonerating an accused are properly addressed during the court-martial's sentencing phase.

Any definition of a technically provident plea merely defines the discretion which the military judge may exercise in accepting the plea. Although there is no constitutional right to plead guilty,²⁷ the military judge lacks unlimited discretion to reject that plea.²⁸ Any such broad discretion would divest the criminal process of its flexibility.²⁹ The Army Court of Military Review has expressly condemned any arbitrary rejection of the plea,³⁰ which entitles the accused to the pretrial agreement's sentence limitation and constitutes evidence of his rehabilitative potential.³¹ The military judge's discretion is instead limited

26. Several authorities support the thesis that the plea process should only satisfy the trilogy of interests which due process, expeditious resolution of criminal dockets, and sentence limitation represent. See United States v. Ammidown, 497 F.2d 615, 621-22 (D.C. Cir. 1973). It is a farcical morality play to "indulge" the accused's protestations of "moral" or "legal" innocence. Cf. Vickery, supra note 4, at 235 (reservations of "moral" guilt inadequate to improvidence plea).

27. Corbitt v. New Jersey, 439 U.S. 212, 223 (1978) (state may constitutionally abolish provisions for the plea of guilty); Lynch v. Overholser, 369 U.S. 705, 719 (1962).

28. See, e.g., Santobello v. New York, 404 U.S. 257, 262 (1971) (court may reject plea in exercise of sound judicial discretion). The Army Board of Military Review suggested in dicta that the discretion was absolute. United States v. Scarborough, 28 CMR 527, 529 (ABR 1959).

29. United States v. Jackson, 390 U.S. 570, 584-85 (1968).

30. See cases cited in note 5, infra.

31. The Manual expressly recognizes the plea as the first step toward rehabilitation. Para. 76a, MCM, 1969. See, e.g., United States v. Schoolcraft, 43 CMR 499 (ACMR 1970).

to a "particular factual situation" which the record must clearly reflect with sufficient specificity.³²

The unique aspects of military practice clearly limit the policy considerations warranting rejection of the guilty plea. The defense counsel must refrain from permitting an accused to enter a plea which is inconsistent with the actual facts of the case.³³ Accordingly, the federal courts' recognition of broad judicial discretion is inapposite. Under Federal Rule of Criminal Procedure 11,³⁴ an individual who protests his factual innocence may plead guilty;³⁵ a relatively broad discretion enables that judicial system to avert the adverse public reaction to the

32. See United States v. Reese, supra note 5. ("The record reflects that the trial judge's refusal to accept the accused's plea was . . . because of an honest and substantial doubt as to whether the accused's pleas were voluntary."); United States v. Williams, supra note 5, at 582. Accord United States v. Davis, 516 F.2d 574, 578 (7th Cir. 1975) (dictum). See United States v. Ammidown, supra note 26, at 623 (D.C. Cir. 1973) (judge failing to explain his dissatisfaction with sentence limitation). But see United States v. Moore, 637 F.2d 1194, 1196 n.2 (8th Cir. 1981) (1974 congressional amendments to F.R.C.P. 11 greatly increased scope of discretion, obviating requirement for judge to articulate his reasons).

33. United States v. Moglia, 3 M.J. 216, 218 (CMA 1977); United States v. Johnson, 1 M.J. 36, 38 (CMA 1975). Government counsel must be attuned to their duty to disclose evidence essential to the accused's intelligent decision to enter a plea of guilty. See Fambo v. Smith, 433 F.Supp. 590, 598-99 (D.C.W.D.N.Y. 1977), aff'd, 565 F.2d 233 (2d Cir. 1977).

34. The Rule requires that the trial judge inquire into the providence of the plea and the fairness of the plea agreement. Rule 11(f) provides that "the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

35. The federal courts have generally required some factual corroboration beyond the accused's admission of guilt. See Mack v. United States, 635 F.2d 20 (1st Cir. 1980). It has been suggested that the acceptance of a guilty plea offered by an accused who protests his innocence fails to satisfy the constitutional requirement that the plea be knowing and voluntary, absent a finding of some factual basis to support that plea. Willett v. State of Georgia, 608 F.2d 538, 540 (5th Cir. 1979).

incarceration of an innocent defendant, as well as appellate litigation challenging that plea.³⁶

The societal interest in insuring the stability of the legal system is insufficient to justify the rejection of a proffered plea. In United States v. Clevenger,³⁷ the Army Court of Military Review rebuked a judicial policy of discouraging guilty pleas in absence without leave cases, which the military judge viewed as rife with potential for reversal on appeal.³⁸ The Clevenger opinion supports the conclusion that the military judge cannot summarily reject the plea of an individual who makes an equivocal statement suggesting factual innocence or a potential defense:³⁹

36. One circuit has proposed that the trial judge should accept the plea if there exists significant evidence supporting it. See Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968); United States v. McCoy, 363 F.2d 306, 308 (D.C. Cir. 1966). Other circuits have rejected this proposal and adopted a "sound discretion" standard. See United States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir. 1979); United States v. Bettelyoun, 503 F.2d 1333 (8th Cir. 1974); United States v. Bednarski, 445 F.2d 364, 365-66 (1st Cir. 1971). The federal judge may reject an overly lenient agreement as failing to protect the public interest in adequate punishment. See United States v. Adams, 634 F.2d 830, 835 (5th Cir. 1981) (discretion in accepting plea bargain same as that in sentencing). One circuit has reversed a trial judge for rejecting a plea to a lesser offense which would have limited the maximum imposable sentence. United States v. Amindown, supra note 26.

37. United States v. Clevenger, supra note 5.

38. The facts presented a "sham" plea of not guilty, whereby the military judge would limit the sentence actually imposed to the sentence provided in the pretrial agreement. Id. at 896-97. See also United States v. Beardon, supra note 5.

39. Tesler, supra note 4, at 41. The facts in United States v. Dunbar, 20 USCMA 478, 43 CMR 318 (1971), typify the equivocal plea. The accused responded that he "guessed" he was in fact guilty while a stipulation of fact conflicted with information elicited during the providence inquiry. A plea is provident where the individual has no independent recollection of the events but is satisfied with the evidence. United States v. Butler, 20 USCMA 247, 43 CMR 87 (1971). This case law constitutes the closest approximation of an Alford plea, see United States v. Alford, supra note 6.

the military judge must instead make every effort to resolve these inconsistencies.

To grant the military judge broad discretion to reject the plea would be to imbalance the entire military justice system. A sentence far exceeding his pretrial agreement would embitter the accused and undermine his potential for rehabilitation.⁴⁰ The perfunctory rejection of the plea threatens to usurp the convening authority's responsibility to negotiate the pretrial agreement.⁴¹ Rejection of the plea also implies that the defense counsel failed to properly acquaint himself with the facts of the case.⁴² Finally, any broad discretion deters the defense counsel's inclination to admit evidence in extenuation and mitigation.

40. The military judge must be attuned to the diminished rehabilitative prospects resulting from the accused's perception that the sentence component exceeding the pretrial agreement represents a punishment for disrupting the plea procedure. See Note, Restructuring the Plea Bargain, 82 Yale L.J. 286, 308 n. 74, 75 (1972). It is inherently inequitable to penalize a layman for equivocal statements which manifest an ignorance for the constructs defining legal guilt. Cf. Rinehart v. Brewer, 561 F.2d 126, 132 (8th Cir. 1977) (plea improvident; need for counsel to follow-up his initial advice to ensure that 15-yearold actually understood). No case law has addressed counsel incompetence which was so abysmally inadequate that the appellant was unable to conduct an informed discussion with the judge as to providence.

41. See United States v. Caruth, 6 M.J. 184, 186 (CMA 1979). When the accused has entered pleas of guilty to all offenses, rejection of a plea to one offense impedes the preference for a unitary sentence in para. 76, MCM, 1969. United States v. Kazena, 11 M.J. 28, 31 (CMA 1981) (partial pretrial agreements disfavored).

42. See note 33, supra, and accompanying text. The accused's competence, rather than counsel failure, is a far more prevelant cause of appellate reversal. See notes 43 and 56, infra. The Army Court of Military Review noted:

It may well happen, as here, that an accused will fail to recall, or have a somewhat different recollection of words alleged to have been uttered in a quarrel or affray, especially if he had been drinking. Nevertheless, if it appears that other

(Continued)

Rather than safeguarding the accused from an improvident plea, any policy favoring the perfunctory rejection of a plea following an equivocal statement during the providence inquiry would subvert the policies underlying paragraph 70b of the Manual and United States v. Care.⁴³ The

42. (Continued)

credible witnesses will testify to facts establishing his guilt, it may be futile to contest the issue. Here, the accused was apparently not convinced, in his own mind, that he had made the remark attributed to him; but the superior non-commissioned officer would so testify. Under this condition, we think that the accused was properly advised to plead guilty to this specification, along with the others in consideration for the agreed maximum sentence.

The law officer, in questioning the accused should have developed whether the accused understood the meaning and effect of his plea, and if that was established, should have let it stand. We find nothing to support the law officer's hasty conclusion that the accused was "not properly advised", and feel that such an imputation of incompetence or lack of diligence to the defense counsel was wholly unwarranted.

United States v. Skinner, supra note 5, at 429.

43. See, e.g., United States v. Hoaglin, 10 M.J. 769 (NCOMR 1981), citing United States v. Kraffa, 9 M.J. 643, 644-645 (NCOMR 1980) cert. of review filed, 9 M.J. 126 (1980) (rote compliance inadequate; military judge should pursue "meaningful" dialogue). Cf. United States v. Skinner, supra note 5, at 429 (ABR 1957). The issue of the accused's competence arises when the accused makes equivocal statements despite being counseled by an attorney who is obligated to ensure that the plea accords with the facts. The great weight of authority holds that an intelligent plea of guilty requires no higher standard of competence than that required to stand trial. See United States v. Rowe, 638 F.2d 1100 (7th (Continued)

providence inquiry serves to legitimate the plea by fostering full disclosure on the record. Every effort must be made to insure that the accused speaks freely and openly.⁴⁴ An inevitable result of the accused's natural proclivity to rationalize his conduct,⁴⁵ equivocal statements are the price paid for free and open discourse with the military judge. Deeming a plea improvident on the basis of these equivocal statements would only encourage "canned answers" to "canned questions."⁴⁶

From the most fundamental perspective, the plea inquiry protects the court from unwitting participation in the fraud which results when a benighted or coerced defendant surrenders his right to trial by jury.⁴⁷

43. (Continued)

Cir. 1981) and cases cited therein. The accused's disjointed statements or disruptive behavior may in conjunction with other factors warrant a rehearing if the judge fails to inquire into the accused's competence. Close scrutiny is particularly apposite in the military; bizarre or obtuse behavior may suggest an insanity defense or a potential jurisdictional issue stemming from lack of contractual capacity. See *United States v. Brown*, CM 439431 (ACMR 12 Mar. 1981) (unpub.) (post-trial evidence of schizophrenia diagnosed prior to, and continuing during, enlistment; rehearing ordered as to insanity and jurisdictional defenses).

44. See e.g., *United States v. Simpson*, 17 USCMA 44, 46, 37 CMR 308, 310 (1967) (disfavoring perjury prosecution for misstatements during providence inquiry); *United States v. Richardson*, 6 M.J. 654, 655 (NCOMR 1978) (improper use during sentencing of information elicited during providence inquiry). The collateral ramifications of perfunctory rejection of pleas are frightening in the military system. Aware that military counsel are obligated to present the actual facts in the plea inquiry, military accused may present a hypothetical fact scenario to counsel.

45. *United States v. Wright*, 6 USCMA 186, 190, 19 CMR 312, 316 (1955); *United States v. Navedo*, 516 F.2d 293, 299-300 (2d Cir. 1975) (Kaufmann, J., dissenting).

46. *People v. Wolf*, 389 Mich. 398, 208 N.W.2d 457, 465 (1973).

47. E.g., *United States v. Clevenger*, supra note 5.

Absent egregious circumstances,⁴⁸ rejection of the plea will only expose the accused to a greater sentence without advancing either societal due process interests or the needs of the prosecution.

A Proposed Resolution of Equivocal Pleas

One court has noted that preoccupation with the perceived need to satisfy the technical requirements of the providence inquiry has stymied defense efforts to preserve a plea when the military judge encounters an accused's equivocal statements.⁴⁹ This distraction from substantive issues may also induce the judiciary to adhere to a stilted, ritualistic

48. Some factors alerting a trial judge to the improvidence of a plea are: (1) a disparity between the defense and government summary of the facts; (2) an incorrect charge on the face of the indictment; and (3) evidence of inadequate representation by counsel. *People v. Francis*, 38 N.Y.2d 150, 341 N.E.2d 540 (Ct. App. NY 1975) (trial judge's discretion is not absolute and is conditioned by circumstances of each case). Not content with the Supreme Court's circumscribed definition of an improvident guilty plea, commentators have advocated inquiry to (and more thorough supervision of) counsel as a vehicle to insure the accuracy of the accused's admission of factual guilt and the counsel's decisions as to legal defenses. E.g., Schwarzer, *Dealing With Incompetent Counsel - The Trial Judge's Role*, 93 Harv.L. Rev. 633 (1980); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U.Pa. L. Rev. 439 (1971). Harshly criticizing the Court's decisions, one author has found the broad waiver principle applied in guilty pleas to be an anomaly in constitutional jurisprudence. The guilty plea process is intrinsically involuntary, analogized to a loaded gun pointed at the accused's head. Counsel serves merely to explain the operation of the gun, while appellate courts sub silentio view allegations of ineffective assistance of counsel as arguments ad hominem lodged against fellow attorneys. The author concluded with the "hope that a bolder Supreme Court will someday tire of elaborate rationalization for a lawless regime and will rule that principles of constitutional fairness extend even to guilty plea cases." Alschuler, *The Supreme Court, the Defense and the Guilty Plea*, 47 Univ. Col. L. Rev. 1, 71 (1975).

