

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

Defense Appellate Division, US Army Judiciary
Washington, D. C. 20315

Vol. 2 No. 2

March 1970

* * * * *

The views expressed in THE ADVOCATE 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.

* * * * *

AWOL AND ITS DEFENSE

There is an almost universal tendency to associate AWOL with guilty pleas and perfunctory scenarios providing only a limited variety of themes in extenuation and mitigation. Indeed, no other offense provides more frustration for defense counsel. Typically his client has no interest in being defended in the traditional sense, and proof of the relatively simple elements of the offense have been greatly facilitated by a combination of favorable appellate decisions and governing regulations. While despair may be in order, counsel with a client prepared to contest an AWOL allegation should not tergiversate--an AWOL defense is not invariably impossible.

A sine qua non of an AWOL defense is a basic understanding of the relevant regulations including AR 630-10, Personnel Absences Without Leave and Desertion (24 May 1966, as amended 3 October 1969); AR 190-9, Military Police--Military Absentee and Deserter Apprehension Program (15 October 1969); AR 680-1, Personnel Information Systems (11 September 1969). Together these

regulations describe what action is to be taken when a soldier departs AWOL through final disposition and what records are to be made of these events.

When an individual is discovered AWOL, his unit commander is required to notify the local provost marshal and to conduct an inquiry into the possible causes or motivation for the absence. This report must be included in the individual's "Field 201 file". Although one of the primary purposes for the report is undoubtedly to preserve prosecution evidence, it may be useful to the defense to corroborate and accused's case by demonstrating unit indifference or hostility to a legitimate problem of the accused.

The fact of departure must also be recorded in the unit morning report and under some circumstances the individual must also be dropped from the rolls. In any event, an individual will be dropped from the rolls of his unit and an entry to that effect made on the unit's morning report thirty days after his departure. At the time the absentee is dropped from the rolls, his records are forwarded to a central records facility, generally at the losing unit. In CONUS, his records will be retained at this unit for thirty days, then will be forwarded to The Adjutant General. If the unit is overseas, the records will be forwarded immediately after being reviewed in the central facility.

At the time an individual is dropped from the rolls, or in some cases earlier, the unit commander will initiate DD Form 553 (Absentee Wanted by the Armed Forces). This will be distributed either directly or through The Adjutant General to law enforcement agents and commands that may be able to effect the absentee's apprehension. Additionally when an individual is dropped from the rolls or relieved from attachment, the unit commander must prepare DA Form 3545, which contains data of value to law enforcement agents. This form ultimately goes to The Provost Marshal General who is responsible for coordinating AWOL apprehension efforts. Problems concerning the return of soldiers from certain foreign countries and the other services are handled by The Adjutant General.

Although the regulations seem to contain conflicting provisions, there are some situations where apprehension is not authorized due to exercise of presidential pardon or statute of limitations problems. AWOL apprehension teams with areas of geographic responsibility apprehend and pick up individuals held by civilian authorities within their territory on a regular basis. These absentees are usually returned to the installation to which the team is assigned where ordinarily a unit typically designated as a Special Processing Detachment will take responsibility for absentees not assigned or previously assigned to a unit at this installation. If the return to military control is at the individual's previously assigned station, the procedures are fairly simple. Ordinarily all that is required is (1) proper notification of the return, (2) assignment, if the individual was dropped from the rolls and, (3) either a redistribution or accessions morning report entry.

However the situation is quite different where return to military control is at other than the previously assigned station. Quite often an absentee is brought to an SPD during off-duty hours. The unit commander frequently has only a vague idea as to the individual's status and much of the necessary information is gained from the absentee himself. Although persons still assigned to another unit will normally be returned to that unit for disposition, and those dropped from the rolls will be assigned to the installation where returned to military control, these rules are flexible. The regulations seem to contemplate immediate assignment where an individual has previously been dropped from the rolls, but this is often unknown initially and not clarified until sometime later. What frequently happens is that these individuals are also picked up on an SPD morning report as attached personnel until further clarification, and actual assignment is not made until much later. Once it is determined who will dispose of the case, that commander

will prepare DD Form 616 and distribute it to all recipients of DD Form 553. This alerts those authorities as to the termination of the AWOL and serves as a request for records from The Adjutant General in appropriate cases. Where an absentee is being returned to his original unit the returning commander must forward copies of orders and extracts of morning reports. Where the absentee is to remain at the installation where he was returned to military control, the former unit commander must forward extracts of morning report entries. If records have been forwarded to Washington, the 201 file must come from the Adjutant General, but Paragraph 63, AR 630-10 specifically directs that disposition of charges will not be delayed awaiting these records.

Admissibility of official records depends upon the recordation of a fact or event ascertained through customary and trustworthy channels of information by a person within the scope of his official duties. Paragraph 144b, Manual for Courts-Martial, United States, 1969 (Revised edition). Although records may be prepared, inter alia, for the purposes of prosecution, as long as there is some requirement by regulation to record the information, courts have generally deemed them admissible. Thus in United States v. Bennett, 4 USCMA 309, 316 15 CMR 309, 316 (1954) the Court literally invited the Army to require recordation of "apprehension or surrender" information to facilitate desertion convictions. This invitation was accepted and approved in United States v. Simone, 6 USCMA 146, 19 CMR 272 (1955). Furthermore, the proper performance of duty is supported by a strong presumption of regularity that ordinarily requires affirmative rebuttal by the defense in the absence of patent irregularities on the face of the proffered document. Compare United States v. Masusock, 1 USCMA 32, 1 CMR 32 (1951) with United States v. Parlier, 1 USCMA 433, 4 CMR 25 (1952). The patent irregularity must be material to the execution of the document. See United States v. Anderten, 4 USCMA 354, 15 CMR 354 (1954). Conflicting entries affect only the weight of the evidence. United States v. McNamara,

7 USCMA 575, 23 CMR 39 (1957); and even a three and a half year delayed entry is admissible. United States v. Takafugi, 8 USCMA 623, 25 CMR 127 (1958). Finally, the mere fact that the source of information is itself inadmissible does not necessarily render the entry inadmissible if based upon a customary and reliable source e.g., a report of apprehension prepared by civilian police.

