

THE ADVOCATE

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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. 1-21 d, 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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CROSS-EXAMINATION OF THE FORENSIC CHEMIST: PART I

In an increasing number of cases received in the Defense Appellate Division during the past few months, trial defense counsel have contested the laboratory findings of the chemists in CID laboratories. We are pleased with this development, having encouraged counsel to explore laboratory findings more fully in past issues of THE ADVOCATE. [See, Vol. 1, No. 3 (May 1969); Vol. 2, No. 5 (June 1970)]. However, in a number of such cases, cross-examination has proved ineffective, evidently due to unfamiliarity with the area of expertise or to the lack of organization and preparation of the cross-examination. In still others, counsel continue to stipulate to part or all of the chemist's findings, chain of custody, identity of the substance, or the amount thereof. We cannot urge too vigorously the importance of putting the government to its proof in all aspects of the drug case.

In the past, we have on occasion presented sample questions for cross-examination for use by trial defense counsel. [e.g., "Confronting Lay Opinion on Marihuana Identification", Vol. 1. No. 3, pp. 3-4; "How to Impeach a Witness with a Prior Inconsistent Statement", Vol. 1, No. 6, pp. 9-10; "Cross-Examining an Accomplice", Vol. 2, No. 2, pp. 19-21; and "Qualifying an Expert Witness", Vol. 2, No. 3, pp. 12-16.] Here, we offer the first portion of our suggested cross-examination of the forensic chemist. This segment deals particularly with laboratory procedures in general, including the quantitative and qualitative analysis of the evidence; in our next issue, we will take up the matter of the actual tests themselves. At the end of this section are suggestions for other "Fertile Areas of Inquiry", which are by no means comprehensive. Any number of valid areas for cross-examination may present themselves by the facts of a particular case, and will depend, in large measure, upon the resourcefulness and ingenuity of defense counsel.

We would counsel extreme caution in the use of this sample cross-examination, urging our readers to be mindful that it is only "suggested", and inviting them to tailor it to the specific objectives of their own cases. The goal of these questions, and, indeed, counsel's own objective in cross-examination, should be as follows:

1. To enhance the defense's position before the court by showing that counsel is well prepared and knowledgeable, and that he is in a position to assist the jury in understanding the problems and deficiencies in the government's case, and in arriving at the truth;
2. To give the jurors a more substantial opportunity to judge the credibility of the chemist because it has been tested by the defense and to measure his frankness in dealing with the defense; and
3. To give the jury a frame of reference within which to examine and weigh the fundamental veracity of the prosecution's evidence.

Of course, there are other collateral objectives to be sought in presenting this model cross-examination. For example,

counsel are strongly urged to use these questions for pretrial discovery, when the chemist is interviewed prior to trial. If done artfully, this procedure will enable counsel to determine which are the areas of inquiry where the chemist is weakest. Of course, care should be taken by the defense lawyer in order not to disclose his awareness of the chemist's vulnerability. Moreover, the ability to conduct a vigorous and effective cross-examination in one case may enhance counsel's effectiveness in plea bargaining in other cases because the government will be less willing to expose its witnesses to such searching inquiry.

This format can be most effectively employed before a court with members. If counsel can convince enough of them to be skeptical of the laboratory findings, he may have won his case. Chemists from Army laboratories are intelligent and wary witnesses, and are trained not to volunteer too much on the stand. But if the chemist is guilty of careless procedures, a jury of military officers, hopefully, will resent his unprofessional conduct. Only a thorough and penetrating cross-examination will bring to light aspects favorable to the defense case. Unfortunately, a military judge alone is unlikely to be impressed by any attack on a chemist which falls short of completely impeaching his findings.

The Chemical Identification and Measurement of Evidentiary Materials

Forensic chemists are expert witnesses who testify to the identity of prohibited substances and to the amount of such a substance in the exhibits they analyze. Heroin is given here as an example, since that drug is almost always "cut" with other substances, and thus the actual amount of heroin in any particular sample often will be quite small. Most laboratory reports, however, are misleading in this regard, and characterize the entire sample as heroin, without qualifying that conclusion by indicating the presence of other substances. While in practice these questions may be of most value in defending simple possession cases involving heroin, counsel may be able to adapt them to cases involving other drugs as well. It is important to be mindful of the possibility that the drug in question may have been "cut" with some other quite innocent substance, for example, talcum powder mixed in with heroin. Counsel should also be wary, in cases involving larger

amounts of drugs, that a higher percentage of heroin (or other drug) in the sample may give rise to the inference that the accused himself was a "dealer", who was apprehended with the drugs before he could himself "cut" it prior to resale. Consequently, defense counsel should learn what percentage of the pure substance is contained in the street dosage, and steer clear of this area where the evidence in question is of a substantially greater percentage strength.

Cross-examination: Identification

Q. Specialist _____, you have testified that the substance which you analyzed in your laboratory, identified in this trial as Prosecution Exhibit _____, contained (heroin, or whatever), is that correct?

Q. Of course, the sample you analyzed contained other substances as well, did it not?

Q. Isn't it true that "street" heroin is often "cut" with other chemicals and substances, such as quinine, milk sugar, talc, mannite and possibly even strychnine? [See paragraph 16c, TB PMG 1, "Drug Investigations", the technical bulletin used at the MP school. Some Chinese samples are cut with caffeine, such as "Red Rock".]