49. *United States v. McCann*, 11 M.J. 506, 508 n.1 (NCOMR 1981). Rather than subjecting a client to the unnecessarily tedious inquiry, counsel should prepare a 3 or 4 line statement, admitting the necessary elements, which the accused could read to set the foundation for a focused inquiry.

providence inquiry. Compliance with a checklist of mandated inquiries is alone insufficient, as the Care and related inquiries provide merely a framework fostering a thematic, probing inquiry.⁵⁰ The recent case law adopting a liberalized standard of review in guilty plea cases should provide a breath of fresh air at the trial forum. These opinions encourage the military judge to engage in a searching inquiry without the fear that one question beyond the procedural minimum will render the plea improvident.⁵¹

This flexibility will enable the military judge to fulfill his affirmative duty to preserve the plea. Highly circumscribing the military judge's discretion to reject a plea of guilty seemingly places him in an untenable position. Extended exposure to the accused's representations during the providence inquiry of a rejected plea creates the appearance of judicial impropriety if the military judge continues to preside over the case after the plea is rejected,⁵² and the issue of recusal will only compound a possible appellate issue arising from a potential abuse of discretion in rejecting the plea.⁵³

50. A review of records suggests that, in satisfying the litany of procedural "trees", the military judge has lost sight of the substantive "forest." In United States v. Parker, supra note 14, the plea was improvident because the trial judge failed to place the accused's statements in context and discern the defense of duress.

51. United States v. Davenport, 9 M.J. 364, 367 (CMA 1980), equally fosters stability of litigation. The military judge's inquiry will determine the providence of a plea. The accused's out-of-court statements are irrelevant to appellate review.

52. See United States v. Bradley, 7 M.J. 332 (CMA 1979). The facts of United States v. Shackelford, 2 M.J. 17, 23 (CMA 1976), demonstrate that "unforeseen risks" render it inadvisable for the military judge to remain on the case even if the accused elects trial on the merits before members.

53. To preserve the issue for appellate review, the defense counsel, when confronted with a judge's rejection of a plea, should state his reasons supporting acceptance of the plea. See note 32, infra. This disclosure by defense counsel would seemingly mandate recusal. The Army Court of Military Review cautioned in dicta that waiver would apply if the defense counsel failed to renew the pleas or raise an "appropriate motion" before the second judge. United States v. Reese, supra note 5. One author has suggested a pre-sentencing motion to limit the sentence to the terms of the pretrial agreement. Tesler, supra note 4 at 27 n. 42.

As a solution to this problem, the military judge could require the prosecution to present its prima facie case.⁵⁴ This recommendation is particularly appropriate when the accused has entered pleas of not guilty to several specifications which are factually interrelated with specifications to which he pled guilty.⁵⁵ Confronted with this information, an accused may well withdraw his equivocal statements and readily convince the military judge that he is in fact guilty.⁵⁶

Conclusion

Any broad discretion to reject a plea of guilty would undermine the integrity of the military justice system and, in particular, subvert the providence inquiry. An arbitrary foreclosure of the providence inquiry following an accused's equivocal statement stifles the very candor the inquiry must foster to insure voluntary and intelligent pleas. Rather than rejecting the plea, the military judge should request that the government present its evidence to demonstrate the accused's factual guilt. Similarly, the defense counsel should vigorously delineate the

54. One federal judge has suggested that asking the government, "What evidence would you present," would reduce the accused's proclivity to minimize his guilt. *United States v. Navedo*, supra note 45 at 299-300 (Kaufmann, J., dissenting). Cf. *United States v. O'Brien*, 601 F.2d 1067, 1070 (9th Cir. 1979).

55. *United States v. Napper*, 7 M.J. 596 (NCMR 1979), pet. denied, 7 M.J. 266 (CMA 1979); *United States v. Grotho*, 2 M.J. 1104 (CGCMR 1973). Courts in other jurisdictions regularly rely on information from both counsel to corroborate the accused's statements. *United States v. Herzog*, 644 F.2d 713, 715 (8th Cir. 1981) (all available evidence examined). The Advisory Committee for F.R.C.P. 11 expressly suggested that the trial judge consult these supplemental sources. See *United States v. Navedo*, supra note 45 at 298 n.10. Cf. *United States v. Lay*, supra note 17, at 685 n.2 (Fulton S.J., concurring in result).

56. The issue of a judicially coerced plea would arise only if the military judge oversteps his impartial role by expressly advising the accused of the hopelessness of the defense evidence and the harshness of the sentence which would be imposed absent a plea bargain. *People v. Davis*, 54 A.D. 913, 387 N.Y.S.2d 909, 911 (N.Y. Sup. Ct. 1976). One military case has ordered a rehearing as a result of an allegation of egregious counsel coercion, see *United States v. Zuis*, 49 CMR 159 (ACMR 1969).

factors which dispel more than a mere possibility of innocence. Such a procedure is essential to appellate scrutiny of the military judge's decision to accept the plea. The procedure addresses the trial judiciary's disquieting fear that the precepts governing appellate review of guilty pleas constitute a balancing of competing societal interests, as to which the Supreme Court has championed stability of litigation and abandoned the accused to a seemingly insurmountable hurdle of establishing ineffective assistance of counsel.⁵⁷ Recent case law dispelling the perception of a guilty plea "gauntlet" implicitly encourages this trial forum colloquy that reason requires before the guilty plea can be satisfactorily and realistically deemed ". . . a break in the chain of events which has preceded it in the criminal process."⁵⁸ Recognition of the accused's natural proclivity to minimize his guilt requires no less. No countervailing interest requires that equivocal and evasive statements as to factual guilt abruptly and perfunctorily entail the loss of a pretrial agreement to an accused, whose presumptively competent counsel had been convinced of the accused's factual guilt and the disutility of asserting legal innocence.

57. See note 48, infra.

58. Tollett v. Henderson, supra note 18.

SENTENCING ARGUMENTS: DEFINING THE LIMITS OF ADVOCACY

by Captain Guy J. Ferrante*

The sentencing phase of a guilty plea case is crucially important: the defense counsel must not only present favorable evidence and arguments on behalf of his client, but also insure that the trial counsel remains within the bounds of the law in presenting the government's case. In this article, Captain Ferrante focuses on prosecutorial sentencing arguments and catalogues the errors that appellate courts have found prejudicial. He suggests that trial defense counsel raise timely objections to these recurring errors in order to secure curative instructions or preserve the issue for appeal.

Although every trial defense counsel's primary goal is to secure an acquittal for his client, if this effort proves unsuccessful he must remember that the court-martial "does not end with the verdict," and instead continues until "the sentence has been finally adjudged."¹ Zealous representation of the client should therefore continue throughout the sentencing phase of the trial. During the course of the presentencing hearing, it is the defense counsel's duty and obligation -- and it is a crucially important one -- to insure that the trial counsel does not exceed the permissible limits of advocacy. The trial counsel's duty is to prosecute, and while "he may strike hard blows, he is not at liberty to strike foul ones."² In making his sentencing arguments,

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1. United States v. Olson, 7 USCMA 242, 244, 22 CMR 32, 34 (1956).

2. Berger v. United States, 295 U.S. 78, 88 (1935); see generally, ABA Standards, The Prosecutorial Function §§5.8, and 5.9 (1971).

the trial counsel is granted reasonable latitude. In this respect, he "may make reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case."³ In sum, "it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."⁴

Preserving the Record

The importance of timely and specific objections to improper trial counsel arguments is reflected in the landmark case of United States v. Lania, where the Court of Military Appeals warned that "defense counsel should be alert to object and seek cautionary instructions if they perceive a risk that the court members are being diverted . . . from their duty to fit the punishment not only to the crime but also to the particular offender."⁵ Appellate courts treat cases where there was no objection to improper arguments in three ways. First, some courts find the lack of defense objection to be a "persuasive inducement to conclude that the argument was appropriate and proper."⁶ Second, an argument may be deemed harmless on the ground that defense counsel's failure to object indicated that the argument had a minimal impact on the court members.⁷ Finally, a number of courts have held that the failure to object waives the issue on appeal unless the trial counsel's argument is so flagrant or egregious that it triggers the military judge's sua sponte duty to interrupt and present curative instructions.⁸ In the vast majority of cases involving

3. Paragraph 72b, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

4. Berger v. United States, supra note 2.

5. United States v. Lania, 9 M.J. 100, 104 (CMA 1980).

6. United States v. Carmans, 9 M.J. 616, 620 (ACMR 1980). See also United States v. Ryan, 21 USCMA 9, 44 CMR 63 (1971).

7. See United States v. Eck, 10 M.J. 501 (AFCMR 1980); United States v. Arnold, 6 M.J. 520 (ACMR 1978) pet. denied, 6 M.J. 151 (CMA 1978); United States v. Albrecht, 4 M.J. 573 (ACMR 1977); United States v. Spence, 3 M.J. 831 (AFCMR 1977), pet. denied, 4 M.J. 139 (CMA 1977).

8. See United States v. Doctor, 7 USCMA 126, 21 CMR 252 (1956); United States v. Williams, 8 M.J. 826 (AFCMR 1980); United States v. Tanksley, 7 M.J. 573 (ACMR 1979), aff'd, 10 M.J. 180 (CMA 1980); United States v. Moore, 6 M.J. 661 (AFCMR 1978), pet. denied, 6 M.J. 199 (CMA 1979); United States v. Herrington, 2 M.J. 807 (ACMR 1976).

improper trial counsel arguments, therefore, an accused will be denied meaningful appellate relief if his defense counsel does not object. On the other hand, defense counsel will preserve the record by properly objecting, and may obtain meaningful immediate relief in the form of a curative instruction or a warning from the military judge.

Catalogue of Improprieties

General Deterrence

The propriety of stressing general deterrence as a sentencing consideration has long been the subject of appellate review. In some early cases, general deterrence arguments were considered improper since that factor was:

included within the maximum punishment prescribed by law, but not as a separate aggravating circumstance that justifies an increase in punishment beyond what would be a just sentence for the individual accused determined on the basis of the evidence before the court.⁹

That view was based on United States v. Mamaluy,¹⁰ in which the Court of Military Appeals reasoned that:

accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment [.] There is no real value in reciting generalities to courts-martial. They should operate on facts, and instructions should be tailored [.] [T]he difficulty with these instructions is that they pose theories which are not supported by testimony and which operate as a one way street against the accused.¹¹

9. United States v. Mosely, 1 M.J. 350, 351 (CMA 1976). See also United States v. Upton, 9 M.J. 586 (AFCMR 1980); United States v. Moore, 1 M.J. 865 (AFCMR 1976) (trial counsel may not cite general deterrence as aggravating factor justifying additional penalty).

10. 10 USCMA 102, 27 CMR 176 (1959).

11. Id. at 106-107, 27 CMR at 180-81.

In United States v. Lania, however, the Court held that general deterrence is relevant to sentencing.¹² Further, the trial counsel may refer to society's interest in general deterrence if, as a whole, it does not appear that he is urging consideration of that factor to the exclusion of all others: the argument must also invite consideration of other sentencing factors.¹³ In United States v. Geidl, the Court of Military Appeals recently found that a trial counsel's repeated references to general deterrence were "on the borderline of propriety," and noted that "[e]ntreaties that court members impose the maximum sentence are quite susceptible to an interpretation that the government is inviting a reliance on deterrence to the exclusion of other factors."¹⁴

Citation of Authorities

In their sentencing arguments, "neither counsel may cite legal authorities or the facts of other cases."¹⁵ Court members must reach their decisions on the basis of properly admitted evidence and the military judge's instructions. Outside influences from legal authorities are improper, confusing, and irrelevant to sentencing.¹⁶ Military courts have condemned references to specific provisions of the Manual¹⁷ such as discussions of the elements of proof;¹⁸ likewise, members may

12. See United States v. Lania, supra note 5.

13. See United States v. Geidl, 10 M.J. 168 (CMA 1981); United States v. Smith, 9 M.J. 187 (CMA 1980); United States v. Thompson, 9 M.J. 166 (CMA 1980); United States v. Lania, supra note 5; United States v. Upton, supra note 9.

14. United States v. Geidl, supra note 13, at 169 (citation omitted).

15. Paragraph 72b, MCM, 1969.

16. See United States v. Johnson, 9 USCMA 178, 25 CMR 440 (1958); United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957); United States v. Yelverton, 8 USCMA 424, 24 CMR 234 (1957).