Thus, through the combination of the official records hearsay exception and the presumption of regularity, the government may transform the inadmissible into the admissible and effectively avoid cross-examination unless defense counsel take affirmative steps. But cf. Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400 (1965). It is thus incumbent upon defense counsel to bring the trial of the case back into the courtroom by interviewing those responsible for the preparation of the morning report entries. United States v. Taiafugi, *supra* specifically states that if evidence is introduced to rebut the presumption the prosecution then bears the burden of proving officiality. Many possibilities clearly morning reports based upon admissions of the accused are not admissible. Cf. United States v. Bearchild, 17 USCMA 598, 38 CMR 396 (1968). In a busy SPD unit, inquiry may well reveal that the commanding officer or his delegate relied upon their morning report clerk and made no personal efforts to ascertain the truth of entries through any sources--customary or otherwise. Additionally the information relied upon may come from sources outside normal channels and the Court has condemned entries made at the instigation of a base legal officer for this reason. United States v. Anderton, 4 USCMA 354, 15 CMR 354 (1954). Moreover investigation may prove that there was no proper delegation of authority. In the case of an intransit AWOL it sometimes happens that a unit assignment is made after the absence is discovered. Where this is true the assignment is retroactive and the unit has no duty to record an absence prior to the date of actual assignment. CMR 397819, Newcomb, 25 CMR 555 (1958); CM 388190, Robinson, 21 CMR 380 (1956). But unless counsel reconstruct the manner in which a case is

handled by going behind the records, he stands little chance of uncovering any of these potential avenues for a successful defense.

In view of the existing large movements of individual replacements, many soldiers are sometimes simply lost in the shuffle. Counsel should be aware that an honest and reasonable mistake of fact as to authority to be absent is a defense even in an extended absence. See United States v. Holder, 7 USCMA 213, 22 CMR 3 (1956); see also Beaty v. Kenan, Civ. No. 24, 745 (9th Cir., Dec 23, 1969). Where such a defense is plausible, counsel may wish to assist the individual in processing a request to have the leave excused as unavoidable for administrative purposes under the provisions of Paragraphs 70 and 71, AR 630-10.

APPEALING DENIAL OF DEFERMENT OF CONFINEMENT

In a pair of related cases, the United States Court of Military Appeals did not decide directly whether a denial of an application for deferment of confinement under Article 57(d), Uniform Code of Military Justice is appealable by way of habeas corpus. In Dale v. United States et al., Misc. Docket 69-55 (COMA decided 27 February 1970), the Court denied a petition for a writ of habeas corpus or other appropriate relief filed by a sentenced prisoner awaiting appeal whose application for deferment of confinement had been denied by the Commanding General, Fort Leavenworth, Kansas [see generally THE ADVOCATE, November 1969]. Dale alleged that his application had been arbitrarily and capriciously denied, and also that the manner of his confinement conflicted with existing regulations concerning the confinement of officer prisoners.

The Court, assuming without deciding that a decision denying deferment could be reviewed [by somebody] for abuse of discretion, held that in the case at bar there was no such abuse.

Moreover, the Court held that a claim that the conditions of confinement were more "rigorous than necessary" could be reviewed by means of a complaint for

the redress of wrongs under Article 138, Uniform Code of Military Justice. If this complaint produces no corrections, then evidence that the confinement was more rigorous than necessary could be presented to the Court of Military Review which may take the violation into account in determining the appropriateness of the sentence. The issue may be relitigated in the Court of Military Appeals when such appeal is otherwise permitted.

In a companion case, Walker v. Commanding Officer, Misc. Docket 69-45 (COMA decided 27 February 1970, the Court reaffirmed the proposition that a sentence to confinement may not be executed during appellate review, and that during post-trial confinement, a convicted prisoner may not be required to work with those whose sentences to confinement have already been executed. In addition, the Court ruled that the conditions of such confinement may not be more rigorous than necessary to insure presence. The Court again noted that relief from onerous confinement conditions should come first through Article 138, then through military appellate channels. Except in unusual cases, extraordinary review will not be granted.

A careful reading of the Court's opinions in these cases will distinguish appellate remedies for review of denial of deferment from review of onerous stockade conditions. In the latter, the appellate channel is clear--Article 138 first, then the Court of Military Review and the Court of Military Appeals. The question of appellate review on deferment questions, is however, not so clear. Since the Court assumed in Dale without deciding, that some appeal was possible for abuse of discretion the extreme position that the decision to deny deferment is absolutely unappealable appears no longer tenable.

We do not know, however, how this particular appeal should proceed. Interestingly, three weeks before Dale was decided Army Reg 27-10 was amended to provide that denial of deferment may be appealed through military administrative channels. If the case is reviewable only under Article 69, then appeal must be had to the

next highest convening authority. If the case is reviewable under Article 66, then the appeal proceeds directly to The Judge Advocate General. The standard for relief in this type of appeal is arbitrariness and capriciousness. Unclassified DA Message 940385, dated 6 February 1970. The Court of Military Appeals did not mention this new regulation in Dale, leaving open the question of whether review of these matters should be through judicial or administrative channels, or both.