Q. What other substances did you find as a result of your analysis of this sample?

[If the witness says, "All I tested for was heroin", or to that effect, counsel might ask:]

Q. But you were requested to determine the contents of the exhibit, were you not?

Q. And if it is true that other substances were also present, shouldn't they have also been identified?

Q. Am I correct in assuming that your laboratory has the capability of identifying a general unknown?

Q. Well, would you have been able to identify a commercial brand of foot powder, for example, if the sample which you analyzed contained an amount of foot powder?

Q. You would agree that the possession of foot powder is not itself a crime, wouldn't you?

[In the same vein, counsel might ask the chemist about other common substances, such as artificial sweeteners, etc., possession of which is not uncommon to the jury].

The general thrust of the questions just set forth is to demonstrate to the court possible prejudice on the part of the chemist who analyzed an unknown sample only with a view to finding a prohibited substance, and also to demonstrate that a more thorough chemist may have discovered the presence of a substance that might have enhanced the defense's theory of the case. For example, suppose a defense of innocent possession is raised, the accused claiming that the can, so he thought, contained foot powder. What if, in fact, 95% of the unknown sample was foot powder, albeit somehow adulterated with heroin? Of course, such a line of defense would possibly appear preposterous were the substance seized from the accused contained in glassine envelopes.

Cross-examination: Weight or Quantity

Q. Am I correct in assuming that you weighed this sample on your laboratory scales as one of the first steps in your analysis?

Q. And, as you have testified (and as indicated in your laboratory report), the evidence you received weighed approximately (0.20 grams, or whatever amount), is that right?

Q. And not all of that 0.20 grams ___ was heroin, was it?

Q. Is it fair to say that "street" samples of heroin actually contain as little as 3-5% heroin (perhaps as high as 10%), and the rest some other substances with which the pure heroin has been "cut" or made to stretch? [See DA Pam 360-500, "Drug Abuse - Game Without Winners", P. 21].

Q. Did you determine what percentage of this present sample was, in fact, heroin, and not some other substance, assuming, of course, that it actually does contain heroin?

[If the witness states a percentage, use his figures. If he ventures as high as 25-30%, he is probably grossly incorrect. Such a high percentage could perhaps be fatal to most users, depending on the "normal" street quality of the drug. If he refuses to state a figure, continue as follows].

Q. Well, then, let's assume for a moment that this sample was average "street" heroin, or anywhere from 5 to 10% heroin. That would mean the sample you analyzed actually contained only .01 or .02 grams of heroin, and not .20, isn't that right?

Q. And very often, you consume that much of the sample in making your laboratory analysis, don't you?

Q. It is really, in fact, a very minute amount, isn't it?

Q. Can it be gathered on the end of a pocket knife? (or some other commonplace measure that the jury can relate to). How much less?

[These questions may help overcome any inferences that may arise during trial that the accused was dealing in narcotics, simply by virtue of the seemingly large amount of the sample. At any rate, they discredit the specification and the laboratory report which tacitly suggest the accused was in possession of pure heroin in the amount specified.]

Laboratory Procedures: Chain of Custody

An often fertile field for inquiry, and one most familiar to defense counsel, surrounds the chain of custody of the evidence. Most attorneys who attempt a cross-examination in this area, however, become too slavishly bound by evidence tags and chain of custody receipts, and lose sight of the primary goal of this type of interrogation: Is there any possibility, or any way, in which the evidence presented in court or examined by the chemist in his laboratory is not the same evidence seized from the accused at the time of his arrest? Common sense must dictate the course of cross-examination in this area. Counsel's objective should be to give the jurors a clear picture of the procedures and activities in the forensic laboratory, to the end that they will fully appreciate the possibility of

mistakes or oversights in the laboratory. Crime labs, on the whole, are dramatically swamped with work, and often terribly understaffed. Training of the chemists is perforce abbreviated and cursory, since new personnel are urgently needed to perform analyses. These are problems that create errors, and such errors may work to the prejudice of an innocent accused.

Cross-examination: Laboratory Procedures

Q. Specialist ____, let's turn our attention for a moment to the procedures which you employed in analyzing this substance. First, I believe you testified that this evidence was received at your laboratory via registered mail, is that right?

Q. Do you recall the number?

Q. Did you open the package personally? [If not, who did?]

Q. In what condition did you find the exhibit? [e.g., was the evidence container broken or damaged? Had any of the suspected contents spilled or leaked out? Was there evidence of any water damage? Were all evidence tags still securely affixed to the exhibit? etc.].

Q. Were there any other exhibits packed in the same package? [If so, how many, what description, what condition, etc.].

Q. Did you make any kind of log entry or did you record receipt of the evidence, including a description thereof? [Again, if not, who did? Who signed registered mail receipt, etc.].

Q. Did you personally assign the exhibit a laboratory number? [If not, who did?] How was it labelled?

Q. Did you record that number somewhere at the time you opened the package? (first received the exhibit?) [Did the chemist himself copy the lab number onto his report from the exhibit or was that done later? etc.].

Q. Did you receive any other exhibits at the same time? [If so, how many? Were they opened at the same time? Description recorded, etc.?].