17. See United States v. Rinehart, supra note 16; United States v. Crosley, 25 CMR 498 (ABR 1957).

18. See United States v. Spruill, 23 CMR 485 (ABR 1956).

not possess copies of the Manual¹⁹ during their deliberations. The restriction on the use of legal authorities also embraces references to specific reported cases²⁰ and "official" technical manuals.²¹ Finally, military appellate courts have consistently held that it is improper for trial counsel to argue the facts of another case,²² or the conclusiveness of a co-accused's acquittal.²³ Because other cases involve extraneous facts and have nothing to do with the offense in question or the appropriateness of a sentence, the trial counsel may not suggest that the facts or sentence in another case should be considered.²⁴

Misstatements of Law and Fact

As an officer of the court, the trial counsel has a duty and responsibility to ensure that his statements to the court members are accurate. As the government representative, much emphasis is placed on what the prosecutor says; accordingly, defense counsel should be alert for misstatements of the law.²⁵ This problem often arises with references to the maximum imposable sentence. For example, the trial

19. See *United States v. Wilson*, 25 CMR 788 (AFBR 1957); *United States v. Smith*, 24 CMR 812 (AFBR 1957).

20. See *United States v. McCauley*, 9 USCMA 65, 25 CMR 327 (1958).

21. See *United States v. Allen*, 11 USCMA 539, 29 CMR 355 (1960).

22. See *United States v. Bowie*, 9 USCMA 228, 26 CMR 8 (1958); *United States v. Rogers*, 17 CMR 883 (AFBR 1954).

23. See *United States v. Beirne*, 22 CMR 620 (AFBR 1956).

24. See *United States v. King*, 12 USCMA 71, 30 CMR 71 (1960).

25. See *United States v. Johnson*, 1 M.J. 213 (CMA 1975) (not guilty plea as matter in aggravation); *United States v. Cox*, 9 USCMA 275, 26 CMR 55 (1958) (misstatement of law); *United States v. Vasquez*, 9 M.J. 517 (AFCMR 1980) (guilt of one offense raises inference of guilt of another); *United States v. Goheen*, 32 CMR 837 (AFBR 1962) (incorrect statement of burden of proof); *United States v. Abernathy*, 24 CMR 765 (AFBR 1957) (erroneous theory of law); *United States v. Powell*, 17 CMR 483 (AFBR 1954).

counsel may not inform the members that the maximum imposable punishment exceeds a special court-martial's jurisdictional limit.²⁶

Arguing Facts Not in Evidence

The trial counsel may not "state in an argument any matter of fact as to which there has been no evidence,"²⁷ although he "may make a reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case."²⁸ The rule set forth by appellate military courts is that arguments must be based on the evidence introduced at trial, comments on contemporary history or common knowledge within the community, and reasonable inferences therefrom which do not exceed the bounds of fair comment.²⁹ Arguments which transgress these boundaries are improper because they amount to unsworn testimony by the trial counsel.³⁰

Interpretation of Evidence

The most serious type of improper argument by trial counsel is one which has no basis in properly adduced evidence. Appellate courts have found error where the trial counsel alleged that the accused is a psychopathic liar;³¹ relied on a fictional novel to illustrate how some defense attorneys encourage witnesses to fabricate defenses;³² asserted

26. See *United States v. Crutcher*, 11 USCMA 483, 29 CMR 299 (1960); *United States v. Green*, 11 USCMA 478, 29 CMR 294 (1960); *United States v. Capps*, 1 M.J. 1184 (AFCMR 1976).

27. Paragraph 72b, MCM, 1969.

28. Id.

29. See *United States v. Long*, 17 USCMA 328, 38 CMR 121 (1967); *United States v. Eck*, supra, note 7; *United States v. Diaz*, 9 M.J. 691 (NCMR 1980); *United States v. Campbell*, 8 M.J. 348 (CGCMR 1980); *United States v. Young*, 8 M.J. 676 (ACMR 1980), pet. denied, 9 M.J. 15 (CMA 1980).

30. See *United States v. Mills*, 7 M.J. 664 (ACMR 1979); *United States v. Williamson*, 17 CMR 507 (NBR 1954).

31. See *United States v. Doctor*, supra note 8.

32. See *United States v. Allen*, 11 USCMA 539, 29 CMR 355 (1960).

that the Army has encountered more disciplinary problems with young E-5's than any other group;³³ referred to what a witness' testimony would have been had he been called to the stand;³⁴ discussed punishments which would have been available in other jurisdictions;³⁵ and characterized the accused's behavior in Vietnam as cowardly.³⁶ A similar problem arises if the trial counsel's argument contains unreasonable inferences drawn from the evidence. Thus, in United States v. Young³⁷ the evidence established that the accused sold certain drugs, and the trial counsel described him as a "pusher." The Army Court of Military Review held that it was unreasonable to infer that the accused was engaged in the on-going business of selling drugs.³⁸

Because references to witnesses who were not called to testify necessarily entail comments on facts not in evidence, the Court of Military Appeals has held that counsel should avoid suggesting that other witnesses could have been called.³⁹ Thus, in United States v. Tawes,⁴⁰ the Army Court of Military Review held that the trial counsel impermissibly stated that he could have called more witnesses to substantiate the testimony actually presented. Such statements render the trial counsel a witness and serve to wrongly corroborate the other witnesses' testimony. Nor should counsel rely upon evidence for a purpose other

33. See United States v. Adkinson, 40 CMR 341 (ABR 1968).

34. See United States v. Shows, 5 M.J. 892 (AFCMR 1978).

35. See United States v. Davis, 47 CMR 50 (ACMR 1973).

36. See United States v. Pendergrass, 17 USCMA 391, 38 CMR 189 (1968).

37. United States v. Young, supra note 29.

38. See also United States v. Collins, 3 M.J. 518 (AFCMR 1977), aff'd 6 M.J. 256 (CMA 1979) (prosecutor erred in arguing that accused violated "special trust" by selling drugs while working as security officer); United States v. Lewis, 7 M.J. 958 (AFCMR 1979).

39. See United States v. Tackett, 16 USCMA 226, 36 CMR 382 (1966).

40. 49 CMR 590 (ACMR 1974).

than that for which it was admitted. In United States v. Salisbury,⁴¹ evidence was admitted for the limited purpose of rebutting the accused's defense. Later, the trial counsel improperly referred to it in an effort to prove that the accused committed the crime.⁴² This issue arises frequently with respect to conditionally admitted evidence. In United States v. Porter,⁴³ evidence was admitted by the military judge on the condition that the prosecutor eventually connect it to the accused. The prosecutor never connected the evidence, so it was never properly admitted. The Court of Military Appeals held that prosecutorial arguments based on that evidence were improper.⁴⁴

References to Other Misconduct

Evidence of uncharged misconduct may not be considered for sentencing purposes unless it is properly introduced before findings or admitted during the pre-sentencing proceedings.⁴⁵ As a result, trial counsel may not associate the accused with other offenses if there is no relevant evidence to that effect.⁴⁶ In United States v. Edwards,⁴⁷ the court held that the trial counsel erred by referring to an offense as to which

41. 50 CMR 175 (ACMR 1975), rev'd on other grounds, 7 M.J. 425 (CMA 1979).

42. See also United States v. Collins, supra note 38; United States v. Young, supra note 29; United States v. Lewis, supra note 38.

43. 10 USCMA 427, 27 CMR 501 (1959).

44. Id. at 431, 27 CMR at 504.

45. See United States v. Poinsett, 3 M.J. 697 (AFCMR 1977), pet. denied, 3 M.J. 483 (1977).

46. See United States v. Long, supra note 29; United States v. Sitton, 4 M.J. 726 (AFCMR 1977); pet. denied, 5 M.J. 394 (CMA 1978); United States v. Abernathy, supra note 25.

47. 39 CMR 952 (ABR 1968).

a finding of not guilty had been entered. In United States v. Baker,⁴⁸ the court condemned an argument based on a prior offense involving moral turpitude.

Convening Authority and Command Influences

The trial counsel may not "bring to the attention of the court any intimation of the views of the convening authority . . . with respect to . . . an appropriate sentence,"⁴⁹ since references to his desires improperly impinge upon the court members' discretion.⁵⁰ Nor may the trial counsel argue that a severe sentence is warranted because the convening authority ordered a general court-martial⁵¹ or effectively reduced the punishment by convening a special rather than a general court-martial.⁵² In United States v. Ruse,⁵³ the court held that the trial counsel erroneously argued that because the members represented the convening authority, they should punish the accused in order to set an example for prospective offenders.

48. 34 CMR 833 (AFBR 1963). See also United States v. Andrades, 4 M.J. 558 (ACMR 1977) (attempted introduction of alleged prior act of misconduct); United States v. Abner, 27 CMR 805 (ABR 1958) (appeal to members to consider offense of which accused was acquitted); United States v. Beneke, 22 CMR 919 (AFBR 1956) (implication that accused's prior conviction may have been for more offenses than reflected in record).

49. Paragraph 44g(1), MCM, 1969.

50. See United States v. Lackey, 8 USCMA 718, 25 CMR 222 (1958); United States v. Olson, supra note 2; United States v. Higdon, 2 M.J. 445 (ACMR 1975).

51. See United States v. Daley, 35 CMR 718 (ABR 1964).

52. See United States v. Crutcher, supra note 26; United States v. Carpenter, 11 USCMA 418, 29 CMR 234 (1960).

53. 22 CMR 612 (ABR 1956).

54. See United States v. Estrada, 7 USCMA 635, 23 CMR 99 (1957); United States v. Fowle, 7 USCMA 349, 22 CMR 139 (1956); United States v. Cummins, 24 CMR 861 (AFBR 1957).

Appellate courts view external command influences in the same light as references to the convening authority. Trial counsel may not incorporate such considerations in their argument because they exceed the proper scope of the court members' deliberations.⁵⁴ Thus, courts have held that references to command policies or directives concerning certain offenses;⁵⁵ comments that a record of the adjudged sentence would be posted on the command bulletin board;⁵⁶ arguments incorporating a command policy in regard to troublemakers in certain ranks;⁵⁷ and pleas to support national efforts to eliminate drug traffic⁵⁸ are improper.

Placing Members in Position of Victim or Relative

An accused is entitled to have his sentence determined by court members who are impartial to the outcome of the case. When the triers of fact are asked to consider the effects of the offense on the victim, their impartiality is undermined. Consequently, arguments which advocate such comparisons are improper,⁵⁹ as are suggestions that members consider what it would be like if they or a close relative had been victimized by the accused.

Comments on Military-Civilian Relations

The trial counsel may not appeal to a court-martial to predicate its verdict upon the "probable effect of its action on relations between the military and the civilian community [.]"⁶⁰ The Court of Military Appeals has condemned such references, observing that "proper punishment should be determined on the basis of the nature and seriousness of the offense

55. See United States v. Estrada, supra note 54; United States v. Fowle, supra note 54.

56. Id.

57. See United States v. Leggio, 12 USCMA 8, 30 CMR 8 (1960).

58. See United States v. Spence, supra note 7.

59. See United States v. Shamberger, 1 M.J. 377 (CMA 1976); United States v. Wood, 18 USCMA 291, 40 CMR 3 (1969), overruled in part, 1 M.J. 377 (CMA 1976); United States v. Moore, supra, note 8; United States v. Poteet, 50 CMR 73 (NCMR 1975).

60. United States v. Cook, 11 USCMA 99, 103, 28 CMR 323, 327 (1959).

of proof."⁶¹ Accordingly, appellate military courts discountenance attempts by the trial counsel to base all or part of his argument on the effect of the offense or the sentence on the relationship between the military and civilian communities.⁶²

Comments on Accused's Silence

If the accused asserts his constitutional right⁶³ to remain silent, the prosecutor "may not comment upon [his] failure . . . to take the witness stand [or if] an accused is on trial for a number of offenses and has testified to one or more of them only, no comment can be made in his failure to testify as to the others"; nor may the prosecutor "comment on the exercise by the accused of his rights under Article 31(b)."⁶⁴ The Court of Military Appeals has stated that the test is "whether the language was manifestly intended or was of such character that the triers of fact would naturally and necessarily take the prosecutor's remarks to be a comment on the failure of the accused to testify."⁶⁵ This mandate has been applied where the trial counsel expressly refers to the accused's decision to remain silent⁶⁶ and where the military judge fails to inform the accused of this right.⁶⁷ The right to remain silent, and the prohibition upon comments thereon, applies with equal force to the court-martial's sentencing phase.⁶⁸

61. United States v. Mamaluy, supra note 10, at 107, 27 CMR at 181.

62. See United States v. Boberg, 17 USCMA 401, 38 CMR 199 (1968); United States v. Cook, supra note 60; United States v. Mamaluy, supra note 10; United States v. Poteet, supra note 59; United States v. Baker, supra note 48.

63. See United States v. Mills, 7 M.J. 664 (ACMR 1977).

64. Paragraph 72b, MCM, 1969.

65. United States v. Gordon, 14 USCMA 314, 34 CMR 94 (1963).

66. See United States v. Albrecht, supra note 7; United States v. Grissom, 1 M.J. 525 (AFCMR 1975); United States v. Finchbaugh, 1 M.J. 1140 (NCMR 1977).

67. See United States v. Penn, 4 M.J. 879 (NCMR 1978).

68. See United States v. Mills, supra note 63; United States v. Gordon, 5 M.J. 653 (ACMR 178), pet. denied, 5 M.J. 361 (CMA 1978).