It should finally be noted that in one case, CM 421338, Lile (pending decision before USACOMR) the accused sought redress under Article 138 for denial of deferment and this avenue was deemed by the Commanding General, Headquarters Fifth Army to have been closed by the amendment to Army Reg. 27-10. Which of these three avenues of appeal, statutory, judicial or administrative, or combinations of them will prove to be the preferred method of appealing under Article 57(d) remains speculative.

RESIGNATION IN LIEU OF TRIAL--A DEFENSE COUNSEL'S ALTERNATIVE

Army Regulations provide that an officer or enlisted person may tender a resignation for the good of the service when his conduct has rendered him triable by court-martial under circumstances which could lead to dismissal or punitive discharge, (Chapter 5, ¶5-1 to 5-7, C3, AR 635-120; Chapter 9, ¶9-7, AR 635-200.) It is important that the defense counsel be aware of this alternative and understand fully the provisions of the applicable regulations. In an appropriate case, a defense counsel who takes advantage of the regulations may save his client from conviction, punitive separation and possibly confinement as well.

Procedure. The regulations offer the resignation option, first of all, to those facing certain court-martial charges. It is also available to those under a suspended sentence to dismissal or punitive discharge. The resignation is to be submitted through channels to the general court-martial convening authority who, in the

case of an enlisted man, has the power to accept the resignation. In officer cases, and those situations in which the convening authority refuses to accept the resignation, the resignation is forwarded to The Adjutant General, Department of the Army for final disposition by the Secretary of the Army.

Policy. Regulations state that the resignation ordinarily will not be accepted when the offense or offenses with which the individual is or may be charged would warrant imposition of punishment more severe than dismissal or dishonorable discharge.

Suggested Approaches

1. The format for the resignation and the required supporting papers are specified in the regulations. The individual has the opportunity of submitting a statement in his behalf. It is here that the defense counsel can provide valuable assistance. Certainly the defense counsel should prepare the most effective and persuasive statement warranted by the facts of the case. Additionally, however, he should assist his client in obtaining and presenting whatever favorable character evidence or testimony in extenuation and mitigation is available. To allow resignation papers to be forwarded which contain only the unfavorable information on the charge and report of investigation is totally inadequate. It is counsel's duty to provide the discharge authority with every fact and argument which could lead to a favorable disposition of the resignation.

2. Since the resignation proceeds through military channels, it is essential that every effort be made to secure favorable indorsements along the line. To this end, counsel, whenever advisable, should request personal interviews with the commanders involved. A well prepared oral presentation to a commander may well influence his action. In turn, his favorable recommendation will improve the chances for similar success on the next level of the chain. Since the commanders must also recommend the type of discharge to be awarded if they recommend approval, counsel's presentation should not overlook this important aspect.

3. In a case in which a possible pretrial agreement is contemplated, counsel might consider entering into negotiations when the resignation is under consideration within the command. Since the policy provides that ordinarily a resignation will not be accepted where the offense would warrant imposition of a punishment greater than dismissal or dishonorable discharge, a pretrial agreement providing for no sentence in excess of such a punishment or providing for a suspended dismissal or discharge would certainly insure a greater hope of success if the resignation is forwarded to the departmental level.

4. The provision for resignation by those under suspended dismissal or punitive discharge also creates the possibility for post-trial resignation activity. In a certain case, where the government has secured a conviction and punitive separation against the client, it might well be argued to the convening authority that, while the client should not remain in the service, he should be permitted to resign. It seems that, in such a situation, an agreement could be concluded whereby the convening authority would suspend the sentence and the client tender his resignation. In officer cases, such a course of action could achieve favorable results at the departmental level, assuming appropriate facts and circumstances.

It is apparent that the resignation regulations create a situation which is particularly amenable to imaginative and aggressive action by counsel. In every case defense counsel should explore the possibilities of employing this avenue to minimize the harsh results of his client's misdeeds.

UNCHARGED MISCONDUCT--A DISSENTING VOICE

Although Paragraph 76a(2), Manual for Courts-Martial, United States, 1969 (Revised edition) permits the court to consider for sentencing purposes evidence of other acts of misconduct which were otherwise introduced during the trial, the Air Force has taken the position that such a provision conflicts with the decisions of the Court of Military Appeals. "Unless the Court modifies

its position," says the Air Force, "evidence should not be considered on sentence which is not specifically admissible for that purpose and appropriate limiting instructions, advising the court to disregard for the purpose of sentence all evidence of other offenses or misconduct not specifically admissible, should be given." Air Force Annotations to the Manual for Courts-Martial, 1969 (Revised edition) [cited as AFANN 2, quoted in Air Force JAG Reporter, July 1969]. This same issue has recently been argued before the Court of Military Appeals United States v. Worley, No. 22,472, (COMA granted 26 November 1969).

THE REQUEST FOR APPELLATE DEFENSE COUNSEL

Two recent cases now pending before the Court of Military Appeals have raised the difficult question whether an AWOL appellant can nevertheless petition for review to the Court of Military Appeals. The sparse case law on the subject seems to indicate that the appellant need not personally sign a petition for review, but that there must exist "a clear expression of purpose" on his part to petition for further appellate review. United States v. Marshall, 4 USCMA 607, 16 CMR 181 (1954).

