T H E A D V O C A T E

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THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21d, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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SEARCH WARRANTS

On 15 December 1971, Change 8 to Army Regulation 27-10, authorized military judges assigned to the Army Judiciary to issue search warrants. Although the use of a warrant procedure, requiring a sworn affidavit to establish the grounds for authorizing the search, is a recent development in military criminal practice, the existing body of military law relating to questions of probable cause to search should still be dispositive of most motions to suppress evidence seized as the result of an illegal search conducted pursuant to such a warrant. However, trial defense counsel in the Army should be aware that the use of military judge warrants in conjunction with their supporting affidavits raise new legal issues which may open additional avenues of attack on the legality of the search. Cursory analysis suggests the following new issues.

If the affidavit supporting the warrant fails to state the time when the facts establishing probable cause were ascertained, the warrant is defective. The search warrant in Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966), was invalidated because the affidavit supporting the warrant, although written in the present tense, failed to allege either the time the affiant received his information from an anonymous informant or the time the affiant detected the odor of mash outside the premises to be searched. In Dean v. State, 242 So.2d 411 (Ala. Crim. App., 1970), a search warrant affidavit, which was based on information received by the affiant from an informant, did not indicate that the information was fresh, but only that the informant had given reliable information within the last three months. This warrant was held to be fatally defective.

The passage of time between the date the facts establishing probable cause were learned and the date the application for the search warrant was made may render the information stale and the warrant defective. Sgro v. United States, 287 U.S. 206 (1932); Schoeneman v. United States, 317 F.2d 173 (D.C. Cir. 1963). In People v. Wright, 116 N.W.2d 786 (Mich. 1962), the Court concluded that a search warrant could not properly be

issued solely on the basis of an affidavit that disclosed facts as they existed six days earlier. A warrant which does not show the underlying circumstances from which the informer concluded contraband was concealed on certain premises is inadequate. Spinelli v. United States, 393 U.S. 410 (1969); State v. Ebron, 273 A.2d 361 (N.J. App., 1971).

A warrant must describe with particularity the place to be searched. In certain factual situations, the mere recitation of an address may not be sufficient to satisfy this rule. For example, a search warrant that describes the place to be searched only by a street address is inadequate when the building at that address is a multiple occupancy dwelling. United States v. Higgins, 428 F.2d 232 (7th Cir. 1970); United States v. Hinton, 219 F.2d 324 (7th Cir. 1955); People v. Avery, 478 P.2d 310 (Colo., 1970); State v. Gordello, 245 So.2d 898 (Fla. App., 1971). This deficiency may occur frequently in the military because of the general use of multiple occupancy buildings, such as barracks and bachelor officers quarters, on military posts both in the United States and in foreign countries. If a warrant fails to describe the place to be searched, this deficiency cannot be remedied by reference to description of the premises contained in the affidavit unless specific language in the warrant incorporates that description. Giles v. State, 271 A.2d 766 (Md. App., 1970); Paragraph 14-5, AR 27-10. Contra, United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971).

When an examination of a particular search warrant reveals no deficiencies on the face of the document, trial defense counsel should then compare the description of the place to be searched with the actual premises which were searched under the authority of the warrant. If the premises to be searched are described in the warrant by a street address or a building number, and this is the only method of description utilized, then a search of a place other than the one with that specific address or number is, in effect, a warrantless search. United States v. Kenney, 164 F. Supp. 891 (D.D.C. 1958); People v. Royse, 477 P.2d 380 (Colo. 1970). See Steele v. United

States No. I, 267 U.S. 498 (1925). This defect in the body of the warrant will nullify its validity even though the facts establishing probable cause in the affidavit relate to the person who occupies the premises which were searched. Courts have held that the insertion of an incorrect name in a search warrant is not a fatal defect if the legal description of the premises to be searched is otherwise correct so that no discretion is left to the officer executing the warrant as to the place to be searched. However, if the warrant identifies the place to be searched solely by reference to the incorrect name of its owner or occupant, then this error renders the warrant fatally defective. Perez v. State, 463 S.W.2d 394 (Ark. 1971).