Q. Were you running tests on any other exhibits or specimens at the same time you were analyzing Prosecution Exhibit ___? [If so, how many? Where? On the same laboratory table, in another well of the same spot-plate? (Spot plates are small porcelain dishes containing a number of shallow indentations or wells approximately an inch or less apart, in which small amounts of the suspected substance are placed and mixed with the reagents. Counsel are encouraged to obtain a sample spot-plate for demonstrative purposes in the courtroom.) What were the other tests that were running at the same time? e.g., Color tests? Opiates? Barbiturates? Others? Do you test all the possible opiates at one time? Counsel should look for any chance of mix-up with other evidence samples being tested with the one in his case.]

Q. How large is your laboratory table or work area?

Q. How many exhibits did you have on the table at the time you were running tests on Prosecution Exhibit ___?

Q. How many other persons work in the same laboratory?

Q. Did you leave your laboratory table at any time while Prosecution Exhibit ___ was lying open on the table, or being tested? Or while other exhibits were laying open on the table or being tested? Have exhibits ever blown off your table or been disturbed in any way during your absence?

Q. Do you ever consult with any other chemists in your laboratory about the tests you run? Did you do so in this case?

Q. Does anyone check your tests before they are destroyed? Did someone do so in this case?

Q. Does anyone in your laboratory ever bring exhibits or samples they are analyzing to your table or work area for advice or help? Do other people ever run tests on other exhibits at your table while you have tests running there?

Q. Do you ever take exhibits you are working on to other tables in the laboratory? Did you do so in this case?

Q. Do you have any personnel in your laboratory undergoing on-the-job training? Do they perform actual tests on unknown samples received from the field? Do you personally supervise the work of these trainees? Do you run the same tests again on the same exhibits tested by the trainees to verify their analyses?

Q. Did any trainees or subordinates perform any of the tests or analysis on Prosecution Exhibit ___? [If so, identify them. What experience have they had in running these tests? Did you personally rerun the complete tests to verify their results? Why did you fail to include their names on the laboratory reports? If the witness admits that someone else actually performed the work on the exhibit in issue, and that all he did was sign the report, defense counsel should leap to the advantage, and move for a mistrial.]

Q. Do you ever have any visitors in your laboratory? Are tests or demonstrations run for them on unknown samples? Do they have access to the work areas in the laboratory? Were there any visitors in the lab on the day you tested Prosecution Exhibit ___?

The next series of questions is closely related to the previous one, and deals essentially with the problem: was the evidence seized from an accused harmless to begin with, and only inadvertently contaminated in the laboratory? Again counsel should attempt to dramatize for the jury the conditions of the laboratory and heighten in their minds the possibility of error by the chemist.

Cross-examination: Contamination of the Evidence

Q. Now, I believe one of the first things you said you did was weigh the sample, is that right?

Q. Was the sample poured out of the container in which you received it, or was it weighed in that container? [If the latter is the case, was the container itself also weighed?]

Q. Did you pour the sample into a container of known weight? Or did you pour it directly into the scale pan?

Q. Were there any other substances weighed in the same containers or on the same scale pan at any time prior to the time you weighed the sample identified as Prosecution Exhibit _____?

Q. Did you personally clean the container or scale pan into which you emptied the contents of Prosecution Exhibit _____ prior to the time you weighed the exhibit? [If not, who did?] How was the cleaning accomplished?

Q. Is there any possibility that a small residue may have been left in the scale pan or container from a previous sample?

Q. If a small amount of heroin were in fact left on the scale pan or container in which you weighed Prosecution Exhibit _____, isn't it possible that the exhibit could have become contaminated at that time?

Q. Is it true that a very small amount of a suspected substance, often less than one-one hundredth of a gram, is used in your tests?

Q. And, therefore, only a small amount of heroin is necessary to show a positive reading on those tests?

Q. Is it possible that particles which could contaminate so small a sample might not be readily visible to the naked eye?

Q. There is a certain amount of heroin present in your laboratory, isn't there? Can it be carried on the hands of the chemist? Through the air? On instruments that you use in your work?

Q. Can you name and describe what instruments there are in your laboratory that are routinely used in analyzing substances such as heroin and that could come into contact with unknown samples or known substances. [Counsel would be wise to arrange a visit to a local crime laboratory (or even a hospital lab) and examine instruments commonly in use. He

might also arrange to bring some of these instruments into court, such as glass pipettes, droppers, syringes, test tubes, tweezers, forceps, surgical knives, glass tubes, etc.]

Q. [After the witness names some instruments, counsel might display them if he has them available, and proceed as follows]: Well, is it possible for small particles of one sample to adhere to the end of a pipette, and be inadvertently deposited in another sample?

Q. Can you personally guarantee that the sample that has been identified as Prosecution Exhibit ____, which you analyzed, was not inadvertently contaminated by you or someone else working in your laboratory?

Other Fertile Areas of Inquiry

1. Laboratory security. Is the laboratory locked at night? Are all exhibits returned to a locked storage area at the end of duty hours? How are known samples and reagents secured? Are logs kept of the storage compartments?

2. Calibration of instruments. Did the chemist check them prior to this test? Are logs kept?

3. Counterattack: Can the defense secure and qualify their own expert who will testify against the procedures used in the prosecution chemist's laboratory. Consider graduate students in chemistry or others who might welcome the chance to testify, often for free.