More often than not, however, arguments which violate this rule do so through subtle innuendoes rather than direct statements. Appellate military courts have not been reluctant to look behind bare statements in order to determine the argument's clear import. Indeed, a statement that the government's evidence is unrefuted constitutes commentary on the accused's silence if he is the only person who could have refuted it.⁶⁹ Further, in United States v. Russell,⁷⁰ the accused was tried for carnal knowledge. The government properly admitted an analysis of semen found on the victim's clothing. The trial counsel then argued that, even though there was an 85% chance that if the accused had submitted to a blood test it would have proven that the semen was not his, he did not submit to a blood test. Trial counsel was suggesting that the absence of the test was evidence of the accused's guilt. The Court had little trouble in finding this to be an improper reference to the accused's exercise of his constitutional rights. Arguments concerning an accused's decision to make an unsworn statement are permissible if the emphasis is on the weight to be accorded that statement.⁷¹ However, comments that because the accused made an unsworn statement neither the trial counsel nor the members were able to cross-examine him are improper.⁷²

Interjection of Personal Opinions

Generally, "[i]t is improper for [the trial counsel] to assert before the court his personal belief [.]"⁷³ Such statements constitute

69. See United States v. Kees, 10 USCMA 285, 27 CMR 359 (1959); United States v. Mills, supra note 63; United States v. Cazenave, 28 CMR 536 (ABR 1959).

70. 15 USCMA 76, 35 CMR 48 (1964).

71. See United States v. Cain, 5 M.J. 844 (ACMR 1978).

72. See United States v. King, supra note 24; United States v. Murphy, 8 M.J. 611 (AFCMR 1979); pet. denied, 9 M.J. 55 (CMA 1980); United States v. Lewis, 7 M.J. 958 (AFCMR 1979).

73. Paragraph 44b(1), MCM, 1969.

inadmissible unsworn testimony which is not subject to cross-examination.⁷⁴ In the vast majority of cases, therefore, the trial counsel may not express his personal opinion as to the credibility of the accused or witnesses.⁷⁵ In certain situations, appellate military courts have found trial counsel arguments improper on the basis of form rather than content. In United States v. Horn,⁷⁶ for example, the trial counsel said "I think" no less than 28 times during his argument; the Court of Military Appeals determined that such repetition amounted to an improper expression of personal opinion.⁷⁷

Inflammatory and Prejudicial Arguments

The Supreme Court has criticized prosecutorial arguments which are "undignified and intemperate [and] contain improper insinuations and assertions calculated to mislead the jury."⁷⁸ The appellate military courts have similarly held that the trial counsel may not:

use vituperative and denunciatory language, or appeal to, or make reference to religious beliefs, or other matters, where such language and appeal is calculated only to unduly excite or arouse the emotions, passions, and prejudice of the court to the detriment of the accused.⁷⁹

74. See United States v. Horn, 9 M.J. 429 (CMA 1980); United States v. Tanksley, supra note 8. In a limited number of circumstances, personal beliefs may be asserted if they are "based solely on evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief." Henderson v. United States, 218 F.2d 14 (6th Cir. 1955); United States v. Weller, 18 CMR 473 (AFBR 1954).

75. See United States v. Tanksley, supra note 8; United States v. Reddick, 33 CMR 587 (ABR 1963). Some examples include a statement that there is no place in the Army for a person like the accused, see United States v. Morgan, 40 CMR 583 (ABR 1968), or comments upon the character of the accused, see United States v. Long, supra note 29.

76. 9 M.J. 429 (CMA 1980).

77. See also United States v. Knickerbocker, 2 M.J. 128 (CMA 1977).

78. Berger v. United States, supra note 2, at 85.

79. United States v. Weller, supra note 74, at 478.

An inconclusive line of cases, however, suggests that such inflammatory and prejudicial arguments are not per se improper.⁸⁰ These cases indicate that an apparently inflammatory argument may be proper if it amounts to fair comment on evidence in the record. In light of this authority, defense counsel must examine the types of arguments which appellate military courts have found to be inflammatory, prejudicial, or beyond the bounds of fair comment.

Many of the previously discussed improprieties, such as comments not based on the evidence or attempts to place court members in the place of the victim, are also inflammatory. The most common type of inflammatory argument is a denunciatory reference to the accused. In United States v. Nelson,⁸¹ the trial counsel compared the accused to Adolph Hitler, an analogy which the Court of Military Appeals easily identified as inflammatory. Other comments which courts have held to be inflammatory include references to the socialist and marxist background of the accused and his family,⁸² accusations that the accused was a sexual pervert who should be incarcerated before he accosted one of the court members' daughters,⁸³ and characterizations of the accused as a moral leper who needs to be put where moral lepers belong.⁸⁴

Occasionally, an argument will be held inflammatory because of references to other parties to the trial. In United States v. Begley,⁸⁵ for example, the trial counsel appealed to the court members' emotions. The accused was a noncommissioned officer. The trial counsel addressed the noncommissioned officer members by name, and invited them to consider how the accused had disgraced the noncommissioned officer corps. Another example of inflammatory argument arose when the trial counsel insinuated that the defense counsel had made an unsworn statement on behalf of the

80. See United States v. Arnold, supra note 7; United States v. Fields, 40 CMR 396 (ABR 1968).

81. 1 M.J. 235 (CMA 1975).

82. See United States v. Garza, 20 USCMA 536, 43 CMR 376 (1971).

83. See United States v. Jernigan, 13 CMR 396 (ABR 1953).

84. See United States v. Douglas, 13 CMR 529 (NBR 1953).

85. 38 CMR 488 (ABR 1966).

accused with the hope of financial gain from the accused's \$800,000 inheritance.⁸⁶ Although there was evidence of an inheritance, the statements exceeded the bounds of fair comment. When the trial counsel exposes the members to embarrassment or contempt if they do not return a stiff sentence, their potential emotional reaction renders the argument inflammatory.⁸⁷ For example, the trial counsel may not assert that the members are "selfish, self-centered and are not fulfilling [their] responsibility to . . . society or the Air Force"⁸⁸ if the adjudged sentence does not include a discharge and confinement.

Prejudicial arguments, like inflammatory ones, usually are also improper on other grounds. In United States v. Ryan,⁸⁹ the trial counsel asserted that higher ranking witnesses were more credible than their subordinates. Although this is obviously improper and incorrect, the prejudicial impact stemmed from the fact that most of the higher ranking witnesses had testified for the prosecution.⁹⁰ Trial counsel may attempt to unfairly influence the members by presenting irrelevant and unnecessary arguments. In United States v. Simpson,⁹¹ the trial counsel urged the members to adjudge a dishonorable discharge by noting that a bad-conduct discharge could eventually be removed from the accused's record administratively. Similarly, the trial counsel erred by introducing evidence of credit card theft in order to establish identity in a court-martial for larceny of a wallet because the former was a much more serious offense than that charged, and there was no issue of identity.⁹² Finally, the trial counsel may not comment that the making and uttering of checks was tantamount to stealing since that argument injects

86. United States v. Vogt, 30 CMR 746 (CGBR 1960).

87. See United States v. Poteet, supra note 59.

88. United States v. Wood, supra note 59, at 8.

89. United States v. Ryan, supra note 6.

90. See also United States v. Ruggiero, 1 M.J. 1089 (NCOMR 1977), pet. denied, 3 M.J. 117 (CMA 1977).

91. 10 USCMA 229, 27 CMR 303 (1959).

92. See United States v. Brown, 8 M.J. 749 (AFCMR 1980). Cf. Mil. R. Evid. 403 (relevant evidence may be excluded if danger of unfair prejudice exceeds probative value).

an irrelevant specific intent into the court members' consideration and ignores the fact that stealing is a much more serious offense.⁹³

In United States v. Pinkney,⁹⁴ the Court of Military Appeals held that undue prejudice resulted from the trial counsel's reference to the accused's request for an administrative discharge. Since such a request is not incriminatory or an admission of guilt, it should not have been used against the accused. Similarly, since an accused has a right to plead not guilty to a given offense, any comment to the effect that his not guilty plea should be held against him improperly impeded his exercise of that right.⁹⁵ Finally, arguments based on evidence in the record can still be considered prejudicial if the trial counsel oversteps the bounds of fair comment. Thus, military appellate courts have found comments on the accused's stupidity⁹⁶ or cowardice⁹⁷ and arguments which focus on a lack of promotions during a 17-year career⁹⁸ to be improper.

Conclusion

In a court-martial with members, the defense counsel can preserve issues for appeal and insure that the accused's rights are fully protected at trial by making timely and specific objections to improper prosecutorial arguments on sentencing. Absent a clear showing to the contrary, a military judge, when presiding over a court-martial without members, is presumed to base his decisions only on properly admitted evidence.⁹⁹ Military appellate courts have followed this ruling in holding that prejudicial arguments,¹⁰⁰ and those based on facts not

93. See United States v. Bethea, 3 M.J. 526 (AFCMR 1977).

94. 22 USCMA 595, 48 CMR 219 (1974).

95. See United States v. Johnson, 1 M.J. 213 (CMA 1975).

96. See United States v. Ortiz, 33 CMR 536 (ABR 1963).

97. See United States v. Brewer, 39 CMR 388 (ABR 1967).

98. See United States v. Larochelle, 41 CMR 915 (AFBR 1969).

99. See United States v. Montgomery, 20 USCMA 35, 42 CMR 227 (1970).

100. See United States v. Moore, 1 M.J. 856 (AFCMR 1976).

in evidence,¹⁰¹ are harmless when presented in trials before judge alone. The defense counsel, however, should not assume that this gives free reign to the prosecutor. By objecting to improprieties in all cases, the defense counsel gives appellate counsel the opportunity to raise these issues on appeal in an effort to change the law.

101. See United States v. Eck, supra note 7; United States v. Diaz, 9 M.J. 691 (NCFR 1980).

Part Five - Search Incident to Lawful Apprehension

The right of law enforcement officers to conduct warrantless searches incident to lawful apprehensions is a long-recognized exception to the fourth amendment's warrant requirement.¹ The threshold prerequisite for this type of search is a lawful apprehension,² and the fruits of the search can never validate an otherwise unlawful arrest.³ However, where the apprehension is lawful, no other justification is needed to conduct a warrantless search.⁴

1. See, e.g., Weeks v. United States, 232 U.S. 383 (1914); United States v. Kinane, 1 M.J. 309 (CMA 1976); United States v. Briers, 7 M.J. 776 (ACMR 1979).

2. A lawful apprehension must be based on probable cause, see Dunaway v. New York, 442 U.S. 200 (1979); United States v. Briers, supra note 1. With regard to the question of whether probable cause must be manifested in an arrest warrant, see United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest permitted in public place); Payton v. New York, 445 U.S. 573 (1980) (arrest warrant required for arrest in private home); Steagald v. United States, ___ U.S. ___, 49 U.S.L.W. 4418 (U.S. Sup. Ct., 21 Apr. 1981) (search warrant required to execute arrest warrant in home of third party not named in latter). The question of whether Payton applies to a military barracks is currently before the Court of Military Appeals in United States v. Phinizy, CM 438655 (ACMR 30 May 1980), pet. granted, 9 M.J. 421 (CMA 1980). For an illustration of the ease with which probable cause may be established, See United States v. Thomas, 10 M.J. 687 (ACMR 1981).

3. Wong Sun v. United States, 371 U.S. 471 (1963) (unlawful arrest not legitimated by discovery of heroin). However, it is not always necessary for the apprehension to precede the search, see Rawlings v. Kentucky, 448 U.S. 98 (1980) (search of person before arrest upheld where probable cause to arrest existed and arrest effected immediately thereafter); United States v. Lotz, 50 CMR 234 (ACMR 1975) (search of unconscious suspect legal where police would have apprehended suspect immediately had he been conscious).

4. See United States v. Robinson, 414 U.S. 218 (1973); United States v. Thomas, supra note 2; United States v. Kinane, supra note 1.

Limitation of Searches Incident to Lawful Apprehensions

Once a lawful apprehension occurs, two limitations govern the subsequent search: it must be confined to a permissible scope and it must be contemporaneous in time and place with the apprehension.

Permissible Scope

In Chimel v. California,⁵ the Supreme Court held that, incident to a lawful apprehension, government agents may search the arrestee's person and the area "within [his] immediate control" from which he might seize a weapon or destructible evidence.⁶ In most cases, courts weigh numerous factors to determine if a search exceeds the geographic scope sanctioned in Chimel.⁷ These factors usually relate to the question of the areas which are within the arrestee's possible reach. Courts examine several questions in determining whether an area is within the possible reach of an arrestee, including: (1) whether the arrestee was under some form of restraint;⁸ (2) whether the police were in a position to deny an arrestee access to an area;⁹ (3) the ease or difficulty of reaching the area

5. 395 U.S. 752 (1969).

6. Id. at 763.

7. See People v. Williams, 57 Ill.2d 239, 311 N.E.2d 681 (1974), where the Court observed that "there can be no hard and fast rule defining the permissible scope of a warrantless search incident to arrest[.] Whether the search is reasonable must depend on the particular facts of the case."

8. See, e.g., United States v. Berenguer, 562 F.2d 206 (2d Cir. 1977) (fact that arrestee was handcuffed relevant to issue of whether nearby area was within his control); United States v. Weaklem, 517 F.2d 70 (9th Cir. 1975) (fact that arrestee was unrestrained justified search of adjacent area); United States v. Mota Aros, 8 M.J. 121 (CMA 1979).

9. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971) (arrest made inside house does not support search conducted outside of premises); Vale v. Louisiana, 339 U.S. 30 (1970) (arrest made outside of house does not justify search of premises); United States v. Mapp, 476 F.2d 67 (2d Cir. 1973) (where one officer stood between arrestee and closet and other officers were in same room, search of closet was unlawful).

searched,¹⁰ and (4) the number of police officers in relation to the number of arrestees and/or bystanders.¹¹

When considering these various factors, courts generally assume that arrestees have considerable freedom of movement at the time of arrest.¹² This assumption sometimes leads to decisions which seem inconsistent with Chimel.¹³ It may be necessary to allow an arrestee to move to another area within a dwelling before he is escorted to the police station,¹⁴ and the Chimel "immediate control" test applies to these areas as well.¹⁵ However, such movement should be scrutinized: the police may not move an arrestee merely to justify a more extensive search,¹⁶ and they may not bring an object within the arrestee's immediate control in order to search it.¹⁷ If an area was within the

10. See, e.g., United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972) (box believed to contain weapon was lawfully searched where it was located six feet from arrestee in small room); United States v. Cordero, 11 M.J. 210 (CMA 1981) (ability of automobile passenger to reach item under seat validated search).