Additionally, the failure of a warrant to describe with particularity the "things to be seized" renders the warrant defective. Stanford v. Texas, 379 U.S. 476 (1965). General words, such as "paraphernalia," may be too vague and nebulous in certain circumstances to satisfy this constitutional mandate of particularity of description. United States v. Marti, 421 F.2d 1263 (2d Cir. 1970); State v. Johnson, 273 A.2d 702 (Conn. 1970); contra, Nuckols v. United States, 99 F.2d 353 (D.C. Cir. 1938); People v. Henry, 482 P.2d 357 (Colo. 1971). The failure of a warrant to describe with particularity the items to be seized is a defect which cannot be cured by reference to the specific descriptions of the items delineated in the supporting affidavits. Specificity is required in the warrant in addition to the affidavit in order to limit the discretion of the officers executing the warrant. United States v. Marti, supra.

A warrant authorizing the search of a person must describe with particularity the individual to be searched. As a result, a "John Doe" warrant which contains no specific description of the person to be searched is constitutionally inadequate. People v. Staes, 235 N.E. 2d 882 (Ill. 1968); accord, McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955). However, a "John Doe" warrant may be valid if it contains a physical description of the individual, coupled with the precise location at which he could be found. United States v. Ferrone, 438 F.2d 381 (3d Cir. 1971).

Paragraph 14-6 of AR 27-10 states that the warrant must be executed within five days after its date. However, a search conducted within the period of execution authorized by the regulation may be illegal if the facts establishing probable cause have changed. For example, an informer swears in his affidavit that an hour earlier he attended a party at a certain address where he saw three guests in a bedroom using heroin. When the warrant is issued that same night, it is obvious that the facts showing probable cause demand an immediate search. Consequently, if the law enforcement agents delay until three or four days later before searching the apartment, the search would clearly be illegal, although within the designated period of execution, since the guests who used the heroin presumably would have left the premises long ago. House v. United States, 411 F.2d 725 (D.C. Cir. 1969).

It is now well-settled that in reviewing the sufficiency of an affidavit used as a basis for issuing a warrant, the reviewing court may not hear any additional information not before the issuing judge in order to support the issuance of the warrant. Spinelli v. United States, 393 U.S. 410 (1969); United States v. Roth, 391 F.2d 507 (7th Cir. 1968); United States v. McDonnell, 315 F. Supp. 152 (D.C. Neb. 1970). However, even if the affidavit relied on by the issuing judge contains sufficient information to satisfy the requirement of probable cause, trial defense counsel may inquire into the veracity of the allegations made by the affiant in an attempt to invalidate the warrant at trial. United States v. Roth and United States v. McDonnell, both supra. In Rugendorf v. United States, 376 U.S. 528 (1964), the Supreme Court assumed for the purpose of the decision that an attack on the underlying affidavit may be made. However, the Supreme Court in the Rugendorf case noted that factual inaccuracies in the affidavit which are of only peripheral relevancy to the showing of probable cause and are not within the personal knowledge of the affiant do not go to the integrity of the affidavit.

The use of a fictitious name to designate the affiant has been condemned by the Court of Appeals for the Seventh Circuit. In United States ex rel Pugh v. Pate, 401 F.2d

6 (7th Cir. 1968), that court held that the fourth amendment itself, in requiring an oath or affirmation, precludes hiding the affiant's identity by use of a false name.

Normally, if items which are seized during the course of a search were not delineated in the warrant, the seizure is unlawful. Marron v. United States, 275 U.S. 192 (1927); United States v. Dzialak, 441 F.2d 212 (2d Cir. 1971). Of course, if the officer in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view, he could seize the evidence or contraband even though it was not designated as a thing to be seized in the warrant. However, it must be noted that a warrant authorizes the type of search which is necessary to find the items specified in the warrant. Consequently, if the warrant authorizes the seizure of medical instruments of the kind used in abortions, the officer conducting the search does not have authorization to seize a diary which contains information that abortion operations had been scheduled and conducted. The items to be seized could not have been found in the diary, hence the officer's perusal of the contents of the diary was beyond the scope of the warrant. State v. Hawkins, 463 P.2d 858 (Ore. 1970). See Justice Stewart's concurring opinion in Stanley v. Georgia, 394 U.S. 557, 569-572 (1969).