We suggest that a good vehicle for demonstrating this purpose would be the "Request for Appellate Defense Counsel." Normally after a trial, a convicted accused is asked to signify his desires for appellate counsel in writing on a preprinted form. This form is normally locally reproduced, and usually specifies that the accused desires (or does not desire) counsel to represent him before the United States Army Court of Military Review. The form then becomes part of the record on appeal. In order to avoid the problem of the absent petitioner, we recommend that the accused, in addition to requesting appellate defense counsel, also signify his attention to petition for further review to the Court of Military Appeals in the event that his case ever warrants such review. The practical effect of this, we think, would be to enable appellate defense counsel to sign a petition for review on behalf of the appellant in cases where this becomes necessary. If the appellant

changes his mind, he could communicate his intention directly to his appellate defense counsel and terminate further appellate review.

Likewise, we suggest that any limitation upon the scope of the representation desired, for example "counsel to represent me before the United States Army Court of Military Review" be deleted. In recent years, the representation afforded by appellate defense counsel within the military encompasses more than simple representation in that forum. For example, Article 57(d) of the Code grants post-trial rights to deferment of confinement which are extrajudicial, but nevertheless appellate defense counsel normally assist. Thus, we recommend that the request for appellate defense counsel be without limitation and open-ended.

Counsel should encounter no difficulty in accomplishing this within the local command, for Paragraph 48k, Manual for Courts-Martial, United States, 1969 (Revised edition) makes it clear that the duty of drafting such a letter requesting appellate counsel devolves directly on the trial defense counsel, not on the command. Moreover, that paragraph also requires the trial defense counsel specifically to advise the accused of his rights before the Court of Military Appeals. We think no better way could be found to insure that such rights are explained than to spell them out on the request form, and to have the accused indicate affirmatively his intention to exercise them when they become available.

CHARACTER EVIDENCE

Evidence of good character is admissible before as well as after findings, and if it is available, such evidence should always be proffered on the merits of a case. Paragraph 138f, Manual for Courts-Martial, United States, 1969 (Revised edition). The Court of Military Appeals has held that evidence of good character is worthy of great weight in the military and may be of itself enough to raise a reasonable doubt. See e.g., United States v. Sweeney, 14 USCMA 599, 34 CMR 379 (1964).

Once the good character of the accused is placed in issue, the military judge must, on request, instruct the court as to the weight which should be accorded to good character evidence. The instruction found at Paragraph 9-20, DA Pam 27-9, The Military Judges' Guide is a good one and is highly favorable to the defense.

Since the military rules in the area of character evidence are heavily weighted in favor of the accused, counsel should be always alert to the possibility of litgating the character of the accused on the merits as well as in extenuation and mitigation.

THE COURT OF MILITARY APPEALS AND FAILURE TO OBJECT AT TRIAL

A recent trend in the decisions of the Court of Military Appeals should be noted by and imprinted on the minds of all trial defense counsel. It is becoming increasingly apparent that the Court is reluctant to reverse a conviction based on an error which was not raised by proper objection at trial. These decisions reflect current thinking that if there is no objection at trial, an error is waived and the Court continually emphasizes the fact that military accused are represented by qualified counsel at trial.

Consider some recent examples: In United States v. Hurt, No. 22, 340, USCMA , CMR (1970), trial defense counsel objected vigorously to a proposed instruction dealing with a confession, and the Court of Military Appeals reversed the conviction on that ground. Likewise, in United States v. Davis, No. 22,280, USCMA , CMR (1970) trial defense counsel objected to the use of a deposition and the Court reversed, finding that an insufficient foundation had been laid.

And in United States v. Harrison, No. 22,145 USCMA,
CMR (1970) where the trial defense Counsel
objected to an accident instruction, the Court again
reversed the decision below.

However, in United States v. Pierce, No. 22,031,
USCMA, CMR (1970) no objection was made
at trial to the lack of a speedy trial, and the Court
had little difficulty in finding that whatever delay
there was was nonprejudicial. In United States v.
Estep, No. 22,260, USCMA, CMR (1970) no
objection was made at trial to the CID's failure to
deal with the accused solely through his counsel, and
the Court found the resultant error lacking in preju-
dice. Again, in United States v. Martin, No. 22,182,
USCMA, CMR (1970) the Court ruled that
failure to object to the lack of jurisdiction upon
rehearing waived a Robbins-type defect in the procedure.

The lesson from all of this is manifest. Counsel
who fail to object at trial are lessening the chance
of reversal of a conviction on appeal. The Court of
Military Appeals relies heavily on the trial defense
counsel's lack of objection in determining not only
whether the error was waived, but whether the error
was prejudicial. Counsel must not be cajoled or misled
at trial, but should object wherever there is any
possibility whatsoever of error, or indeed any less
than desirable procedure. Counsel should relearn the
use of the general objection, and when there is doubt,
counsel should ask for a brief recess in order properly
to frame an objection. There is simply no excuse for
less than a vigorous defense of a client, and effective
representation requires knowledgeable and intelligent
use of trial objections to preserve errors for appeal.

DEPORTATION FOLLOWING GENERAL COURT-MARTIAL CONVICTION

Defense counsel representing clients who are aliens
should be aware that a conviction and sentence may be
grounds for deportation. Under 8 U.S.C. §1251(a)(4),
an alien convicted of a crime involving moral turpitude

committed within five years after entry and sentenced to confinement, or confined, for a year or more; or who at any time after entry is convicted of two such crimes not arising out of the same "scheme of criminal misconduct," regardless of whether confinement is adjudged or whether the convictions were in a single trial, may face deportation proceedings. However, this provision is inapplicable if the sentencing court makes a recommendation to the Attorney General within thirty days after judgment or sentence that the alien not be deported. 8 U.S.C. § 1251(b)(2).