EFFECT OF ACQUITTAL OF CO-CONSPIRATORS ON PROSECUTION FOR CONSPIRACY

In United States v. Nathan, 12 USCMA 398, 30 CMR 398 (1961) the Court of Military Appeals announced the rule that an accused cannot be convicted of conspiracy where his alleged co-conspirators have been previously tried and acquitted on the same charge of conspiracy since, as long as the verdict in the trial of the accused stands, it must exclude the acquitted co-conspirators from the conspiracy, and if no other persons, known or unknown, are alleged to have conspired with the accused, the essential fact of agreement is missing. Subsequently, in United States v. Kidd, 13 USCMA 184, 32 CMR 184 (1962) the Court reaffirmed the

rule and extended it to the situation in which acquittal of alleged co-conspirators came after the accused's conviction of conspiracy. By these decisions the Court of Military Appeals seemingly adopted the prevailing rule in the federal circuits. The rule is, however, restricted to situations in which there is an acquittal of co-conspirators on the merits and not a mere termination of prosecution not amounting to an acquittal. Further, there must be an acquittal of all of the other alleged conspirators; if there is an allegation of unknown conspirators and evidence to show a combination with them, the rule does not apply. United States v. Kidd, supra at page 188.

Application of the rule does not seem to depend on identical pleading. The Court has held that acquittal of the only alleged co-conspirator requires an acquittal even where different overt acts are alleged or where different victims are involved. See United States v. Fisher, 16 USCMA 78, 36 CMR 234 (1966); United States v. Kidd, supra. The Court's opinion in Kidd indicated that in determining the terms of the conspiracy and its objects, the court is not limited to the averments of the charge but that it should determine the question on the basis of all facts in the case. A case currently pending in the Court of Military Appeals is expected to give further guidance in this area. United States v. Smith, CMR ___ (ACMR 6 November 1970), Petition Granted (COMA, 28 January 1971).

Where the alleged co-conspirators are tried and acquitted of the same conspiracy prior to the trial of an accused, the issue can effectively be litigated at trial by a motion to dismiss. Problems may arise, however, in the situation in which the co-conspirators are tried and acquitted subsequent to an accused's conviction. If the acquittal occurs before the findings and sentence have been approved by the convening authority, the matter should be brought to his attention by appropriate motion or Article 38(c) brief. If, however, the convening authority has already approved the case and forwarded the record to the Court of Military Review, when the acquittal of co-conspirators is announced, trial defense counsel should insure that appellate defense counsel or the Court of Military Review is made aware of the disposition of the related cases. Trial defense counsel are urged to file an appellate brief on behalf of their client in such an instance under provision of Article 38(c), Uniform Code of Military Justice, appending

thereto documentation of the acquittal of alleged co-conspirators in the form of the court-martial promulgating orders. See The Article 38(c) Brief: A Forgotten Defense Tool, THE ADVOCATE, Volume 2, No. 8, October 1970, page 13. If the case is not subject to automatic review by the Court of Military Review, a petition to the Judge Advocate General under Article 69, Uniform Code of Military Justice, or a motion addressed to the accused's present supervisory authority over the case, Manual for Courts-Martial, United States, 1969 (Revised edition) Paragraph 94, would be appropriate.

Appellate defense counsel in a conspiracy case will naturally make every effort to determine the disposition of cases involving alleged co-conspirators. However, this information may not be readily available since those related cases may never reach the appellate level. Accordingly, counsel closest to the situs of the trial (and usually the trials of the alleged co-conspirators) are urged to insure that their counterparts in the Defense Appellate Division are made aware of circumstances which may require reversal of their client's conviction.

ON-POST CIVILIAN-TYPE CRIMES IN THE U.S. SUPREME COURT

In United States v. Relford, ___ U.S. ___ (1971) the petitioner sought habeas corpus from the United States Disciplinary Barracks on the basis that the military had no jurisdiction to try him. He was a serviceman convicted by courts-martial of raping and kidnapping two women in unrelated incidents which occurred on a military reservation. One victim was abducted from a car where she was waiting for her serviceman brother who was visiting the base hospital. The other was driving from her home on base where she lived with her serviceman husband to the post exchange where she worked. The petitioner forced his way into the second women's car at a stop sign and forced her to drive to a secluded area where he raped her. The Court denied the petition. It held that the military has court-martial jurisdiction over a serviceman who commits an offense "within or at the geographical boundary of a military post and violative of the security of a person or property there. . . ." In so holding the Court emphasized several points, including the following: the military interest in the security of persons and property on a military enclave; the responsibility and authority of the military commander for maintenance of order in his command; the adverse

impact of a crime committed against a person or property on a military base upon morale and discipline of personnel, the integrity of the base itself, and the military mission; the possibility that civilian courts would not have the concern or capacity to properly handle all the cases that vindicate the military's disciplinary problems within its own community; and the difficulty of distinguishing between a post's strictly military areas and its nonmilitary areas, or between a serviceman's on-duty and off-duty activities and hours on the post.

The petitioner's case had become final 5 1/2 years before the decision in O'Callahan v. Parker, 395 U.S. 258 (1969). The Court declined to decide the question of retroactivity of O'Callahan since it was not necessary to the decision in this case.