Finally, trial defense counsel should note that, since only a judicial officer may issue a search warrant, it is axiomatic that the right to alter, modify, or correct the warrant is necessarily vested only in the issuing authority. Consequently, the alteration of a warrant by the executing officer constitutes usurpation of a judicial function and renders the warrant invalid. United States v. Mitchell, 274 F. 128 (D.C. Cal. 1921); Hernandez v. People, 385 P.2d 996 (Colo. 1963).

SOME SUGGESTED APPROACHES IN DEFENDING THE DRUG ADDICT

It was a decade ago that the Supreme Court recognized that narcotic addiction is a disease and not a crime. Robinson v. California, 270 U.S. 660 (1962). Since that time, Congress itself has indicated its dissatisfaction with punishing an addict for offenses entailed by his addiction in the Narcotic Addict Rehabilitation Act of 1966 (Pub. L. No. 89-793; 80 Stat. 1438 et. seq.; 18 U.S.C. §§ 4251-4255). Efforts in the last ten years to expand the eighth amendment protection to preclude punishing the drug addict for possessing the sustenance of his addiction have not met with success, mainly because of the provisions of the Narcotic Addict Rehabilitation Act, which declares that "non-trafficking addict possessors", who are shown to be amenable to rehabilitation should, in lieu of prosecution or sentencing, be civilly committed for treatment designed to effect their restoration to health and their return to society as useful citizens. Cf. Watson v. United States, 439 F.2d 442 (D.D. Cir. 1970); Bailey v. United States, 386 F.2d 1, 4 (5th Cir. 1967). Nevertheless, several developments in the law, both federal and military, should cause military defense counsel to take a new look at what remedies outside the eighth amendment issue are available in defense of the non-trafficking addict possessor.

First of all, a number of federal courts have held that the "non-trafficking addict possessor" has an affirmative defense to the charge of wrongful possession of the particular drug which is derived from the traditional doctrine of duress and lack of criminal responsibility ("free will") arising from an inability to refrain from possessing the substance of his addiction. Watson v. United States, supra; Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965); Castle v. United States, 347 F.2d 942 (D.C. Cir. 1965). The theory behind the defense is that criminal penalties should not be inflicted upon a person for being in a condition he is powerless to change, and that as a practical matter no one can be a narcotic addict without periodically possessing narcotics. Cf. Powell v. Texas, 392 U.S. 569 (1969)(Fortas, J., dissenting). It is important to bear

in mind that this approach has not been widely used in federal courts for the reason that most non-trafficking addict possessors would be civilly committed under the Narcotics Rehabilitation Act rather than sentenced to confinement in a penitentiary, which in large measure has obviated the issue. Cf. United States v. Watson, supra at 457, n. 15. However, the Narcotic Addict Rehabilitation Act has been held not to apply to the military accused, and the military judicial system is without its equivalent counterpart. Consequently, the accused's appropriate remedy in a court-martial setting is to raise these issues as a matter in defense to the charge; that is, both the lack of mental competency by reason of drug addiction and/or duress or compulsion self-generated by apprehension of serious and immediate bodily harm of major withdrawal symptoms, are affirmative defenses to alleged wrongful possession of narcotics and dangerous drugs under Articles 92 or 134, Uniform Code of Military Justice. The court in Watson, supra, referred to the procedure followed in the traditional sanity defense as being instructive in this regard. Id. at 454. Cf. United States v. Trede, 2 USCMA 581, 10 CMR 79 (1953). Paragraph 120-122, Manual for Courts-Martial, United States, 1969 (Revised edition).