The Ninth Circuit has held that court-martial convictions cannot give rise to deportation under this statutory provision. Gubbels v. Hoy, 261 F.2d 952 (9th Cir. 1958). The court held that the differences between courts-martial and civilian courts regarding safeguards for the accused precluded consideration of military convictions for purposes of deportation (id. at 954-55). More emphasis, however, was placed on the ad hoc nature of a court-martial and the practical impossibility of obtaining a recommendation from the members under § 1251(b)(2). The importance of the judicial recommendation in protecting the alien was emphasized by the Supreme Court in Costellic v. Immigration and Naturalization Service, 376 U.S. 120 (1964), in an opinion citing Gubbels, supra, on this point.

The fact that military judges now sit alone in a majority of cases opens up the possibility of a new look at the Gubbels holding by the federal courts. Accordingly, defense counsel in cases tried before a judge alone should consider making a formal request to the judge for a recommendation against deportation if the findings or sentence place the accused in one of the categories of § 1251(a)(4). Notice should be given the Immigration and Naturalization Service, the convening authority, and the prosecution, and a hearing should probably be held before the judge decides to make the recommendation. In requesting the recommendation, counsel should expressly state that the defense in no way concedes that the military conviction or sentence may serve as a basis for deportation. Refusal of the military judge to entertain the request for the recommendation or denial of

the request itself may be appealable since the drastically punitive nature of deportation has been repeatedly noted by the courts. See, e.g., Costello v. Immigration and Naturalization Service, supra at 128.

MATTERS IN EXTENUATION AND MITIGATION

Over 92 percent of all general court-martials result in convictions. Therefore, in over 9 out of 10 cases the court will adjudge a sentence. Faced with these statistics trial defense counsel should carefully and completely prepare prior to trial, evidence in mitigation and extenuation. Unfortunately for the defendant, too often the commendable and effective efforts of counsel cease after findings.

The Court of Military Appeals has reversed cases where evidence affecting punishment was not submitted by counsel. United States v. Rosenblatt, 13 USCMA 28, 32 CMR 28 (1962). In United States v. Broy, 14 USCMA 419, 34 CMR 199, 207 (1964), the Court held that "Defense counsel's trial responsibility to the accused does not end with the findings." Recently the Court reversed where the omission of such evidence would have "'manifestly and materially affect[ed] the outcome' of the court-martial's deliberation on the sentence had it been brought to its attention." United States v. Rowe, 18 USCMA 54, 39 CMR 54 (1968). Clearly counsel's actions after findings are coming under close scrutiny. United States v. Wimberley, 16 USCMA 3, 36 CMR 159 (1966); United States v. Allen, 8 USCMA 504, 25 CMR 8 (1957); United States v. Evans, 18 USCMA 3, 39 CMR 3 (1969).

NOT-GUILTY PLEA CASES. Many not-guilty cases reflect counsels' concerted effort prior to findings, but little or no effective assistance afterwards. Before findings, witnesses are carefully prepared and examined, numerous documents are offered, objections are vigorously made. The sentence proceedings often reveal a cursory examination of character witnesses, a few unimpressive

letters, and a short, poorly prepared and unpersuasive unsworn statement. Presentence arguments seldom are as coherent, thought-out or organized as arguments on the merits.

It is suggested that in every not-guilty case counsel concentrate a substantial portion of his pretrial investigation and preparation to matters that go to sentencing. The attorney should find witnesses, question acquaintances, convince reliable persons to testify. Counsel should not passively acquiesce in the defendant's statement that no one can say a good word for him.

The counsel capable of vigorously defending against allegations is just as able to construct a case against a heavy sentence. Former commanding officers who have given excellent efficiency ratings, former platoon sergeants who had cooperation from the defendant, neighbors and relatives should be called. An alibi witness living 500 miles away would be subpoenaed; so too should a minister, town official, or former employer who could help reduce a sentence. Letters can be useful; but the fact a witness is willing to travel some distance to help the defendant is impressive and shows faith and confidence in the defendant.

Post-trial reviews often contain valuable data about the defendant. These matters should, and most of the time could, be presented to the court-martial. Present a personality, a person, to the jurors--not just a wanted poster description. Bring in children, parents, wives. Repeatedly, relatives living within 100 miles of the trial submit letters to the convening authority or appellate counsel offering help and noting they did not even know about the trial. If the defendant received the Bronze Star with "V" device, let someone testify how and what he did--have a witness praise his efforts; give details, add color. Don't just casually remark "On X date, the defendant received such and such award."

When counsel tries to reduce, say a larceny charge to wrongful appropriation, or unpremeditated murder to manslaughter, what he really considers is the relative

sentences for the charged offense and the lesser included offense. When the post findings portion of the case comes up, the efforts of counsel should be as resolved and meaningful. During sentence counsel should be mindful of Chief Judge Quinn's views:

"Defense counsel is an advocate, not an *amicus* to the court. . . . he is obliged to marshal the evidence in the way most favorable to the accused." United States v. Mitchell, 16 USCMA 302, 36 CMR 458, 459 (1966). See United States v. Evans, *supra*.

GUILTY-PLEA CASES. In guilty-plea cases, the records of trial too frequently reflect little work, and mere reliance on the pretrial agreement. In United States v. Broy, *supra* at 207 it was stated:

[Defense counsel's] obligation to provide effective assistance continues through the imposition of sentence. That obligation is not satisfied by obtaining before trial the agreement of the convening authority to disapprove so much of the sentence as exceeds a specified maximum.