TRIAL BY JUDGE ALONE--DANGER?

In a previous article, we reported that between 1 August 1969 and 31 March 1970, bench trials accounted for 997 or 56% of 1776 Army general court-martial cases. Judge or Jury?, THE ADVOCATE, Vol. 2, No. 4, May 1970, at page 1. Similar information is now available for the period October-December 1970 and is herewith tabulated:

Month	All Cases		Military Judge Alone(%)	
	GCM	SPCM(BCD)	GCM	SPCM
December 1970	202	87	88%	100%
November 1970	187	91	86%	99%
October 1970	262	133	87%	95%

These figures indicate a dramatic increase in the percentage of cases where a military jury is waived. This article will explore some of the implications of this astounding development in military criminal practice. It will report some of the issues being litigated on the appellate level. Information on acquittal rates and sentence differentials between bench trials and jury trials, supplied by Records Control and Analysis Division, United States Army Judiciary, are herein reported for the first time anywhere. Finally, additional considerations are suggested for trial defense counsel faced with the decision whether to waive the military jury.

Probably no other change in military criminal law has so altered the nature of military trials as the waiver of the military jury. For the "military judge alone" court-martial is a completely novel concept in military law. It is far more than a glorified summary court because its presiding officer is a military judge, yet it is still far less than a civilian bench trial for the military judge does not have self-executing conviction and sentencing powers. Some appellate litigation is beginning to appear which attempts to define the nature of a military bench trial and the powers of a military judge. See Appellate Review of Evidentiary Contests in Nonjury Trials, THE ADVOCATE, Vol. 3, No. 1, January 1971, page 2. The development of a complete analysis of the "military judge alone" trial must await case-by-case litigation, in the fashion of United States v. Pierce, CMR (ACMR 23 December 1970), which states a military judge cannot suspend a sentence under 18 USC § 3651. See also United States v. Carroll, USCMA, CMR (29 January 1971) (Military judge reading Article 32 investigation and staff judge advocate advice prior to sentencing); United States v. Greene, 20 USCMA 232, 43 CMR 72 (1970) (Election of judge alone because panel composed only of high ranking officers); United States v. Villa, 19 USCMA 564, 42 CMR 166 (1970) (Military judge may read pretrial agreement). Legal guidelines are yet to be developed on such issues as a military judge alone trying closely related cases, or trying the same accused several times, or a convening authority changing the military judge after a 39a session but before trial, or the referral of contested jury cases to different courts-martial than waiver cases. Certainly, these problems do not exhaust the issues to be found in military bench trials and trial defense counsel should be alert to uncover other aspects of a bench trial which are detrimental to their client's interest. They should develop and litigate such issues in the trial forum in the first instance. Unless raised at trial, there is little chance it can be appealed properly so that the issue can be presented squarely to the appellate court.

While the body of law on military bench trials is developing, defense counsel are still required to make a case-by-case determination whether to advise a client to waive a military jury. Some guidelines have already been suggested in this area. See Judge or Jury?, THE ADVOCATE,

supra. Other indicators are found in Kalven and Frisel, The American Jury (1966), where several interesting aspects of jury waivers are reported. Their data suggest that "a chief determinant in the decision whether or not to waive the jury in a criminal case is simply regional custom, and that the custom varies enormously from one part of the country to another." Id. at 24. They also find that "the crimes that rank low in guilty pleas rank low in jury waivers, and conversely." Id. at 26. This finding suggests the inappropriateness of contesting a case before a judge alone. Yet the court-martial records for October-December 1970 indicate that 55% of the bench trials were contested. Moreover, when comparing jury waivers with the proportion of verdicts in which the defendant is treated more leniently by the jury than by the judge, they find "the defendant is more likely to waive the jury in those crime categories in which the net leniency expected from the jury is small." Id. at 30. Although we do not have data by crime categories, our sentencing data indicate that the median sentence in guilty plea bench trials (9-11 months) is lower than guilty plea jury trials (12-17 months) for all cases. The not guilty plea cases tell a far different story, for the median sentence by a military judge in contested cases is 9-11 months, while the median sentence in a contested jury case is under 3 months, with no confinement at all adjudged in 30 of the 62 cases tried on a not guilty plea before a military jury. These median sentence length statistics, of course, do not account for the type of offense, or other variable factors in a case. There is no reason to believe, however, that only less serious crimes are brought before a military jury.

The waiver of a military jury is a highly individual decision which largely depends on the facts of a case, the temperament of the area military judge, and the track records of the unit's court-martial panels, if available. One recent guilty plea bench trial appeared to appellate counsel initially to be grossly improper because of evidence that the alleged rape victim had voluntarily entered a car with strangers, had refused their invitation to leave if she were not willing to have sexual relations with them, had asked them for money, and had submitted to an examination which indicated she had venereal disease despite her protestations of virginity. Upon further examination, it became apparent that a guilty plea and jury waiver was not inappropriate, because an accomplice had previously been tried by a full court-martial on a not guilty plea, and had "the book thrown at him".

Very few cases ever allow such a dress rehearsal before deciding upon a plea, and no one could fault the decision of the lawyer who contested the first case before a jury. Of course, in these cases it might well be that the jury convicted an innocent man, which consequently would undermine the validity of the jury waiver in the companion case.