The second avenue of approach involves the mandatory considerations required in cases involving drug abusers as directed by Army Regulation 600-32, "Drug Abuse Prevention and Control." Although not nearly as broad as the Federal Narcotic Addict Rehabilitation Act of 1966, the Department of the Army has at least endorsed a policy of rehabilitation rather than prosecution or punishment for certain drug offenders. Military defense counsel have long been aware of the provision of AR 600-32 which affords to a soldier who voluntarily seeks rehabilitation for his drug problem before its discovery "amnesty" from prosecution for his drug revelations. More recently, Department of the Army has published its "Alcohol & Drug Abuse Prevention & Control Plan (DA-ADAPCP) 3 September 1971,[1/] which promulgates Army policy, outlines programs, and

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[1/] Recently the Army has expanded its prevention and control program to include alcohol abuse as well as drug abuse. See DOD Directive 1010.2, 1 March 1972. Counsel should be mindful that the same considerations discussed herein concerning drug offenders would also be applicable to the chronic alcoholic. Cf. Easter v. D.C., 361 F.2d 50 (D.C. Cir. 1966).

provides guidelines to major Army commands for implementation of a world-wide alcohol and drug prevention and control program.[2] While the term "amnesty" has been replaced by the term "exemption," the narrow scope of those who qualify for treatment is basically the same. Id. at Appendix 1 to Annex B. The provisions of the DA Plan and the AR have several limitations, (e.g., only volunteers are eligible for "exemption," many commanders do not have drug rehabilitation facilities, alternatives to imprisonment are not available for addicts charged with nondrug, but drug-related, offenses) and as a result, there are many military accused who are readily amenable to rehabilitation but because of the limitations of the "prevention and control" program, are not eligible for "exemption" from punitive or administrative action.

It should be noted that the federal rehabilitation program does not suffer from the same shortcomings. The Narcotic Addict Rehabilitation Act authorizes civil commitment in lieu of conviction for addicts charged, inter alia, with narcotic offenses not involving unlawful importation or sale, as well as other federal crimes, except crimes of violence. 18 U.S.C. § 425. It further provides that if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, "it shall commit him to the custody of the Attorney General for treatment under this chapter . . . ." 18 U.S.C. § 4253. In absence of a clear showing that the eligible offender will not respond to treatment, the discretion of the judge not to commit him civilly is very limited in this regard. Cf. United States v. Williams, 407 F.2d 940 (4th Cir. 1969). Moreover, the offender will be afforded an examination under the Act to determine if he is an addict as defined by Section 4251 (Supp. 1971) of the Act. 18 U.S.C. § 4252. This can be done before or after conviction. Consider also the "Controlled Substances Act of 1970" (Pub. L. No. 91-513; 84 Stat. 1242, Oct. 27,

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[2] Responsibility for this program is centered with the Office of the Deputy Chief of Staff for Personnel, Directorate of Drug and Discipline Policies, Drug Abuse Control Division, HQ, DA, Washington, D.C. 20310.

1970), which is more extensive in scope than the 1966 Act, since it applies to nonaddicts and operates to avert criminal convictions rather than providing only for suspension of sentence. This latter Act invests federal courts with the discretion to defer the prosecution of first offenders, and with the consent of the defendant, place him on probation for one year under such reasonable conditions as the court may prescribe. Presumptively, in the case of addict-defendants, one of those conditions would be submission to a medical center for rehabilitation. Upon the successful completion of the probation period all charges would be dismissed.

Yet, in spite of its limitations, Army Regulation 600-32 is helpful. It places the onus of making a determination as to the dispositions of "drug abusers" on commanders at all levels including the convening authority. Irrespective of the provisions of the "exemption" program, both AR 600-32 and the DA plan exhort immediate commanders to determine "the appropriate disposition of [the] case. . . on an individual basis," including the rehabilitative steps under Paragraph 2-5, AR 600-32, (e.g., "limited hospitalization," "maximum counseling," "positive efforts toward reinforcement of individual attitude changes leading to full restoration to military duty"). Evaluation of rehabilitative potential will be made by a medical officer, legal officer, and chaplain among others. Id., Para. 2-4b(5). Moreover, Paragraph 2-4b makes mandatory the requirement that "soldiers convicted by court-martial of offenses involving narcotics, marijuana, or other dangerous drugs will be considered for rehabilitation." In this regard, Paragraph 2-4c requires that "when confinement is adjudged, the prisoner will receive a medical and psychiatric evaluation before a determination is made concerning the place of confinement and/or treatment." Id. See also Para. 5b(5), Annex D to DA-ADAPCP. The United States Army Court of Military Review has held that these provisions confer certain beneficial rights upon the "drug abuser," although not the drug seller who is not possessing for his own use. United States v. Hillman, No. 425832, ___ CMR ___ (ACMR 30 Sep 71). Moreover, it is a long established rule that regulations