Guilty-plea cases require the same type of preparation in extenuation and mitigation as do not-guilty cases.

MAKE A RECORD FOR APPEAL. The Court of Military Review has the power to reduce sentences. Even if there is a pretrial agreement, counsel should present as much mitigation and extenuation as possible, so that the Court of Military Review can find cogent reasons to reduce the sentence. In not-guilty plea cases, the Court of Military Review may be the only appellate body willing to reduce the sentence. Less than five percent of the appellate decisions result in reversed findings; the sentence portion of the record is more important in obtaining relief of some sort.

Trial defense counsel will greatly serve their clients by making an impressive presentation at the pre-sentence part of the trial. A few days or weeks delay to investigate, gather information, and obtain and prepare witnesses may save the defendant a year or more in prison

CROSS-EXAMINING AN ACCOMPLICE

The following list represents types of questions which might be used in cross-examining an accomplice witness. Not all will be applicable to every situation.

1. When you were first arrested, you didn't tell the CID agents that the defendant was involved, in the commission of the offense, did you?
2. You denied your involvement in the offense, didn't you?
3. That was a lie, wasn't it?
4. And it was only after that lie that you decided to say that the defendant was involved in the offense?
5. Now prior to your arrest, you hadn't said anything to anyone about the defendant being involved in the offense, had you?
6. It took a conversation with the CID in which you yourself, were accused to bring this out?
7. And how long did you converse with the CID before you decided to implicate the defendant?
8. Now you were accused of all of these charges (or specifications) weren't you?
9. You have agreed to plead guilty to charges (or specifications) in a pretrial agreement with the convening authority?
10. How many charges (or specifications) were dropped as a result of your agreement to plead guilty?

11. You haven't been tried by court-martial yet, have you?
12. It's your understanding that those charges (or specifications) will be dropped before you are court-martialed, isn't it?
13. And you base that understanding on representations made in the pretrial agreement, don't you?
14. You don't think that these charges (or specifications) would have been (or will be) dropped if at the present time you change your testimony and absolve the defendant, do you?

[Note: Questions 9-14 should be changed if no pretrial agreement has been signed, but the witness was promised that some charges will be dropped if he testifies. Also check the pretrial agreement, if there is one, to determine if the agreement expressly relates to giving testimony in the defendant's case. If there is no express provision, be sure you can reasonably imply that the pretrial agreement depends on testimony in defendant's case.]

15. In other words, it's your understanding that these charges are being held over your head until you testify in this case. Isn't that right?
16. There are [_____] charges (or specifications) that are pending against you, isn't that right?
17. And the maximum sentence for each charge (or specification) is [_____] years?
18. Then, if these charges (or specifications) are not dropped, you face a possible maximum sentence of [_____] years, don't you?

19. As a result of all this, you are satisfied, aren't you, that the length of confinement in this case depends in part on your testimony?
20. And you've been in confinement before, haven't you?
21. For how many years?
22. It would be fair to say that you have every desire and interest to shorten the length of time you will have to spend in confinement on these charges, isn't that right?
23. How old are you, Private _____?

See generally Maryland, District of Columbia, Virginia, Criminal Practice Institute, Trial Manual (1964).

[Important: Know what answers will be given. Be able to impeach if necessary. Don't let answers come forth that hurt the defendant.]

* Special Findings: Although we recommended *
 * in the October 1969 issue of THE ADVOCATE *
 * that special findings be requested in all *
 * cases tried by a judge alone whenever *
 * there is a material factual matter *
 * reasonably in issue, Paragraph 741, *
 * Manual for Courts-Martial, United States, *
 * 1969 (Revised edition), we have noticed *
 * in our review of cases on appeal that *
 * rarely if ever are counsel availing *
 * themselves of this most valuable defense *
 * tool. We therefore emphasize again the *
 * importance of special findings in judge- *
 * alone trials, both for the purpose of *
 * seeking clarification of evidentiary *
 * disputes, and for appeal. *

RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

AWOL--TERMINATION OF ABSENCE -- Accused was convicted of being AWOL from 25 August 1968 - 16 December 1968. A stipulation of fact placed in evidence indicated that the accused was arrested by Armed Forces Police on 4 October 1968 on suspicion of absence without leave, and was released to his own custody 6 October 1968. The Army Court of Military Review held that the accused was effectively returned to military control on 4 October 1968 because he was apprehended on that date on suspicion of being absent without leave and, by the exercise of due diligence, the military authorities concerned could have obtained knowledge of his true status. CM 420635, Ellison, (decided 19 January 1970).

BREACH OF PEACE--FAILURE TO STATE AN OFFENSE -- The Air Force Court of Military Review held that a specification alleging unlawful assembly for the purpose of resisting apprehension by police officers does not state the offense of breach of the peace. Missing from the specification was the essential element of an overt act of a violent or tumultuous nature. Citing United States v. Hewson, 31 USCMA 506, 33 CMR 38 (1963) and Paragraph 195b, Manual for Courts-Martial, United States, 1969 (Revised edition), the Court stated that there must be an act which disturbs public tranquility or impinges upon peace and good order. The lesser included offense of disorderly in station was approved by the Court. ACM 20457, Haywood, CMR (29 December 1969); 6 Crim. L. Rep. 2318.