A study of numerous judge alone cases tends to point out that a judge's standard of evidence sufficiency may be far different from a jury's. Although both fact-finders would consider their standard to be "beyond a reasonable doubt", it appears that a military judge is more often less in doubt than a military jury of a defendant's guilt. This belief is borne out, in part at least, by the general court-martial statistics for the last quarter of 1970, where military juries acquitted 34% of their contested cases while military judges acquitted only 8%. In this respect, one trial defense lawyer reports several jury acquittals where the military judge, while the court was closed for findings, opined that he would have convicted one defendant, as charged, and another of a lesser offense. One possible explanation for these results may be found in the way judges and juries view a case. While a jury probably takes an overview of all the evidence, both prosecution and defense, a judge is more likely to view the evidence in two stages, the government's case and the defense's case. And once a judge has ruled, expressly or impliedly, that the government has established a prima facie case, the defense must overcome that psychological barrier, which is ordinarily not present in a jury trial.

Several additional reasons appear for questioning the decision to allow the military judge to become the fact-finder in a case. His unlimited access to inadmissible evidence, United States v. Martinez, ___ CMR ___ (ACMR 26 October 1970), and his participation in hearings to suppress evidence, cause him to become familiar with evidence which would never get before a jury. In bench trials, where the military judge has no occasion to articulate instructions for a jury, and where special findings, Manual for Courts-Martial, United States, 1969 (Revised edition), Paragraph 74i, are a very rare phenomena, and where the judge will occasionally not even recess prior to findings, it may well be that some military judges do not assess the evidence in a case in the

same strict manner which is required of a military jury. The military judge's decisions on evidence sufficiency are almost immune from appellate attack, as a practical matter, but some progress could be made in this area if trial defense counsel would request special findings. See Special Findings, THE ADVOCATE, Vol. 1, No. 8, October 1969. In the final analysis, it may well be a delusion that legally trained judges will make better fact-finders than laymen, for legal training itself is often a bar to jury service, Harrison v. Indiana, 106 N.E. 2d 912 (1952); 32 A.L.R. 2d 875 (1952). Moreover, it is almost a universal practice of trial lawyers elsewhere to challenge lawyers, law students, and even legal secretaries from their juries.

In the broader historical perspective, jury waiver should not be lightly undertaken. In Duncan v. Louisiana, 391 U.S. 145, 155 (1968) the United States Supreme Court spoke to the right of trial by jury:

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of

the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment. . . ."

While the typical court-martial panel is not a jury of peers, nevertheless it is composed of laymen. And even though they will likely be professional soldiers, they probably are not as immune as judges to pleas for compassion and "jury nullification" (or sympathetic verdicts) at least remains a possibility. Of course, if the net result were merely to replace a judge who is "too responsive to higher authority" with a panel of officers responsive to the same pressures, at least the accused would have numbers on his side, and the jurors would have the relative anonymity of a jury verdict on theirs. In any event, the way to attack the deficiencies of a military jury is not by waiving it, but by using voir dire to identify bias, or other appropriate motion to broaden those eligible for military jury duty.

Although a bench trial should not be rejected out of hand by trial defense counsel, and we do not so advise, these thoughts are offered to assist the trial defense counsel in making that decision on an issue which has so few guiding principles.

THE MISCELLANEOUS DOCKET

In Swisher v. United States Board of Parole, COMA Misc. Docket No. 71-18 (22 March 1971), the Court dismissed for lack of jurisdiction an application for declaratory judgment and certain other relief wherein the applicant represented that he had a parole release date in September of 1971 from the United States Penitentiary, Leavenworth, Kansas. The applicant did not like the conditions of parole and had asked the United States Board of Parole to release him without any conditions.

Post-trial consideration of juvenile offenses. In Green v. Wylie, COMA Misc. Docket No. 71-9 (16 February 1971), the Court of Military Appeals observed that a convening authority did not abuse his discretion if in fact he had considered several juvenile involvements in denying petitioner's application for deferment of sentence to confinement, and that the juvenile involvements adequately sustained the respondent's action denying petitioner's application. The statutes of the State of Ohio, where petitioner's earlier difficulties arose, provide that such a record may not be used in any judicial proceeding against him. The Court of Military Appeals observed, however, that the prohibition against the use of a juvenile conviction in the course of a trial does not apply to the considerations of a convening authority or subsequent reviewing officials charged with the responsibility of assessing the appropriateness of any penalty imposed by a court-martial, citing United States v. Barrow, 9 USCMA 343, 26 CMR 123 (1958).