issued by the Secretary of the Army, which confer rights upon a certain class of soldiers, are binding until changed and cannot be waived, if such waiver is in derogation of the administrative due process accorded such soldiers. Roberts v. Vance, 343 F.2d 236, 239 (D.C. Cir. 1964); see also, Vitarelli v. Seaton, 359 U.S. 535 (1958); Service v. Dulles, 354 U.S. 363, 388 (1956); Accardi v. Shaunghnessy, 347 U.S. 260, 267 (1953); United States v. Goins, 23 CMR 452 (ABR 1957).

Military defense counsel should insure compliance with the mandatory provisions of AR 600-32 and the policy considerations in DA-ADAPCP in cases involving drug abusers. Moreover, counsel should be familiar with and utilize the much broader provisions of the federal rehabilitation program for suggested alternatives in the disposition of cases involving drug-related offenses. It is suggested that in all drug related offenses where the accused has expressed a sincere desire to undergo treatment and to be rehabilitated and restored to duty, counsel should submit pretrial motions to the convening authority with a view toward holding charges in abeyance pending his client's induction into a rehabilitation treatment program and dismissal of such charges upon successful completion thereof. In the case of an addict defendant, of course, his rehabilitation program would include medical and psychiatric treatment. For nonaddicts, counsel might suggest a period of probation subject to other reasonable conditions as agreed to by the accused and the convening authority. In the event the case proceeds to trial and findings of guilty have been entered, counsel are advised to request the military judge to recommend suspension of sentence and to follow up with a post-trial clemency petition to the convening authority requesting treatment instead of incarceration. In this regard, a request should be made for a presentencing examination to determine both the need for treatment rather than incarceration and the rehabilitative potential of the client along the lines employed in federal district courts. Of course, all such requests should be made a matter of record for purposes of appellate review. Moreover, every effort should be made to insure compliance with all the pretrial and post-trial provisions of AR 600-32 and DA-ADAPCP by commanders at each level. Finally, because an accused

would clearly be sentenced under the Narcotic Addict Rehabilitation Act as a patient rather than as a criminal if he had the good fortune to have been tried in federal courts rather than by court-martial, a good faith claim of denial of equal protection of the laws can be advanced on the theory that the same Congress which affords the civilian offender treatment under the act creates the forum and the offense by which the same offender is convicted and imprisoned in the military and denies the military offender benefits afforded his civilian counterpart.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

AFFIRMATIVE DEFENSES - QUASI-ENTRAPMENT BY GOVERNMENT AGENTS BARS CONVICTIONS -- Even though a defendant has a predisposition to commit an offense before being contacted by a government agent (and therefore is not entitled to the defense of entrapment) he may not be prosecuted if the government's participation in the criminal enterprise is so extensive that it rises to the level of "creative activity". The Ninth Circuit Court of Appeals recently found this unlawful level of government involvement where the agent persuaded the defendant to start production of bootleg whiskey when the latter was reluctant to do so. The agent also furnished a site for the still, as well as an operator, containers, and a ton of sugar at wholesale prices. Finally, the agent purchased all of the illegal alcohol produced by the defendants. The Court stated that the government may not prosecute its collaborators when it is directly and continuously involved, over a long period of time, in the creation and maintenance of criminal operations. Greene v. United States, _ F.2d _ (9th Cir. 23 November 1971); 10 Crim. L. Rep. 2225.

RIGHT TO COUNSEL AT PHOTOGRAPHIC IDENTIFICATION -- One day before trial, but three years after the robbery, co-defendants' pictures were viewed by prosecution witnesses who identified defendant Ash, but not defendant Bailey. Bailey's counsel sought to introduce only his client's picture in cross-examining a government witness, but the prosecution insisted upon admission of the entire array. This was done over the objection of Ash's counsel, with the predicted

result: conviction for Ash, acquittal for Bailey. The photos were not only suggestive, but were shown to the witnesses while the defendants were in custody, but without the presence of or notice to counsel.