11. Compare United States v. Mapp, supra note 9 (one arrestee, five or six officers) with United States v. Jones, 475 F.2d 723 (5th Cir. 1973) (four defendants, six or seven officers). See also United States v. Belton, infra.

12. See, e.g., Collins v. Commonwealth, 574 S.W.2d 296, 299 (Ky. 1978), where dissent notes that unless arrestee "was an acrobat, a Houdini or Stretcho-Man I cannot conceive how the [searched area] could have fallen within the area of his immediate control."

13. See cases cited in LaFave, infra note 18, at 414 n.31, 32.

14. See, e.g., United States v. Mason, 523 F.2d 1122 (D.C. Cir. 1975) (arrestee requests permission to change clothing); United States v. DeMarsh, 360 F.Supp. 132 (E.D. Wis. 1973) (arrestee requests use of restroom).

15. See notes 5-14, supra, and accompanying text.

16. United States v. Mason, supra note 14.

17. United States v. Rothman, 494 F.2d 1260 (9th Cir. 1974).

possible reach of an arrestee, an inquiry into the probability that weapons or evidence would be found in that location would seem appropriate.¹⁸ However, courts devote little attention to this question.¹⁹ If the issue is raised, it should be analyzed in terms of two questions: whether the crime involved was one of violence or one for which destructible evidence would exist²⁰; and whether the arrestee had a known propensity for violence.²¹

The Supreme Court's most recent description of the proper scope of a search incident to a lawful arrest may be found in New York v. Belton,²² where the Court extended the permissible scope of a search incident to the arrest of a vehicle's passenger to the automobile's entire passenger compartment. Such a search may include closed containers found therein. Although the purpose of the decision was to establish a "bright line" rule to aid police officers in performing their duties, Belton leaves unanswered several vital questions. It is uncertain whether Belton eliminates judicial inquiry into the actual accessibility of a container found within the passenger compartment: incident to the arrest of a driver of an automobile with no other passengers, may the police lawfully search a locked suitcase in the back seat, out of reach of the driver? Additionally, the effect of the broad language of Belton on non-automobile cases is uncertain.

18. Since the purpose of this type of search is to discover weapons or evidence to which the arrestee might have access, the question of whether these items even exist would seem relevant. See 2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment §6.3(c) (1978 and Supp. 1981).

19. United States v. Robinson, supra note 4, held that a case-by-case justification is not required for a search of the person.

20. Consider, for example, the apprehension of a person for failure to pay a traffic fine. See State v. Seiss, 168 N.J.Super. 269, 402 A.2d 972 (1979).

21. Where an arrestee is suspected of committing a violent crime, or is known to be armed or dangerous, a broader search would likely be justified. LaFave, supra note 18, at 418-19.

22. ___ U.S. ___, 29 Crim.L.Rptr. (BNA) 3124 (Sup. Ct. 1 July 1981).

The Contemporaneity Requirement

In Preston v. United States,²³ Justice Black, writing for a unanimous Court, stated that "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."²⁴ Two later cases altered this requirement that the search be conducted contemporaneously with the lawful apprehension. In Robinson v. United States,²⁵ the Court ruled that a search of a person at the scene of an apprehension is permissible regardless of whether the arresting officer had probable cause to believe the arrestee possessed a weapon or evidence of crime.²⁶ Further, in United States v. Edwards,²⁷ the Court held that searches of the arrestee's person and articles associated with his person which could have been conducted at the time of apprehension may legally be performed later at the place of detention.²⁸ Interpreted in conjunction, Robinson and Edwards remove searches of the person from Preston's "contemporaneity" requirement.²⁹

23. 376 U.S. 364 (1964).

24. Id. at 367.

25. 414 U.S. 21 (1973).

26. Id. at 23. If a custodial arrest is permitted, a full search of the person is allowed, regardless of how minor the underlying offense may be. See Gustafson v. Florida, 414 U.S. 260 (1973). Some state courts have limited the right to search incident to apprehension for minor offenses by construing state constitutional provisions as providing greater protection than the fourth amendment. See, e.g., People v. Maher, 17 Cal.3d 196, 130 Cal. Rptr. 508, 55 P.2d 1044 (1976); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

27. 415 U.S. 800 (1974).

28. Id. at 805.

29. In Edwards, the Court found that a search of the arrestee's clothing 10 hours after his arrest was justified because substitute clothing was not available earlier. One commentator believes Edwards is limited to its facts. Whitebread, Criminal Procedure - An Analysis of Constitutional Cases and Concepts 139 (1980). However, courts have not construed Edwards so narrowly. See LaFave, supra note 18, at §5.3(a).

Uncertainty arises, however, as to the extent to which an article must be associated with the person of the arrestee in order to justify a departure from the contemporaneity requirement. The Edwards case involved an individual's clothing; therefore, items found in pockets, cuffs, or on the body itself³⁰ will fall within its rule.³¹ The Court has not, however, been willing to extend that rule to items not directly associated with the person of the accused and in which an individual has a reasonable expectation of privacy.³² Generally, the area over which the arrestee has control at the time of his arrest must be searched contemporaneously with the arrest and the search cannot be conducted after the arrestee is removed from the scene.³³ This rule, however, may be weakening in light of Belton, in which the Court approved an automobile search conducted after the occupants had been removed from the car.

30. See State v. Magness, 565 P.2d 194 (Ariz. App. 1977).

31. In Robbins v. California, ___ U.S. ___, 29 Crim. L. Rptr. (BNA) 3115 (Sup. Ct. 1 Jul 1981), the Court ruled that closed, opaque containers may not be searched without a warrant because they evidence a reasonable expectation of privacy with respect to their contents. See also Arkansas v. Sanders, 442 U.S. 753 (1979). It is not clear whether this more restrictive rule will apply to searches incident to arrest. In both Robbins and Sanders, the Court specifically indicated that the "search incident to arrest" issue was not being decided. In Robbins, for example, the Court stated that the state had not alleged any circumstances which would constitute a valid exception to the container rule and, "[i]n particular, . . . that the opening of the package was incident to a lawful custodial arrest." Id. at 3117 n.3.

32. See United States v. Chadwick, 433 U.S. 1 (1977), where the defendants were arrested while standing next to an open car trunk in which they had just placed a footlocker; a search of the footlocker later at police headquarters could not be justified as incident to apprehension.

33. See State v. Rodriguez, 580 P.2d 126 (N.M. 1978); State v. Peterson, 525 S.W.2d 599 (Mo. App. 1975). But see State v. Bale, 267 N.W.2d 730 (Minn 1978) (search of premises conducted after defendant was subdued and secured in patrol car was proper).

Conclusion

The "search incident to apprehension" exception to the fourth amendment's warrant requirement accords government agents broad search powers. Defense counsel should consider attacking these searches on several grounds, contending, where appropriate, that the preceding arrest was unlawful; that the scope of the attendant search was too broad; or that the contemporaneity requirement was not met. Recent Supreme Court decisions have altered the rules applicable to this type of search. Belton, in particular, may be read to give police officers carte blanche over areas which were previously protected under Chimel. The trend seems to be toward replacing the police officer's judgment with that of a magistrate, or providing a set of rules for particular situations³⁴ The result may well be a broadening of the power to search incident to apprehension.³⁵

34. See New York v. Belton, supra note 22; Robbins v. California, supra note 31; Payton v. New York, supra note 2; Steagald v. United States, supra note 2.

35. See New York v. Belton, supra note 22. For a discussion of Belton, see United State v. Gladdis, 11 M.J. ____ (ACMR 24 July 1981).

PROPOSED INSTRUCTION

Law of Principals

There are three aspects of the law of principals in military jurisprudence: aiding and abetting; counseling, commanding, or procuring; and causing an act to be done.¹ The military instructions on the law of principals inadequately stress the concept of "willfulness." The most serious omission of this element is found in the standard military explanation of the basis upon which an accused may be convicted if he "causes an act to be done." See Department of Army, Pamphlet No. 27-9, Military Judges' Guide, §9-11(c) (1969).² Criminal intent is an essential element of every felony. To insure that the court members understand that the accused must willfully cause the act, defense counsel should propose the following instruction:

In order to cause another person to commit a criminal act, it is necessary that the accused willfully do, or willfully fail to do, something which, in the ordinary course of the business or employment of such other person, or by reason of the ordinary course of nature or the ordinary habit of life, results in the other person's either doing something the law forbids, or failing to do something the law requires to be done.

An act or a failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

This instruction, extracted from Devitt and Blackmar, Federal Jury Practice and Instructions (3rd ed. 1977), was cited with approval in United States v. Ordner, 554 F.2d 24 (2d Cir. 1976), cert. denied,

1. Article 77, Uniform Code of Military Justice, 10 U.S.C. §877 (1976) [hereinafter UCMJ].

2. While Article 77, UCMJ, does not expressly contain this element, counsel should argue that willfulness is required for conviction of this offense.

430 U.S. 931 (1977). See also 18 U.S.C. §2(b) (1976). Because they inadequately address the willfulness element, the standard military instructions on the law of principals may confuse the jury and prejudice the accused. For instance, an accused can knowingly perform an act which aides an offense even though he does not willfully intend to consummate the crime. Thus, a servicemember who knowingly brings a woman to a barracks area may facilitate another soldier's rape of that individual. Absent the instruction on willfulness, the jury may conclude that the accused "caused the act to be done" by bringing the victim to the barracks, and convict him as a principal even though he did not willfully facilitate the rape. This danger is substantially lessened by the proposed instruction's emphasis of the willfulness element.

SIDE BAR

A Compilation of Suggested Defense Strategies

"Sanitizing" Testimony

During a recent oral argument before the Court of Military Appeals, Chief Judge Everett criticized a procedure whereby the reliability of an informant who provided information supporting a search authorization was preliminarily tested before the court members. The Chief Judge opined that a far better practice would be to elicit this preliminary evidence at an Article 39(a) session, and thereby "sanitize" the evidence presented before the court-martial. The members, for example, would only hear the agent's testimony that he conducted a search authorized by Colonel X, rather than "my informant told me that he had purchased drugs from the accused on numerous occasions." While the latter evidence would entitle the accused to an uncharged misconduct instruction, there is clearly less potential for prejudice if the members are never exposed to it.

The need to "sanitize" testimony arises in other areas as well. The Fifth Circuit Court of Appeals, for example, recently aligned itself with five other federal courts of appeal in holding that hearsay evidence of reputation and prior criminal conduct may not be introduced to rebut an entrapment defense. See United States v. Webster (5th Cir., 2 Jul 1981), 29 Crim.L.Rptr 2385. The government ordinarily attempts to admit these statements to prove a "pertinent trait" of the accused's character under FRE 404(a)(1). The court aptly pointed out that predisposition is a state of mind, not a character trait. Military Rule of Evidence 404 was taken from FRE 404 without substantial change. Counsel should insure that the government does not try to prove its case in rebuttal through inadmissible hearsay; an Article 39(a) session should be requested to minimize the risk that the witness will reveal prejudicial matter.

Petitioning Convening Authority for Specific Relief

If a defense counsel encounters problems arising from the prosecutor's conduct or the recalcitrance of government witnesses whose testimony concerns their official duties, he should submit a petition to the convening authority requesting relief. These problems arise in diverse situations. In one case, Panamanian police refused to allow the defense counsel to interview any Panamanian witnesses, attempted to apprehend the counsel when they persisted, and refused to allow the defense counsel off post to investigate the cases. In another case,

the trial counsel directed company commanders to send all defense witnesses to the trial counsel before being interviewed by the defense. A third situation involved an Army nurse who was scheduled to testify as an expert on rape-crisis counselling, yet refused to talk to the defense counsel prior to trial. The final scenario concerned a military policeman who refused to authenticate his inconsistent pretrial statement at trial, but admitted to the defense counsel after trial that he had made the statement. When asked to sign a statement to that effect, he sought the trial counsel's advice and subsequently recanted his earlier statement to the defense counsel. While witnesses generally cannot be required to speak with defense counsel, a government agent can be compelled to divulge matters concerning his official duties. In each of these situations, relief should be sought from the convening authority. If relief is not forthcoming, the defense counsel should consider filing a writ before the appellate courts.

Responding to Allegations of Ineffective Representation

Questions concerning the adequacy of legal representation arise in two ways. Most questions originate from the client, either as an inquiry regarding something he doesn't understand, or as a direct allegation of inadequacy. Appellate counsel are aware that some clients will use any excuse to secure a reversal. Thus, all allegations of inadequacy are closely scrutinized. They are initially reviewed in light of the trial record. In most cases, the record amply discredits the claims; the appellate attorney's findings and opinions are explained to the client, and the matter is dropped. When the record provides insufficient information to resolve the issue, the client's specific allegation is reduced to an affidavit and forwarded, sometimes with the appellate counsel's interrogatories, to the defense attorney. Upon receipt of the defense counsel's response, the appellate counsel and his supervisors analyze the facts and determine if the claim is meritorious. If, in their opinion, the issue is viable and should be resolved by an appellate court, it will be raised.