CROSS-EXAMINATION -- LARCENY VICTIM -- An accused was tried for interstate transportation of a stolen automobile. His defense was that the owner of the car gave him permission to take the vehicle. The Fourth Circuit Court of Appeals held that the trial judge committed prejudicial error by refusing to allow the defense to cross-examine the owner as to the latter's sobriety on the night the car was allegedly stolen. The Court stated that such an examination

was clearly relevant. If the jury believed the owner to be drunk, they might have concluded that he did in fact give permission and had forgotten it when he awoke the following morning and discovered his car was missing. Ketchem v. United States, F.2d (4th Cir., 29 December 1969), 6 Crim. L. Rep. 2312.

DERELICTION OF DUTY -- FAILURE TO STATE AN OFFENSE-- A specification alleged dereliction of duty by knowingly and wrongfully consuming alcoholic beverages while on Military Police duty. The Army Court of Military Review stated that the gravamen of a dereliction of duty offense is dereliction in the performance of an assigned duty. The Court held that no offense of dereliction was stated without an averment in the specification that the consumption of alcohol in some way impaired the performance of the accused's duty. CM 419726, Robinson, (decided 23 January 1970).

FAIR TRIAL -- PROSECUTION ARGUMENT -- A military judge, sitting alone, on a guilty plea case requested and received a recommendation by the trial counsel on the sentence to be imposed which corresponded exactly with the terms of the pretrial agreement. The Army Court of Military Review held that such a recommendation by the trial counsel was beyond the scope of proper argument, although the prosecution could argue for an appropriate sentence. The Court cited Paragraph 44g(1), Manual for Courts-Martial, United States, 1969 (Revised edition), which states that a trial counsel ". . . will not bring to the attention of the court any intimation of the views of the convening authority, or those of the staff judge advocate or legal officer, with respect to . . . an appropriate sentence. . . ." CM 421670, Razor, CMR (6 February 1970).

FAIR TRIAL -- PROSECUTION ARGUMENT -- In a trial for shoplifting, a prosecutor in closing argument stated that the defense counsel had "not seen fit to offer any evidence to contradict" the testimony that the defendant had been caught with several items of clothing in his possession. The Montana Supreme Court held that this

statement violated the Fifth Amendment as it was clearly a prosecutorial comment on a defendant's failure to testify. Such comment would only be proper if there was a defense witness other than the accused himself who could refute the specific state evidence, but this was not the situation in the instant case. State v. Hart, ___ P.2d ___ (Mont. Sup. Ct., 16 December 1969), 6 Crim. L. Rep. 2263.

FAIR TRIAL -- QUESTIONING BY TRIAL JUDGE -- The convictions of two codefendants by a federal district court for offenses arising out of a demonstration at the Pentagon were reversed because the trial judge's questioning of the defendants indicated a predetermination of guilt. One defendant was interrogated by the judge for a period covering 13 consecutive pages of trial transcript, and was "lectured and chided" as to why "an honor student at Harvard University" would participate in such events. The judge also referred to provocative incidents which occurred at the demonstration but which were not the subject of charges against the defendant in question. In regard to another defendant, the Court stated that the trial judge exhaustively questioned the defendant in a "chiding, seemingly hostile manner," often indicating that he was seeking a specific answer other than the one that had been given. The judge also repeatedly and persistently interrupted the defense counsel during the trial and summation with sharp, critical comments which undoubtedly tended to prejudice the defendant before the jury. In general, the Court stated that "The assumption by the judge of the burden of cross-examination of the accused in a criminal case by extensive interrogation may be reversible error." Cassiagnol v. United States, ___ F.2d ___ (4th Cir., 8 January 1970), 6 Crim. L. Rep. 2296.

GUILTY PLEA -- PROVIDENCY -- Accused was indicted for felony murder arising out of a robbery and pleaded guilty to manslaughter. The trial defense counsel informed the judge that his client after "some misunderstanding at first" now understood what the law was in regard to his offense. Prior to sentencing, the

accused, through his counsel, stated that he did not assault or rob the victim. In regard to this statement, the trial court assumed that the accused was referring to his degree of participation in the robbery as opposed to that of his two codefendants. The New York Court of Appeals held that the defendant was entitled to a hearing as to whether his guilty plea was "knowingly" and "meaningfully" entered. There was sufficient doubt about the voluntariness of the plea and the trial judge did not make proper inquiries to alleviate this doubt. No questions had been asked about the defendant's participation in the crime, nor was there any discussion of the facts involved. The defense statement at sentencing "may be interpreted to mean that he did not participate in the robbery forming the basis of the felony murder charge." Beasley v. People, ___ N.Y.S.2d ___ (Ct. App., 11 December 1969), 6 Crim. L. Rep. 2282.

INSANITY -- REQUIREMENT OF COUNSEL AT PSYCHIATRIC INTERVIEW -- A defendant charged with murder raised the defense of insanity, but refused to talk with a government psychiatrist who approached defendant at his home without giving prior notice of his visit or its purpose either to the defendant or his counsel. The prosecutor argued that the insanity defense was raised in bad faith. The Ninth Circuit Court of Appeals held that post-indictment questioning of an accused by a state psychiatrist without notice to, and in the absence of, counsel violated the accused's right to counsel at all critical stages of criminal proceedings against him. The Court indicated that defense counsel could have informed his client that a refusal to be interviewed might be admitted against him at the trial, and, if an interview was held, could have insisted upon appropriate safeguards including the use of neutral experts, the presence of a defense representative, and the preparation of a taped or stenographic record of the examination. The Court also stated that the prosecutor's attempt, through the state psychiatrist, to communicate directly with the defendant rather than with his counsel, was a gross violation of professional

ethics. Schantz v. Eyman, 418 F.2d 11 (9th Cir., 31 October 1969), 6 Crim. L. Rep. 2182. (Note: In United States v. Hayes, 19 USCMA 60, 41 CMR 60 (1969), the Court of Military Appeals stated that the absence of counsel in a pretrial psychiatric examination would be prejudicial only upon a specific showing of prejudice to the accused.)