The Court of Appeals for the District of Columbia held that the right to counsel applies to such photographic identifications, based upon the principles espoused in United States v. Wade, 388 U.S. 218 (1967). Rejecting the majority position in the Courts of Appeals as "unpersuasive", the Court followed the rule of the Third Circuit in United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970) in holding that counsel must be present at a pretrial photographic identification when the defendant is in custody. The rule does not apply in the District of Columbia when the photos are shown before arrest, (United States v. Kirby, 427 F.2d 610 (D.C. Cir. 1970)), or when other exigent circumstances exist in an "on-going investigation" where "time is of the essence". United States v. Ash, _ F.2d _ (D.C. Cir. 1 March 1972); 10 Crim. L. Rep. 2408. The impact of this rule on military cases is questionable. Heretofore military courts have rejected the Zeiler rule and applied the majority position, holding that the right to counsel does not attach at pretrial photographic showings. See, e.g., United States v. Smith, No. 424527, ___ CMR ___ (ACMR 21 December 1971).

SEARCH AND SEIZURE - PROBABLE CAUSE, ARREST AND AUTOMOBILES -- Two Circuit Courts of Appeals recently indicated situations in which searches of vehicles or their contents will not be upheld. In United States v. Day, _ F.2d _ (3d Cir. 11 February 1972); 10 Crim. L. Rep. 2445, the Sixth Circuit held that an officer may not seize, without a warrant, a package seen being hidden by a passenger in a car stopped for a routine traffic violation. After stopping the car for lack of an inspection sticker, the officer observed one passenger hide a blue package behind one of the seats. Suppression of the package was upheld by the court on the ground that the officer had no probable cause to search the vehicle, thus recognizing the absence of the premise for warrantless searches under Chambers v. Maroney, 399 U.S. 42 (1970). Furthermore, because all occupants were outside the car and in police custody at the time, the search was held not incident to their arrest.

In United States v. Colbert, _ F.2d _ (5th Cir. 1 February 1972); 10 Crim. L. Rep. 2445, the Fifth Circuit rejected the fruits of a search of two brief cases removed unopened from a car and searched shortly thereafter in a police car. The defendants were arrested in their car for failure to possess draft cards (!). The arresting officer took two brief cases from the car to his patrol car, opened them and found two shotguns. In upholding the suppression of the guns, the Court noted that the "immobile brief cases being beyond the reach of the defendants does not meld into the Chambers environment." The court also found no "exigent circumstances" to permit a warrantless search, citing Coolidge v. New Hampshire, 403 U.S. 443 (1971).

SEARCH AND SEIZURE -- TIP FROM CURIOUS TELEPHONE OPERATOR -- After connecting an overseas call to appellant's on-post quarters, a Fort Ord telephone operator initially checked the line to insure a complete connection. After establishing that all was in order, she continued to listen to the parties' conversation, learning that a "brick" of drugs had been mailed from Germany to the party at Fort Ord. She testified at trial that she had listened in because she was "curious". The information gleaned from the operator's eavesdropping activities formed part of an affidavit in support of a search warrant. The U.S. Army Court of Military Review held recently that under 18 U.S.C., Chap. 119, the operator improperly disclosed matters overheard solely as a result of her curiosity. The affidavit was held tainted, the evidence rejected and the charges dismissed. United States v. Forrest, No. 426223, (ACMR 31 March 1972).

SEARCH AND SEIZURE - WARRANTLESS INTRUSION INTO IMPOUNDED AUTOMOBILE. The defendant's brother-in-law was arrested in defendant's car and charged with reckless driving. The car was impounded on the highway and towed away by a local garage owner acting under contract to the police. He was instructed to lock the vehicle and to release it to the owner only at police instruction. The garageman promptly searched the car to determine ownership for the purpose of assessing towing charges and noticed a brown bag on the front seat. Noticing that it contained an unidentified grassy substance, he searched further and found a like

substance in a field jacket which belonged to the defendant. When the police were summoned, they tentatively identified the substance as marijuana and searched the car without a warrant, uncovering more pot.