In Anders v. California, 386 U.S. 738 (1967), the Supreme Court stated that an accused may raise issues of his choice before appellate courts, notwithstanding his attorney's determination that they are meritless. The Anders procedure was approved by the United States Court of Military Appeals in United States v. Larnear, 3 M.J. 76, 82 n.19 (CMA

1977).¹ If a client desires to raise an allegation of inadequacy over his appellate attorney's objection, the attorney is ethically bound to join in asserting the error. If the attorney's review of the trial record prompts questions concerning the adequacy of representation, he fully advises the defense counsel of the situation and clarifies any uncertainties he may have. The overwhelming majority of these inquiries establish the excellence of the client's representation. If the information indicates that a defense counsel may have erred, the primary appellate counsel and his supervisors must analyze the potential issue in light of United States v. Rivas, 3 M.J. 282 (CMA 1977).²

Trial defense counsel can do much to assist appellate counsel in resolving allegations of inadequate representation. Most allegations involve witnesses who were not called or motions that were not made. Accordingly, the defense counsel should keep detailed records of conversations with clients and pay particular attention to potential witnesses. He should have the client explain, in writing, his side of the case. If a particular witness suggested by the client is not called, the client should be advised; a memorandum regarding the conversation should set forth the reasons for not calling the witness. All potential defenses or motions should be explained to the client and noted in memoranda initialed by him.

1. See also United States v. Crooks, 4 M.J. 563 (ACMR 1977). Further, the client may submit the assignment of error himself or have his appellate attorney draft the pleading. If the attorney drafts the pleading, he indicates that the issue is being raised at his client's insistence.

2. In Rivas, the Court of Military Appeals stated, "[w]e believe that to exercise the skill and knowledge which normally prevails within the range of competence demanded of attorneys in criminal cases requires that the attorney act as a diligent and conscientious advocate on behalf of his client." 3 M.J. at 288.

USCMA WATCH

Synopses of Selected Cases In Which The Court of Military Appeals Granted Petitions for Review or Entertained Oral Argument

During oral argument in United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980), pet. granted, 9 M.J. 129 (CMA 1980), argued 23 June 1981, the Court expressed its inclination to exhaustively reexamine the military insanity defense. See 13 The Advocate 203 (1981). The Court requested briefs on several supplemental issues, including the question of whether constitutional, statutory, and public policy considerations preclude abolishing insanity as a substantive defense. The Court must confront the controversial diagnostic categories which, although suitable for psychiatric treatment, have historically confused the jurisprudential effort to ascribe guilt. The primary issue is whether the lower tribunal adequately defined "mental disease or defect" for purposes of determining mental responsibility; the lower tribunal was uncertain as to whether the accused's personality disorder constituted a substantive insanity defense or a "mere" behavior disorder.

GRANTED ISSUES

MILITARY JUDGE: Abuse of Discretion

In United States v. Carpenter, 1 M.J. 384 (CMA 1976), the Court held that the government must produce material witnesses or abate the proceedings. The Court will address the problems arising from this requirement in United States v. Menoken, ACMR 15412, pet. granted, 11 M.J. 347 (CMA 1981). In that case, the accused testified that a noncommissioned officer told him he was on excess leave during the time he was allegedly AWOL. The defense counsel unsuccessfully moved for a brief continuance to corroborate the story. Because no offer of proof was made as to his testimony and the issue was not previously raised on appeal, the Court will resolve the waiver issue as well as the claim that the military judge abused his discretion by denying the continuance.

TRIAL: Speedy Trial

The Court faces a two-pronged speedy trial issue in Unites States v. Burrell, ACMR 439780, pet. granted, 11 M.J. 298 (CMA 1981). Initially, the accused submits that a period of hospitalization is tantamount to

severe restriction when he was not allowed to leave the building without an escort. See United States v. Schilf, 1 M.J. 251 (CMA 1976). He also contends that the prosecution failed to proceed with due diligence when many delays occurred throughout the 124-day pretrial period. The Court has the opportunity to determine whether a showing of prejudice is necessary under the latter theory.

DEFENSES: Duty to Instruct

In United States v. Gonzalez-Dominicci, ACRM 439669, pet. granted, 11 M.J. 398 (CMA 1981); and United States v. Sermons, ACRM 15215, pet. granted, 11 M.J. 283 (CMA 1981), the Court will consider entrapment issues. In Sermons the Court will determine whether the defense was raised by the government's evidence, despite a defense denial of involvement in the alleged cocaine sale. In Gonzalez-Dominicci, it will decide whether the instruction in the Military Judges' Guide is fatally deficient despite a defense request for that particular instruction. See Cain and Gallaway, A call for a New Entrapment Instruction: Banishing the "Reasonable Suspicion" Interloper, 13 The Advocate 148 (1981).

OFFENSES: Multiplicity

In United States v. Glover, ACRM 40083 pet. granted, 11 M.J. 405 (CMA 1981), the Court was invited to expand the rule that a specification alleging the nature of the force used to perpetrate a rape is multiplicitious for findings purposes with the rape charge. See United States v. Neverson, 11 M.J. 153 (CMA 1981) and United States v. Thompson, 10 M.J. 405 (CMA 1981). The accused in Glover was convicted of rape, aggravated assault, sodomy, and unlawful entry. The facts established that he entered the victim's room and committed rape and sodomy at knife point. Because the knife was used to perpetrate the greater offenses of rape and sodomy, appellate defense counsel argued that the assault was multiplicitious for both findings and sentencing purposes. Appellate government counsel argued that the issue was waived since there was no objection raised at trial; that if the issue was not waived, the charges were not multiplicitious since the accused was convicted and sentenced for substantially different offenses; and that even if the charges were multiplicitious, the accused was not prejudiced.

APPELLATE REVIEW: Duty to Raise Noted Issues

One of the trial defense counsel's most important tasks is to preserve issues for appellate review. Notifying appellate defense counsel of any possible appellate issue is part of this responsibility. In United States v. Grostefen, AFCMR 25116, pet. granted, 11 M.J. 358 (CMA 1981), the Court will decide whether appellate defense counsel must

assign as errors those issues raised at trial and specifically noted by the accused in his request for appointment of appellate counsel. After talking twice with the accused and the assistant defense attorney and researching the issues, appellate defense counsel determined that the issues raised and noted were nonmeritorious and submitted the case upon its merits. The Court will determine whether appellate counsel must still assign the issues as errors despite his conclusion that they lacked merit.

VOIR DIRE: Challenge for Cause

During voir dire, one of the members indicated that his responsibilities as a member of the Base Resources Protection Committee included the reduction of on-post larcenies, and that one of the victims of the larcenies for which the accused was being tried had reported the theft to him. In United States v. Harris, AFCMR 22770, pet. granted, 11 M.J. 284 (CMA 1981), the Court will decide whether the military judge erred by denying a challenge for cause of this member and thereby forcing the defense counsel to use the peremptory challenge. In response to questions by the military judge, the member stated that he could decide the case strictly on the basis of in-court proceedings. See United States v. Tippit, 9 M.J. 106 (CMA 1980).

TRIAL: Verbatim Record

During the trial counsel's redirect examination of a witness testifying as to the genuineness of the accused's signatures on certain documents necessary to prove the government's case, the recording equipment malfunctioned, and about 30 minutes of the proceedings were not recorded. In United States v. Lashley, AFCMR 22744, pet. granted, 11 M.J. 288 (CMA 1981), the Court will decide whether the attempted reconstruction, over defense objection, of the testimony in an Article 39(a) session conducted immediately after the malfunction was discovered satisfies the requirement for a complete record and rebuts the presumption of prejudice flowing from the substantial omission. See United States v. McCullah, 11 M.J. 234 (CMA 1981); United States v. Eichenlaub, 11 M.J. 239 (CMA 1981); United States v. Gray, 7 M.J. 296 (CMA 1979).

VACATION OF SUSPENSION: Right to Counsel

The accused's bad-conduct discharge was suspended for six months after his release from confinement. During this "probationary" period, he was brought before five "Captain's Mast" proceedings conducted pursuant to Article 15, UCMJ. Shortly before the suspension expired, he was notified that vacation proceedings were being instituted pursuant to Article 72, UCMJ. The supervisory authority, however, determined that

Article 72, UCMJ, did not require the appointment of a trained attorney, and the accused was represented by a warrant officer. In United States v. Moore, CGCMR S23530, pet. granted, 11 M.J. 341 (CMA 1981), the Court will consider whether the vacation of the suspension of the bad-conduct discharge was improper when, contrary to the accused's request, he was not represented by a lawyer at the vacation hearing.

EVIDENCE: Admissibility

In United States v. Gaeta, SPCM 14387, pet. granted, 11 M.J. 343 (CMA 1981), a case tried prior to the implementation of the Military Rules of Evidence, the accused challenges the hearsay testimony of a law enforcement agent who had been told that he would be selling drugs on the night in question. See United States v. Zone, 7 M.J. 21 (CMA 1979). This testimony was not objected to at trial. The Army Court of Military Review found that the statement was inadmissible hearsay derived from the agent's conversation with an informant who did not testify. However, the court concluded that this testimony was not a major factor in the prosecution's case and held that the accused was not prejudiced by its admission. The facts in the case establish that he did not personally sell the drugs in question but that he entered the room as the sale was being completed. The prosecution pursued two theories of criminal liability, conspiracy and aiding and abetting.

The first granted issue in this case is whether the lower tribunal erred by finding that the inadmissible hearsay testimony was harmless. The second granted issue concerns whether the judge was obligated to present a Pinkerton instruction to the jury, see Pinkerton v. United States, 328 U.S. 640 (1946), and, if so, whether the lower court erred in finding that the accused could be convicted of the substantive offenses on the basis of his conspiracy conviction. See United States v. Washington, 1 M.J. 473 (CMA 1976). A Pinkerton instruction advises the jury that if it finds beyond a reasonable doubt that the accused conspired to commit the substantive offenses, it may convict him of those offenses, even if there is no evidence that he otherwise participated in the crimes. The accused's position is that because the military judge did not give such an instruction to the members, they could not convict him of the substantive offenses on the basis that he conspired to commit those crimes. The accused further argues that the lower tribunal erred as a matter of law in finding that his guilt of the substantive offenses was established by his conspiracy conviction. In Nye & Nissen v. United States, 336 U.S. 613 (1949), the Supreme Court held that a Pinkerton instruction must be presented if that theory is to be relied upon to

support the conviction of the substantive offense. While that case also holds that an aiding and abetting instruction may preclude the necessity of the Pinkerton instruction with regard to the substantive offense, the accused argues that if the Pinkerton instruction is not given at trial, an appellate court may not rely on its rationale to support the conviction of the substantive offenses even if the judge presented an aiding and abetting instruction.

EVIDENCE: "Fresh Complaint"

In United States v. Sandoval, ACRM 439327, pet. granted, 11 M.J. 344 (CMA 1981), the unit's adjutant, a warrant officer, was allowed to testify that one of his female subordinates complained to him that the appellant indecently assaulted her more than a week earlier. The defense counsel objected to this testimony but the military judge held that the testimony was permissible because the alleged victim's statement constituted a "fresh complaint". Citing United States v. Thompson, 3 M.J. 168 (CMA 1977), the Army Court of Military Review agreed with the trial defense counsel that, regardless of the reasons for delay, reporting the incident to the warrant officer did not constitute fresh complaint. However, the lower court held that since the latter's testimony, standing alone, was "practically meaningless," its admission was harmless. The Court of Military Appeals will now decide whether "fresh complaints" must be made "while in a state, of shock, outrage, agony and resentment" as well as within a reasonable time after the incident, and, if so, whether the testimony in this case was sufficiently damaging to warrant reversal.

REPORTED ARGUMENTS

GUILTY PLEA: Providency

Is a rehearing required when the convening authority honors a pre-trial agreement provision which the military judge inadequately explains during the providency inquiry? In United States v. Kraffa, 9 M.J. 643 (NCOMR 1980), certificate of review filed, 9 M.J. 126 (CMA 1980), argued 22 June 1981, the military judge perfunctorily interpreted a clause requiring the convening authority to defer all confinement at hard labor exceeding six months. The convening authority deferred confinement at hard labor exceeding five months and remitted any confinement beyond that period. The Navy Court of Military Review ordered a rehearing, holding that the plea was improvident because the military judge did not fully explain the distinctions between deferment, remission, and suspension. The Court's decision may further erode the precept that a plea is improvident unless the military judge fully inquires into each element

of the pretrial agreement. Compare United States v. Crawford, 11 M.J. 336 (CMA 1981) and United States v. Hinton, 10 M.J. 136 (1981) with United States v. King, 3 M.J. 458 (CMA 1977) and United States v. Green, 1 M.J. 453 (CMA 1976).

OFFENSES: AWOL

In United States v. Dubry, NMCM 80-0225/S, pet. granted, 9 M.J. 938 (CMA 1980), argued 23 June 1981, appellate defense counsel urged the Court to hold that an accused's AWOL constructively terminates when military authorities learn of his status and location. While AWOL, the accused was arrested for assault and incarcerated in a Missouri jail. The terms of his bail required him to remain in that state. While on bail, he telephoned his unit in Charleston, South Carolina. The evidence also suggests that he visited a Missouri reserve unit. Although the Court is unlikely to adopt the rule that an AWOL terminates when military authorities disregard their affirmative duty to apprehend the violator, see United States v. Coglin, 10 M.J. 670 (ACMR 1981) and authorities cited therein, it may hold that the accused's confinement by Missouri authorities terminated his period of unlawful absence, see United States v. Garner, 7 USCMA 578, 23 CMR 52 (1957). The Court's comments during oral argument focused on the fact that the accused's civilian bond precluded his return to his unit, and that his dealings with military authorities subsequent to his release on bond suggested, at most, an ambivalent intent to return to military control.