PRETRIAL PUNISHMENT -- ADMINISTRATIVE SEGREGATION -- An accused in pretrial confinement was placed in administrative segregation at a post stockade for almost three months during which time he was kept "virtually isolated" from all other personnel in the stockade compound. He was confined in a small cell (7'8" long, 5'9" wide, and 8 or 9 feet high) containing neither furniture nor lighting fixtures. His bedding was removed from the cell during the day and, except for a one-hour period of exercise, required to remain seated until his bedding was returned approximately 15 hours later. In addition, a sign was placed over his cell which read: "Prisoner Kirby is to talk to no one. This includes all guard personnel." The Army Court of Military Review held that, although administrative segregation was not per se a violation of Article 13, Uniform Code of Military Justice, the "protective custody" treatment afforded the accused was "completely at odds with any civilized notion of treatment of a suspect held pending trial" (United States v. O'Such, 16 USCMA 537, 37 CMR 157 (1967)). The Court further held that an instruction by the military judge authorizing the court to consider such pretrial treatment in imposing its sentence was insufficient to purge any possible prejudice. The accused was, therefore, entitled to a "meaningful" reassessment of his sentence. As he had already served almost half of his two-year term of confinement, the Court disapproved all remaining confinement, CM 421188, Kirby, ___ CMR ___ (3 February 1970).

REGULATION -- MOTOR VEHICLES -- An accused was charged with violating a general regulation (Paragraph 2, Army Reg. 600-55, 25 January 1968), by operating a

military motor vehicle without a valid military operator's permit, and with wrongful appropriation of the vehicle. The Court of Military Review held that the phrase, "operating a motor vehicle for the Army" (emphasis added) in the regulation contemplates that Army personnel must possess a valid military operator's license when engaged in operating a military vehicle incident to official business. Therefore, the accused could not have violated this regulation if he had wrongfully appropriated the vehicle in question for he clearly was not acting "for the Army." CM 420662, Murray, CMR (19 January 1970).

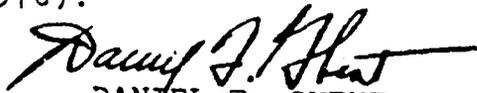
RIOT -- TERRORIZATION OF GENERAL PUBLIC -- The Air Force Court of Military Review held that terrorization of the general public, the gravamen of the offense of riot, was totally lacking under the circumstances of the disorder in question. There had been a violent and tumultuous disturbance at a bus stop which lasted for 30 minutes. There was no property damage, although minor injuries were suffered by two security policemen. The only persons at the scene other than the participants were females being escorted by members of the group involved in the disturbance. Several of these women were "crying," another woman was "wide-eyed" after being ordered by police to remove her vehicle from the scene of the incident, and several policemen indicated that they feared for their personal safety. These facts were held to fall far short of the "intense public fear necessary to escalate a public disturbance to the proportions of a riot." The Court affirmed the lesser included offense of breach of the peace. ACM 20457, Haywood, CMR (29 December 1969), 6 Crim. L. Rep. 2318.

SEARCH AND SEIZURE -- CONSENT -- The Michigan Court of Appeals held that the 17 year old brother of an assault defendant could not validly consent to a search of the defendant's apartment. Although both men occupied the apartment, the defendant paid the rent and supported his brother. The Court noted that Fourth

Amendment rights are personal rather than property-oriented. In addition, the Court found that the totality of circumstances negated any finding of consent based upon "knowledgeable agreement or acquiescence." The 17 year old youth was confronted by three policemen at 4:30 a.m., was not informed of the purpose of the investigation, was not advised that he could refuse to permit a search. The Court concluded that the "attendant coercive atmosphere" negated a finding of voluntariness. People v. Smith, N.W.2d (Mich. Ct. App., 2 October 1969), 6 Crim. L. Rep. 2333.

SEARCH AND SEIZURE -- SCOPE OF SEARCH -- Military police stopped an accused's vehicle because it did not have a registration decal, and then noticed that the accused appeared intoxicated. After the accused had stepped out of the car, the police searched the car for a possible large quantity of alcoholic beverages, and found marihuana under the passenger seat on the passenger side of the vehicle. The Army Court of Military Review held that the warrantless search of the vehicle was not constitutionally permissible. Under Chimel v. California, 395 U.S. 752 (1969), a permissible search incident to an arrest is limited to a search for weapons and to prevent destruction of criminal goods or evidence of crime. The Court held that since the accused was out of his car, he did not have ready physical access to the car and could not have destroyed any evidence of crime. CM 420039, Pullen, CMR (29 January 1970).

SPEEDY TRIAL --UNAVAILABILITY OF MILITARY JUDGE -- The Army Court of Military Review opined that it was not "impressed" with government assertions regarding the unavailability of a military judge as an explanation for a questioned delay in bringing an accused to trial. "In this day of modern communications and travel facilities, we will not be content to rely solely on the busy schedule of a military judge as an explanation for delay." (Emphasis in original.) CM 421188, Kirby, CMR (3 February 1970).



DANIEL T. GHENT
Colonel, JAGC

Chief, Defense Appellate Division