In Cash v. Williams, _ F.2d _ (6th Cir. 1972), 10 Crim. L. Rep. 2454, the court suppressed the admission into evidence of the seized marijuana. Noting that during the original search, the garage owner did not act as a police agent, the court then considered him an informer and tested the subsequent police search on traditional search and seizure grounds. The court indicated that the search was not incident to apprehension (Chimel v. California, 395 U.S. 752 (1969)), and that the rule of Chambers v. Maroney, 399 U.S. 42 (1970) was distinguishable. In that regard, there was "no danger of the automobile being removed from police access" nor a "possibility that any possible evidence contained therein would be destroyed." See also Coolidge v. New Hampshire, 403 U.S. 443 (1971)

JURISDICTION - RETROACTIVITY OF O'CALLAHAN V. PARKER. Two federal circuit courts recently reached divergent results on the question of the retroactivity of O'Callahan v. Parker, 395 U.S. 258 (1969). In Flemings v. Chafee, _ F.2d _ (2d Cir. 1972), 40 U.S. L. W. 2657, the Court voided a 1944 Navy conviction for non-service-connected car thefts. In applying O'Callahan retroactively, the Second Circuit noted that the basis of the decision had been an "absence of jurisdiction to adjudicate," and that where that exists, retroactivity preserves the "basic integrity of the institutions which enforce our criminal laws," i.e., civilian courts during peacetime considering civilian crimes. The Court also noted that O'Callahan was a habeas corpus proceeding and that new procedural rules have been retroactively applied in such cases (e.g., Gideon v. Wainwright, 372 U.S. 335 (1963)).

In a contrary decision, the Tenth Circuit upheld the 1963 murder conviction of a serviceman, even though the crimes were committed off-post and were not service-connected. Schlomann v. Moseley, _ F.2d _ (10th Cir. 1972), 40 U.S. L. W. 2658. The Court analyzed the basis for O'Callahan noting that it rested mainly on a consideration of guarantees of indictment by grand jury and trial by petit jury. Finding that the Supreme Court had denied the retroactive application of decisions imposing those requirements on state

courts, the Court found the O'Callahan rule to be prospective only. The opinion does not discuss the jurisdictional aspect of O'Callahan. The case generally follows the guideline for retroactivity found in Stovall v. Denno, 388 U.S. 293 (1967), explaining that an important consideration was the prospect of a flood of litigation should O'Callahan be applied retroactively. The Fifth Circuit reached a similar decision in Gosa v. Mayden, 450 F.2d 753 (1971).

At present, the rule of the United States Court of Military Appeals is the same as that in Schlomann and Gosa. Mercer v. Dillon, 19 USCMA 264, 41 CMR 264 (1970). However, the conflict among federal circuits raises the prospect of an eventual Supreme Court pronouncement on the retroactivity of O'Callahan v. Parker.

ADMINISTRATIVE NOTES

It is periodically necessary to bring our distribution list up to date. Accordingly, it is necessary that all civilian subscribers and all military subscribers to whom THE ADVOCATE is sent by name, or who receive it at a military address other than a unit or installation judge advocate office, advise THE ADVOCATE of their continuing interest and current address, accompanied by their present mailing label, no later than 10 July 1972. This requirement does not apply to subscribers who have written on or after 1 March 1972 requesting a copy of THE ADVOCATE and providing a current address.

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CORRECTION

An announcement in the March issue of THE ADVOCATE stated that the Newsletter on Military Law and Counseling (NOMLAC) was published by Robert S. Rivkin, and was available free by writing him at 140 Leavenworth Street, San Francisco, California 94102. In fact, NOMLAC is published by CCCO, a non-profit agency for military and draft counseling, and Mr. Rivkin is a staff lawyer for CCCO. There is a subscription charge of $6.00 per year for first class mail, $4.00 for third class mail, and no charge for those who state that they cannot afford to pay anything.