OFFENSES: Violation of Regulation

In United States v. Kolkach, AFMR 24 826, pet. granted, 10 M.J. 189 (CMA 1980), the Court of Military Appeals has the opportunity to define the term "properly published" as used in paragraph 171b, Manual. The accused's command endorsed, but did not enforce, a policy prohibiting airmen and officer on alert status from drinking. The command subsequently issued an Air Force regulation prohibiting drinking on alert status. The accused was apprehended for driving while intoxicated during off-duty hours but while he was on alert. At that time, no one in the accused's immediate command was aware of the new regulation prohibiting drinking on alert status. The regulation was distributed to the command, and several days after the initial charge relating to drunk driving was served, the accused was additionally charged with violating the regulation. The Court may decide the case based on the rationale of Lambert v. California, 355 U.S. 225 (1970) which requires actual knowledge or proof of the probability of such knowledge. In doing so, the Court would have to distinguish, overrule, or ignore the rationale of United States v. Leverette, 9 M.J. 627 (ACMR 1980), which states that it was the intent of Congress and the President to utilize a "scheme of strict liability" when it approved paragraph 154a(5) of the Manual (ignorance or mistake of the law is no defense).

PRETRIAL AGREEMENTS: Effect of Appellate Review

The importance of carefully drafting pretrial agreements is underscored by the issue facing the Court in United States v. Cook, 9 M.J. 763 (NCMR 1980), certificate of review filed, 9 M.J. 194 (CMA 1980), argued 21 July 1981. The Navy Court of Military Review held that the accused's guilty plea was improvident and ordered a rehearing. At the rehearing, he was convicted of charges which had been withdrawn pursuant to a pretrial agreement in effect at his first trial. The Court will determine whether a pretrial agreement which does not expressly bar the prosecution of withdrawn charges nevertheless has that effect even if the accused's guilty plea is deemed improvident on appeal. Although federal practice permits the revival of a withdrawn specification, see United States v. Cook, 9 M.J. 763, 765 n.1 (NCMR 1980) and cases cited therein, the imposition of a single sentence for the original and revived charges may violate Article 63(b), UCMJ, which provides that a sentence on rehearing may not exceed the punishment originally imposed. The case provides the Court with a suitable forum for further discussing the applicability of traditional contract law principles to the interpretation of pretrial agreements.

CASE NOTES

Synopses of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

CHARGES AND SPECIFICATIONS: Sufficiency

United States v. Clifton, CM 440047, ___ M.J. ___ (ACMR 14 July 1981).
(ADC: CPT Castle)

The accused was convicted of adultery. On appeal, he successfully contended that the charge was fatally deficient because it did not allege that one party to the sexual intercourse was married to a third person. Although the specification said that the accused had sexual intercourse with a woman not his wife, that phrase alone does not imply that either party was married to another. The court dismissed the charge and reassessed the sentence.

CONVENING AUTHORITY'S ACTION: Sufficiency

United States v. Evans, SPCM 15522 (ACMR 15 July 1981) (unpub.).
(ADC: CPT Ferrante)

Pursuant to a pretrial agreement, the accused pled guilty to, *inter alia*, larceny. The military judge rejected the plea and the agreement was cancelled. Without the benefit of a pretrial agreement, the accused subsequently pled guilty to and was convicted of wrongful appropriation. His approved sentence exceeded that allowed by the voided agreement. On appeal, he contended that the convening authority's action was unfair and unjust. The court disagreed; although the convening authority "implicitly agrees that the sentence provided for in the agreement is fair and appropriate," in order to encourage guilty pleas it is generally comparatively lenient and is not the only appropriate sentence. Other, more harsh sentences may also be just. Independently assessing the adjudged sentence, the court determined it to be "fair and appropriate," and affirmed the conviction. See Frank v. Blackburn, 605 F.2d 910 (5th Cir. 1979), rev'd en banc, 646 F.2d 873 (1981).

EVIDENCE: Admissibility of Prior Convictions

United States v. Calin, 11 M.J. 722 (AFCMR 1981).
(ADC: MAJ Smith)

Prior to sentencing, the military judge admitted, without defense objection, evidence that the accused had pleaded guilty to theft in a civilian trial. Although civilian convictions are admissible if properly entered and maintained in the accused's military personnel records, paragraph 75d, Manual for Courts-Martial, United States, 1969 (Revised

edition) [hereinafter Manual], the record in the case sub judge is silent on this point. Normally, such an error would be waived by the lack of defense objection. See Mil.R.Evid. 103(a). However, the court held that "since the conviction was not even offered as a personnel record, or thereby shown to be admissible and it was plainly not admissible as a previous court-martial conviction, we decline to apply any waiver rule in the interests of justice." The court reassessed the sentence.

EVIDENCE: Records of Nonjudicial Punishment

United States v. Beaudion, SPCM 15996, ___ M.J. ___ (ACMR 10 July 1981).
(ADC: CPT Pascale)

Prior to sentencing, a record of nonjudicial punishment was admitted without defense objection. On appeal, the court concluded that although several illegible signatures rendered the record defective, the error was waived by the trial defense counsel's failure to object. See Mil.R.Evid. 103(a). Although absence of a defense objection would not have constituted waiver prior to the effective date of the Military Rules of Evidence, the defects do not rise to the level of "plain error" as defined by Mil.R. Evid. 103(a). See United States v. McLemore, 10 M.J. 238, 240 n.1 (CMA 1981).

MILITARY JUDGE: Duty to Instruct

United States v. Bullington, SPCM 15952 (ACMR 7 July 1981) (unpub.).
(ADC: CPT Pepler)

The accused was convicted of two brief periods of unauthorized absence. The appellate court held that the military judge erred by not instructing the court members that a bad-conduct discharge was authorized only because the aggregated authorized confinement was six months. United States v. Nelson, 2 M.J. 175 (CMA 1976) (summary disposition); United States v. Murray, 19 USQMA 109, 41 CMR 109 (1969). See paragraph 127c, Manual. The court set aside the sentence and ordered a rehearing.

OFFENSES: Communicating Insulting Language to Female

United States v. Baro, CM 439932 (ACMR 23 July 1981) (unpub.).
(ADC: MAJ Rhodes)

The accused was convicted of communicating insulting language to a female in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934 (1976) [hereinafter UCMJ]. On appeal, he contended that the offense unreasonably differentiates between men and women in violation of the fifth amendment's equal protection clause. The court held that since the offense of communicating "obscene" language may be committed without regard to the sex of the offender or victim, United

States v. Respass, 7 M.J. 566 (ACMR 1979), pet. denied, 7 M.J. 249 (CMA 1979), nothing suggests that a different rule should be applied when the charge is communicating insulting, rather than indecent or obscene, language. See generally United States v. Choleva, 33 CMR 599 (NBR 1962).

OFFENSES: Perjury

United States v. Alston, 11 M.J. 656 (AFCMR 1981).
(ADC: CPT Kohrt)

The accused was convicted of perjury committed at his previous court-martial. At trial, all elements of the offense were established except that the offense occurred in a duly detailed and constituted judicial proceeding. See paragraph 210, Manual. Since no evidence was introduced to prove this essential element, the court set aside the findings and dismissed the charge.

OFFENSES: Receipt of Stolen Property

United States v. Traylor, CM 439984, ___ M.J. ___ (ACMR 13 July 1981).
(ADC: CPT Pardue)

The accused pled guilty to receipt of stolen property and to robbery upon the theory of aiding and abetting. He and another soldier had shoved the victim while a third soldier took the victim's wallet and ran away with it. Shortly thereafter, they divided the money. The appellate court noted that the military follows the common law rule that a thief cannot be convicted for receiving goods he has stolen. United States v. Ford, 12 USCMA 3, 30 CMR 3 (1960). The court held that "one who is present at the scene and who aids and abets in the commission of the theft by assisting in the taking and carrying away falls within the general [common law] rule and may not be convicted of receiving the stolen property." See also Aaronson v. United States, 175 F.2d 41, 43 n.3 (4th Cir. 1949); paragraph 213f(4), Manual.

OFFENSES: Solicitation

United States v. Mitchell, CM 438532, ___ M.J. ___ (ACMR 29 July 1981).
(ADC: CPT McAtamey)

The accused was convicted under Article 134, UCMJ, of soliciting a subordinate to assist him in his "black market" pursuits in the Republic of Korea. On appeal, he contended that the trial judge's instruction that solicitation is a general intent offense was erroneous. The appellate court disagreed and held, without reference to any decisional authority, that solicitation does not require "a specific intent which must be determined by a subjective test rather than [by an] objective

test[.]" Thus, the accused's conduct is to be examined to determine if a reasonable man would believe that he was inducing, enticing, or influencing another to commit an offense. Apparently, his intent is now irrelevant. But see United States v. Benton, 7 M.J. 606 (NCMR 1979), pet. denied, 8 M.J. 227 (CMA 1980). The dissent noted that Article 82, UCMJ, as well as common law, requires "an intent that the person solicited commit the offense" and that there is no authority for the proposition that the same intent is not required under Article 134, UCMJ.

POST-TRIAL REVIEW: Rebuttal

United States v. Snelling, CM 439406 (ACMR 10 August 1981).

(ADC: CPT Walinsky)

A copy of the staff judge advocate's review and an authenticated copy of the accused's record of trial were received by his trial defense counsel, who had been reassigned. Nine days later, the SJA's office received by return mail the above described items without comments or rebuttal. The convening authority took action two days later. The defense counsel's comments were received several days later but the convening authority did not reconsider his action. The appellate court disagreed with the accused's contention that he was not accorded a "legitimate opportunity" to respond to the post-trial review. Although the trial defense counsel submitted an affidavit to the court stating that he believes he returned a form with the record and review indicating his intent to submit comments, the court held that the "record [and the affidavit filed by the government] fails to establish that anything other than the record of trial was received . . . prior to the convening authority's action;" furthermore, the convening authority waited a reasonable time for a defense response before taking his action.

SEARCH AND SEIZURE: Reasonableness

United States v. Weiss, 11 M.J. 651 (AFCMR 1981).

(ADC: COL Vance)

A civilian sheriff, accompanied by Air Force security police, repossessed the accused's automobile on base. The sheriff told the accused that he could remove his personal effects from the car and that items left behind would be inventoried and taken with the automobile. The accompanying military policeman, who was not assisting the civilian authorities, looked inside the car, noticed a piece of plastic protruding from the center console, and retrieved it. The item, a "baggie" containing marijuana, was admitted into evidence at the accused's trial over his objection. The appellate court held that the accused had no reasonable expectation of privacy because the title to the vehicle had passed from him, and that at any rate, the inventory

and subsequent discovery of the contraband was reasonable under the fourth amendment. The court said that, balancing "the accused's expectation of individual privacy against governmental and societal interests, we are convinced in light of [South Dakota v. Opperman, 428 U.S. 364 (1976)] that the seizure of the baggie of marijuana in the accused's car was reasonable."

SEARCH AND SEIZURE: Search Incident to Lawful Apprehension
United States v. Gladdis, CM 14924, ___ M.J. ___ (ACMR 24 July 1981).
(ADC: CPT McAtamney)

Suffering from an overdose of heroin, the accused was taken to a military hospital by two military policemen. During the course of treatment, one of the officers spotted and removed a spoon from the accused's jacket. He then searched the remaining pockets and discovered a hypodermic needle and syringe; the blackened spoon contained heroin residue. At trial, the accused unsuccessfully moved to suppress the needle and syringe because there was no probable cause or, in any event, any exigent circumstances justifying the warrantless search. The appellate court said that the seizure of the spoon was proper because it was in "plain-view" and the military policeman could, under the circumstances, logically infer that it was evidence of a crime. The court then determined that the military policeman had "informally" apprehended the accused; therefore, the subsequent search was of "personal property immediately associated" with him, United States v. Thomas, 10 M.J. 687 (ACMR 1981), and incident to his apprehension. United States v. Lotze, 50 CMR 234 (ACMR 1975). The court also examined New York v. Belton, ___ U.S. ___, 101 S.Ct. 2860 (1981), and concluded that when a person is apprehended, contemporaneous searches of the person and property immediately associated with him are unlawful only if there is no possibility that he or his confederates might gain possession of a weapon or destructible evidence. See United States v. Chadwick, 433 U.S. 1 (1977).

SIXTH AMENDMENT: Applicability to Military
United States v. Delp, CM 440166 (ACMR 6 July 1981) (unpub.).
(ADC: MAJ Rhodes)

After determining that lower-ranking enlisted persons had not been systematically excluded from membership on courts-martial, the military judge denied the accused's request that privates be detailed as members of the general court-martial trying him. The appellate court held that an accused does not have the right to a jury trial within the meaning of the sixth amendment. United States v. Kemp, 22 USCMA 152, 46 CMR 152 (1973). Article 25, UCMJ, provides adequate and appropriate standards

for members even though the lowest ranking soldier will almost certainly be tried by persons of higher rank, experience, and age. However, the court noted that rank alone cannot support the exclusion of soldiers from selection as court members. United States v. Yager, 7 M.J. 171 (CMA 1979).