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

RECORD OF TRIAL -- VERBATIM - RECORDING MACHINE MALFUNCTION -- Accused was convicted of willfully disobeying the order of his superior, a Captain K . During the direct examination of Captain K, the recording machine malfunctioned and did not record. As a result, approximately 15 minutes of his testimony had to be reconstructed. This was done in question and answer form, and a certificate signed by the military judge, trial counsel, defense counsel, and the accused stated that the reconstructed testimony was essentially the same as that given by Captain K during the time the recording machine was malfunctioning. On appeal, since a bad conduct discharge was adjudged, the question arose as to whether the record of trial was verbatim within the requirements of Articles 19 and 54, Uniform Code of Military Justice, and Paragraph 83a of the Manual for Courts-Martial, United States, 1969 (Revised edition). The reconstructed testimony contained evidence of Captain K's verbal order and the accused's refusal to obey it. However, evidence of the order and accused's disobedience appeared elsewhere in the record of trial. Moreover, Captain K later reiterated essentially the same testimony he gave when the recording machine was inoperative. The Air Force Court of Military Review, citing United States v. Weber, 20 USCMA 83, 42 CMR 274 (1970), held that, under the circumstances of this case, the transcription of the proceedings was sufficiently complete to fulfill the requirements set forth in the Manual for Courts-Martial, United States, 1969 (Revised edition) and the Uniform Code of Military Justice. United States v. Caudill, ACMS 23002, 43 CMR ____ (AFCMR February 1971).

DEPOSITIONS -- WAIVER OF ESTABLISHING UNAVAILABILITY OF DEPONENT; SUFFICIENCY -- RESISTING APPREHENSION -- The Army Court of Military Review held that where the deponent had rotated from the Republic of Vietnam to the United States prior to trial a failure of objection to the taking of the deposition and to introduction at trial waives the need for the government to actually prove unavailability at the trial in the Republic of Vietnam. Citing United States v. Howell, 11 USCMA 712, 29 CMR 528 (1960); United States v. Ciarletta, 7 USCMA 606, 23 CMR 70 (1957); Paragraph 145a, Manual for Courts-Martial, United States, 1969 (Revised edition). The Court further found that the deposition was merely cumulative evidence of guilt as to a conviction which was set aside on other grounds.

In dismissing a charge alleging resisting apprehension the Court noted that the prosecution must prove that an apprehension was attempted and that the accused was notified that he was being taken into custody. Citing United States v. Young, 3 CMR 635 (AFBR 1952); Paragraphs 19c and 174a, Manual for Courts-Martial, United States, 1969 (Revised edition); United States Department of the Army Pamphlet Number 27-9, Military Judge's Guide, paragraph 4-36 (1969). The absence of evidence showing that the accused was put on notice that he was being taken into custody resulted in the evidence being legally insufficient to support the finding of guilty of resisting apprehension. United States v. Brown, SPCM 5962 (ACMR 2 February 1971)

SENTENCE AND PUNISHMENT MULTIPLICIOUS CHARGES FOR SENTENCING PURPOSES -- The offenses of wrongful appropriation of a government vehicle and larceny of government property were deemed by the Army Court of Military Review to be multiplicitious for sentencing purposes where the vehicle was used to transport the stolen property. Citing United States v. Weaver, 20 USCMA 58, 42 CMR 250 (1970); United States v. Pearson, 19 USCMA 379, 41 CMR 379 (1970); United States v. Murphy, 18 USCMA 571, 40 CMR 283 (1970); United States v. Payne, 12 USCMA 455, 31 CMR 41 (1961). United States v. Burney and Aiken, No. 423421 (ACMR 12 February 1971). [Note: On 15 March 1971, The Judge Advocate General of the Army certified to the Court of Military Appeals, the issue of whether the Court of Military Review was correct in holding that the wrongful appropriation and larceny were multiplicitious for sentencing purposes.]

STIPULATION AND FAILURE TO STATE AN OFFENSE -- BAD CHECK OFFENSE -- The accused pleaded not guilty to larceny but guilty to wrongful appropriation of a checkbook. Thereafter a stipulation of fact was offered and accepted in which it was stated that the accused at the time he took the checkbook intended to deprive its owner "at least temporarily" but that later after taking a check from the book for the purpose of presenting it for payment he decided not to return the book to the owner. The accused was convicted of larceny. The Army Court of Military Review agreed that the stipulation amounted to a confession and should not have been received in evidence. Paragraph 154b, Manual for Courts-Martial, United States, 1969 (Revised edition). The lesser included offense of wrongful appropriation was affirmed. The accused was also charged with wrongfully making a savings withdrawal

slip for payment of money, with intent to defraud, in violation of Article 123(a), Uniform Code of Military Justice. The instrument was pleaded in hac verba and showed it was a "Savings Withdrawal Slip" and that \$300.00 was "Received" from the bank. The court was of the opinion that the specification failed to allege the "making" offense denounced by Article 123(a) because the savings withdrawal slip did not qualify as a "check", "draft", or "order", and when made operated only as a receipt and not as an order to pay. United States v. Greene, ___ CMR ___ (ACMR 11 February 1971).

CONFESSIONS AND ADMISSIONS -- ADMISSION OF CODEFENDANT'S STATEMENT -- A majority of the Court of Appeals for the 7th Circuit concluded that the rationale of Bruton v. United States, 391 U.S. 123 (1968) requires that the government produce a codefendant who dropped out of a trial by virtue of pleading guilty rather than rely upon introduction of his pretrial statement which implicated the who pleaded not guilty.