FEDERAL COURT DECISIONS

EVIDENCE: Admissibility of Prior Convictions
United States v. Bramble, 641 F.2d 681 (9th Cir. 1981).

After selling cocaine to an undercover agent, the accused was charged with possessing with the intent to distribute, and distributing cocaine. At his trial, he contended that he was entrapped. Over his objection, a 2-year old conviction for possessing marijuana plants was admitted. The court stated that where entrapment is in issue, evidence of prior offenses is irrelevant unless it tends to prove that the accused was engaged in illegal operations similar to those charged. Noting the absence of any evidence that the accused possessed the marijuana with the intent to distribute, the court reversed and remanded the case. See Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963); Mil.R.Evid. 403.

EVIDENCE: Opinion and Reputation
United States v. Curtis, 644 F.2d 263 (3rd Cir. 1981).

At his trial, the accused claimed that he was entrapped into selling illicit drugs to an undercover agent. Four character witnesses testified that he had a reputation as a peaceful, law abiding citizen. They were not asked about their opinion of his character. On cross-examination, over defense objection, the prosecution asked if their opinion of the accused would change if he admitted to distributing amphetamines. The court noted that on "cross-examination, inquiry is allowable into relevant specific instances of conduct." Fed.R.Evid. 405(a). The federal evidentiary provisions, however, have not abandoned the distinctions between reputation and opinion evidence. If a witness' direct testimony is addressed to community reputation, opposing counsel may inquire about conduct which may have come to the community's attention, but questions which bear only on the basis of an opinion are irrelevant. Furthermore, while the accused's reputation at a point reasonably contemporaneous with the charged acts is relevant, his reputation after the criminal charge is not. See United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973).

RIGHTS WARNINGS: Waiver
United States v. McCrary, 643 F.2d 323 (5th Cir. 1981).

Armed with a search warrant for drugs and an arrest warrant for the accused for buying and receiving a stolen van, the police entered the accused's trailer. After unsuccessfully searching for the drugs, the police observed fifteen "long guns", the possession of which violated federal law. The police then told the accused that he was "suspected of being involved in some crimes," read him Miranda warnings, and questioned him about the guns. At trial, he attempted to suppress his responses because he was never told of the nature of the offense upon which the questioning was based. The court said that the waiver of Miranda rights must be knowing, intelligent, and voluntary. See Johnson v. Zerbst, 304 U.S. 458 (1938). Although the court did not require an appendage to the traditional Miranda warnings, it held that an accused cannot waive those rights if he is totally unaware of the offenses about which he is questioned.

SEARCH AND SEIZURE: Detention of Luggage
United States v. West, 29 Crim.L.Rept. (BNA) 2322 (1st Cir. 16 June 1981).

The accused's "disheveled appearance and nervous behavior" aroused the suspicions of law enforcement authorities in a Miami airport. They asked to search his carry-on luggage but he refused. Upon landing, he was met by DEA agents alerted by the Miami authorities. The accused told them that his bag had been searched in Miami, but later admitted that it had not been examined. He refused to allow the agents to search the bag, and they told him of their plan to detain and examine it with a drug detection dog. The dog alerted during the search, and the agents obtained a warrant and found cocaine. The accused contended that the temporary detention of his bag was "so substantial an invasion of his privacy as to require probable cause rather than merely reasonable suspicion." The court disagreed, noting that the agents had no "effective alternatives" available to them to prevent the destruction of any contraband in the bag, and concluded that, under the circumstances, they acted reasonably.

SEARCH AND SEIZURE: Reasonableness
Michigan v. Summers, ___ U.S. ___, 101 S.Ct. 2587, 69 L.Ed.2d. 340 (1981).

Police officers armed with a warrant to search the accused's house detained him as he was leaving the premises. After finding narcotics and ascertaining that he owned the house, the officers arrested him and discovered heroin on his person during the attendant search. The State appealed the accused's successful motion to suppress the heroin as the product of an illegal search. Although the Court agreed that

his original detention was a seizure unsupported by probable cause, it held that the police conduct in this case was constitutionally "reasonable." The Court noted that a magistrate had already allowed an invasion of the resident's privacy by authorizing a search of the premises. The temporary detention of a resident during the search is less intrusive than the search itself. Furthermore, "most citizens - unless they intend flight to avoid arrest - would elect to remain in order to observe the search of their possessions." Moreover, similar detentions are justified in order to minimize the risk to police, and to prevent potential suspects from fleeing once incriminating evidence is discovered.

SEARCH AND SEIZURE: Scope
New York v. Belton, ___ U.S. ___, 101 S.Ct. 2860 (1981).

The accused was one of several passengers in a car lawfully stopped by a policeman who discovered marijuana in the vehicle and arrested the individuals. The policeman then searched the car's passenger compartment, found the accused's jacket, unzipped one of its pockets, and discovered cocaine. Extending Chimel v. California, 395 U.S. 752 (1969), the Court held that when a policeman lawfully arrests the occupant of an automobile, he may, contemporaneously to the arrest, search the vehicle's passenger compartment because it is "within the arrestee's immediate control;" furthermore, he may conduct a warrantless search of the contents of any container, whether open or closed, found there.

SEARCH AND SEIZURE: Scope
Robbins v. California, ___ U.S. ___, 101 S.Ct. 2841 (1981).

After stopping the petitioner's station wagon, the California Highway Patrol searched the passenger compartment of his car, found marijuana, and arrested him. Then, in a covered, recessed luggage compartment, the police discovered two packages of marijuana wrapped in opaque plastic. Citing United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), the Court held that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as similar pieces found elsewhere. Furthermore, the Court refused to distinguish between sturdy containers, such as suitcases or briefcases designed to hold personal effects, and "flimsy containers" such as cardboard boxes or paper bags. See United States v. Ross, ___ F.2d. ___ (D.C. Cir. 1981). If a container is closed and opaque, its contents are protected by the fourth amendment unless, by its very nature, it "cannot support any reasonable expectation of privacy because [its] contents can be inferred from [its] outward appearance." United States v. Chadwick, supra at 765 n. 13.

STATE COURT DECISIONS

RIGHT TO COUNSEL: Waiver

People v. Bartolomeo, 50 U.S.L.W. 2031 (N.Y. Ct. App. 16 June 1981).

Arrested for arson, the accused retained an attorney and was released. Seven days later, he was apprehended on an unrelated charge and informed of his rights by detectives who knew of his earlier arrest but were unaware that he had obtained counsel. The accused's attorney was not notified of or present during the interrogation. At trial, the accused unsuccessfully moved to suppress his inculpatory pretrial statements. Because the detectives, who were members of the department that had arrested him earlier, failed to ask the accused whether he had an attorney, that knowledge was imputed to them and they were precluded from questioning him without his legal representative. According to the appellate court, "once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer." People v. Hobson, 39 N.Y.2d, 479, 481, 348 N.E.2d 894, 896 (1976). See People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709 (1979). Therefore, the trial court's ruling was reversed. A strong dissent questioned this apparent "addition to the litany of Miranda warnings." See United States v. McDonald, 9 M.J. 81, 85 (CMA 1980); United States v. Littlejohn, 7 M.J. 200, 203 (CMA 1979).

SEARCH AND SEIZURE: Third Party Consent

People v. Adams, 49 U.S.L.W. 2736 (N.Y. Ct. App. 7 May 1981)

The accused's girlfriend informed law enforcement agents that he kept weapons, which he had threatened to use against her, in his nearby apartment. She escorted several officers to the accused's apartment and opened the door with her key. The officers discovered a rifle and ammunition during the search. The girlfriend then told the police that she did not live in the apartment. Although the police may conduct a search when consent is granted by a third party who possesses common authority over the premises, it is unclear whether such a search may be sustained if the officers reasonably, albeit erroneously, believe that the consenting party has that authority. Noting that the primary purpose of the exclusionary rule is to deter police misconduct and that reasonableness is the linchpin to any analysis of fourth amendment issues, the the court held that the police acted reasonably. Therefore, the accused's motion to suppress the results of the search was properly denied. See United States v. Peterson, 524 F.2d 167 (4th Cir. 1975).

FIELD FORUM

Defense Appellate Division Responses to Readers' Inquiries

Does the new excess leave power of attorney deprive an accused of his right to petition the Court of Military Appeals for further review of his conviction?

After the Army Court of Military Review publishes its decision in a case, the Clerk of the Court temporarily holds it to allow for possible motions to reconsider. The decision is then mailed to the accused's general court-martial convening authority pursuant to para. 15-4, Army Reg. 27-10, Legal Services-Military Justice (C20, 15 Aug. 1980) [hereinafter AR 27-10]. If the accused is still incarcerated or has returned to duty, service is usually completed within 10 days. Problems sometimes arise if he is on excess leave. According to para. 15-5b(1), AR 27-10, the general court-martial convening authority at the installation from which the appellant departed on excess leave must serve the accused by certified mail, return receipt requested, restricted delivery. He has 30 days from the date of service to petition the Court of Military Appeals for further review. See Article 67(c), UCMJ; para. 100c(a), Manual.

In United States v. Larnear, 3 M.J. 75 (CMA 1977), the Court held that actual service is required. Some accused neglect to inform their general court-martial authority of their current addresses, however, and actual service is often difficult or impossible to effect. Consequently, the government changed para. 15-2, AR 27-10, to require that prior to going on excess leave pursuant to para. 5-2d(4), Army Reg. 630-5, Personnel Absences (C3, 15 May 1979), the accused must execute Dept. of the Army Form 4915-R, 1 Sept. 1980, as a prerequisite to approval of the leave request. That power of attorney places the onus of receiving service of the intermediate court's decision on the Chief, Defense Appellate Division, or his designee, yet it does not grant him authority to petition the Court of Military Appeals on the accused's behalf.

Of particular importance to trial defense counsel is footnote 15 of Larnear. There, the Court, citing United States v. Palenius, 2 M.J. 86 (CMA 1977), suggested that trial defense attorneys advise any clients who wish to protect their right to appeal to execute an appropriate power of attorney. Since DA Form 4915-R makes the Chief, Defense Appellate Division, responsible for receiving service, the client should be advised to make the Chief or his designee his attorney-in-fact for petitioning purposes as well. Whenever possible, the power of attorney should be attached to the post-trial appellate rights forms and forwarded with the record of trial. The following format, extracted from Trial Defense Service, Special Training Memorandum, dated 17 March 1981, will suffice:

APPELLATE POWER OF ATTORNEY

I, _____, a member of the United States Army, SSAN _____, hereby constitute the Chief, Defense Appellate Division, appointed under the provision of Article 70, UCMJ, and all who may be associated with, appointed by, or substituted for him, as my appellate attorney to accept service on my behalf of any adverse decision or order of the Court of Military Review, and petition for further relief from such decision or order to the U.S. Court of Military Appeals. However, my attorney shall not accept service or petition on my behalf unless he is satisfied that Government authorities have made diligent, but unsuccessful, efforts to serve me personally by mail or otherwise.

This power shall continue to be valid until my attorneys receive written notice of revocation from me.

ACKNOWLEDGMENT*

I certify that on this ____ day of _____, 19__, appeared before me, _____, and being first duly sworn, acknowledged that he signed and executed this instrument on the date it bears, and that such execution was his free and voluntary act and deed for the uses and purposes set forth.

Place: _____

Signature of Officer or Notary

Official Capacity

*May be acknowledged before notary public or officer authorized to administer oaths under 10 U.S.C. §936 (Article 136, UCMJ).

Judge Advocate, Adjutant, Notary

My Commission

Expires: _____

(Notary only)

SSAN, Grade, Branch of Service
(Officer only)

ON THE RECORD

or

*Quotable Quotes from Actual
Records of Trial Received in DAD*

(During voir dire):

DC: What would you say if somebody--one of your friends--stated to you, in all seriousness, that women deserve to be knocked around occasionally?

Member: I don't necessarily subscribe to that. Necessarily I don't subscribe to that at all. I'd have a great deal of trouble selling that at home.

* * * * *

(Accused testifying regarding disrespect offense):

ACC: I wasn't trying to be slanderous when I said, "As a Captain, he is a Lieutenant."

* * * * *

TC: Could you tell me how you're going to handle arguments . . . as far as if prosecution would be offered the opportunity for rebuttal?

MJ: The way that I prefer to handle it is that trial counsel make an opening argument, the defense counsel make a rebuttal, then I'll give the opportunity for the prosecution to make a rebuttal to that, and defense an opportunity to make a rebuttal to that.

TC: I don't quite feel comfortable allowing the defense to have final argument, your honor.

MJ: Well, I don't think we're really concerned with your comfort here today. I think my comfort is probably a little more important.

(During closing argument):

TC: I'm sure many of you are married and may have some children. I am a family man. I have four children. My oldest is about five years.

DC: Objection. Improper argument.

MJ: I don't see anything improper about having four children, do you?

* * * * *

(Cross-examination of accused during extenuation and mitigation):

TC: So when did you get to Germany?

ACC: I got to Germany on February the 21st, 1980.

TC: Okay, and so since that time -- February -- what eight or nine months, you've managed to amass all of these court-martial charges and one Article 15, isn't that correct?

ACC: No, sir, it isn't.

TC: It's not correct?

ACC: Since I came off emergency leave I managed to accumulate all of that, sir.

* * * * *

(Victim testifying on forcible sodomy charge):

Q: How long did this [forcible sodomy] go on?

A: Maybe for about three to five minutes. It's pretty short.