Appellant A's trial for possession and sale of heroin began as a joint trial with codefendant B. The government introduced testimony that B, after arrest, had confessed, implicating A. The judge instructed the jury that it must disregard the statement so far as A was concerned. After conclusion of the government's case B pleaded guilty. The government did not reopen the case to have B testify, A did not call B nor present any other evidence, and the jury convicted A. The Court of Appeals opined that when an extrajudicial declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to an accused's right of confrontation, it must be the government's burden to produce the declarant. Mere availability in the sense that the accused could have subpoenaed him does not suffice. Although B had dropped out of the case so that the jury's attention was focused on A and the jury had been instructed to disregard B's statement as it concerned A, a majority of the court, nevertheless, concluded that a fair risk remained that the jury would not disregard B's statement in determining A's guilt or innocence and that A was denied his right of confrontation. Simmons v. United States, ___ F2d ___ (7th Cir. 1971), 8 Crim. L. Rep. 2375.

PROBABLE CAUSE -- ARREST AND SEIZURE -- Police officers observed the defendant and a companion walking on the street carrying a

television set. The defendant was holding a screwdriver. The officers became suspicious and approached the defendant who dropped the screwdriver and denied ownership. Asked how they obtained the television set, the defendant replied that he had purchased it from his companion's cousin who had driven them to a point one block south and dropped them there. The officers inquired of and received the cousin's name, and the defendant and his companion agreed to go to the station for further investigation of their story. The officers had no knowledge of any housebreaking, and had not been advised to be on the lookout for any suspects. Upon their arrival at the station, the officers' inquiries still revealed no housebreaking or other crime with which the suspects could be connected. The suspects were placed in an unlocked room in the stationhouse where they remained "voluntarily" for one and one-half hours. Though they were not told that they were under arrest, neither were they told that they were free to take the television and leave. After an hour, the companion's cousin was located and denied having seen the companion. However, appellant and his companion were not released or told they were free to go. Later in the day a housebreaking was reported at an address only 25 feet from where the suspects were first sighted. The television was taken to the scene and identified by complainant as his. The suspects were then formally arrested and advised of their rights. A majority of the Court of Appeals for the D.C. Circuit concluded that at some point after the cousin discredited appellants' story and before the report of the housebreaking the appellants were in fact under arrest. The majority went on to hold that the de facto arrest was not based on probable cause stating that denying ownership of the screwdriver was at most suspicious and that the discredited story may have added to that suspicion, but did not raise it to the level of probable cause to believe a crime has been committed. The dissenting judge believed that the arrest was justified by the defendants' disclaimer of any connection with the screwdriver, which he dropped when the police stopped him, and the "implausible" story of how the defendant and his companion came to possess the television set. Campbell v. United States, (D.C.C.A. 3 February 1971) 8 Crim. L. Rep. 2393.

PROVIDENCY -- AWOL -- The Army Court of Military Review held improvident a plea of guilty to absence without leave where, although the accused admitted to all the elements, in an unsworn

statement through counsel after findings he stated that, "I was on Christmas leave and late coming in. I had gone to Connecticut to stay with my sister and I got snowed in." The Court was of the opinion that the defense of physical inability to return was raised (citing United States v. Amie, 7 USCMA 514, 22 CMR 304 (1957)) obligating the trial judge to inquire into the matter and set aside the plea unless appellant disavowed the statement. United States v. Gorham, No. 424921 (ACMR 10 March 1971).

DISRESPECT TOWARD OFFICER -- FAILURE OF SPECIFICATION TO ALLEGE AN OFFENSE -- The Army Court of Military Review considered that the following alleged misconduct did not state an offense.

"[D]id at Camp Eagle, Vietnam, on or about 3 November 1969, behave himself with disrespect toward Captain X., his superior commissioned officer, by referring to him as 'man', or words to that effect."

The Court held that the expression "man", or words to that effect, standing alone and not alleged as being addressed to or spoken to the officer concerned, or spoken in a disrespectful manner, but merely "by referring to him" is not, per se, disrespectful language. Thus the specification was deemed legally insufficient to allege an offense. United States v. Smith, SPCM 5893 (ACMR 9 March 1971).

JURISDICTION -- FAILURE TO RE-REFER AMENDED AWOL CHARGE -- On 8 January 1970, accused was charged with an unauthorized absence extending from 23 April 1969 to 7 January 1970. This charge was properly referred to trial. Thereafter the trial counsel ascertained that the evidence available to him did not conform with the charge. The charge was amended to two separate specifications within the time span encompassed by the original charge alleging unauthorized absences from 23 April 1969 to 12 July 1969 and from 1 August 1969 to 22 December 1969. The record of trial was bare of any indication that a new pretrial advice was prepared as to these charges or that the convening authority again referred them to a court-martial. At trial the accused was arraigned and tried on the new charges and was convicted. The Army Court of Military Review held that with regard to the first specification (AWOL 23 April 1969 - 12 July 1969) the amendment was permissible because it included no person, offense, or matter not fairly included in the original

charge as preferred. Subparagraphs 33d and 35a, Manual for Courts-Martial, United States, 1969 (Revised edition); United States v. Krutsinger, 15 USCMA 235, 35 CMR 207 (1965).

However, the addition of Specification 2 increased the maximum permissible punishment from one to two years and was thus a material amendment which required a new pretrial advice and re-referral. Article 34(a), Uniform Code of Military Justice. Thus the findings of guilty of Specification 2 could not stand. United States v. Hayward, No. 423125 (ACMR 9 March 1971).



GEORGE J. MC CARTIN, JR.
Colonel, JAGC
Chief
Defense Appellate Division