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THE ADVOCATE

U.S. Army Defense
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THE ADVOCATE

Volume 11, Number 6

November-December 1979

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Included in this issue is the annual index. It should prove useful to our readers using The Advocate as a reference.

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NEW SECTIONS

This issue of The Advocate marks the appearance of a new "USCMA WATCH" column. Its purpose is to assist trial defense counsel in spotting issues of current interest pending review by the United States Court of Military Appeals and discerning any new trends or philosophies in the Court. Additionally, cases decided by summary disposition that are of special interest to the defense bar will be discussed. Our TDS representative, Major Malcolm H. Squires, Jr., will author the feature.

Another new feature, entitled "Inquiries from the Field," is currently being formulated. The objective of this feature is to deal with criminal defense matters of current interest to field defense counsel. To that end the Editorial Board solicits questions, comments, and suggestions from trial defense counsel relevant to trial practice, the appellate process, and inquiries for "updates" on current appellate issues. Selected comments and suggestions will be treated, and appropriate questions will be presented and "answered" by the Editorial Board. We envision that this feature will create an atmosphere of greater communication between trial and appellate counsel in our unique bifurcated justice system.

Questions, comments, and suggestions should be in letter form and sent to:

United States Army Legal Services Agency
Defense Appellate Division
Attn: Managing Editor, The Advocate
Nassif Building
Falls Church, VA 22041

* * * * *

STAFF CHANGES

The Editorial Board wishes to express its appreciation to an outstanding appellate attorney, Captain John M. Zoscak, Jr., who has completed his service as Editor-in-Chief of The Advocate. We have all profited from his leadership, professional expertise, and hard work. It was through his efforts, in large part, that The Advocate moved forward in its mission of actuating a progressive and informed approach to military criminal defense practice. Frequent compliments on The Advocate, received from all quarters of the military bar, attest to his fine work. We wish John well as he leaves to work with the Internal Revenue Service. His guidance as well as his friendship will be missed.

We also take this opportunity to say farewell to Captain Peter A. Nolan, Articles Editor of The Advocate. Pète will also be joining the civilian world as a member of the Texas Attorney General's Office in Austin. Our sincere thanks for his outstanding work as Articles Editor and author.

New staff members welcomed are Captain M. Kris King as Editor-in-Chief, Captain Edwin S. Castle as Articles Editor, and Captain Robert L. Gallaway and Captain Charles E. Trant as Associate Editors.

FAVORABLE EVIDENCE UNDER BRADY V. MARYLAND,
AN ACCUSED'S RIGHT

Captain M. Kris King, JAGC*

Introduction

An accused's access to evidence and information relating to criminal charges in the military is unquestionably broad. Discovery rights are available under the provisions of the Manual for Courts-Martial,¹ the Jencks Act,² and the Federal Rules of Criminal Procedure. In addition, cognizant of the Government's superior position and resources with which to investigate and discover evidence, and its unequal access to evidence once discovered, the courts have fashioned for the accused a constitutional due process right to favorable evidence possessed by the prosecution. This is the widely accepted principle postulated in the Supreme Court's Brady v. Maryland³ decision. The purpose of this article is to focus on the impact of that case, and briefly discuss other discovery tools available to the accused.

Discovery Devices

A review of discovery tools should begin with the Manual, where an exposition of fundamental discovery rights is found.

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1. Manual for Courts-Martial, United States, 1969 (Revised edition), paras. 33, 34, 44, 115 [hereinafter cited as MCM, 1969]. See also United States v. Franchia, 13 USCMA 315, 32 CMR 315 (1962).

2. 18 U.S.C. §3500 (1957). See O'Brien, The "Jencks Act" - A Recognized Tool For The Military Defense Counsel, 11 The Advocate 20 (1979).

3. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

To begin with, there is an affirmative duty upon the trial counsel to disclose evidence. He is directed to "serve a copy of the charge sheet on the accused . . . [and to] permit the defense to examine from time to time any paper accompanying the charges, including the report of investigation"4 Additionally, trial counsel is forbidden to engage in suppressive conduct of the nature addressed in Brady: "[A]ny act, such as the conscious suppression of evidence favorable to the defense . . . is prohibited."5

Furthermore, in cases considered for referral to general court-martial, a pretrial investigation must be conducted pursuant to Article 32 of the Code.6 This investigation will reveal much of the Government's case against the accused, as prosecution witnesses will be called under oath, be subjected to cross-examination, and documentary evidence may be presented. Beyond that, the defense itself may, and routinely should, request the examination of other evidence, witnesses, or documents.7 The report of the investigation containing the substance of the testimony from both sides, documents, and other matters considered will then be furnished to the defense.8

Finally, a very liberal right of discovery is set forth under paragraph 115c of the Manual:

c. Use and examination of documentary and other evidence in control of military

4. MCM, 1969, para. 44h.

5. Id. para. 44g(1). Brady is significant to the military attorney in that its application appears to be broader than that of the Manual rule, since it is not limited to conscious or deliberate suppression.

6. Uniform Code of Military Justice, Art. 32, 10 U.S.C. §832 [hereinafter cited as UCMJ]. See Dept. of Army Pam. 27-17, Military Justice Handbook - Procedural Guide For Article 32(b) Investigating Officer (June 1970).

7. See MCM, 1969, para. 34.

8. Id. paras. 33i, 34e.

authorities. If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge, or the president of a special court-martial without a military judge will, upon reasonable request and without the necessity of further process, take necessary action to effect their production for use in evidence and, within any applicable limitations (see 151b(1) and (3)), to make them available to the defense to examine or to use, as appropriate under the circumstances. (Emphasis added).

Besides the Manual and the Code, another important source of authority allowing defense discovery is the Jencks Act. This Act, in sum, provides that pretrial statements of witnesses who testify at trial become available to the defense, upon request, if the statements are in the possession of the prosecution and relate to the subject matter of the witnesses' trial testimony.

Finally, the Federal Rules of Criminal Procedure should be examined where they do not conflict with the Manual or the Code. Especially significant are Rules 16 and 17 which allow discovery of, inter alia, (1) statements and evidence of or relating to the defendant which are possessed by the Government, and (2) documents and objects in control of the Government which relate to the case.

Also, while not a discovery device, keep in mind that, ethically, the prosecutor "should make timely disclosure to the defense of available evidence, known to him, which tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."⁹

Although there is overlap in the respective material covered, each discovery procedure or right has its own unique significance. Through the diligent efforts of the trial defense counsel, they become potent means with which to ferret out weakness in the prosecution's case, as well as to acquire evidence which may enhance the defense of an accused.

9. ABA Cannons of Professional Ethics No. 7, EC 7-13.

Brady v. Maryland

Turning now to the right to favorable evidence as proclaimed in Brady, note at the outset that Brady does not require the prosecution to provide all its information in a given case to an accused.¹⁰ What it does require is that "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment . . ." ¹¹ must be disclosed. As a general proposition, Brady does not prohibit non-disclosure of inculpatory,¹² or neutral,¹³ evidence. However, evidence which may be critical and is either undeveloped or subject to varying opinion may be subject to development by or for the defense.¹⁴

10. See Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); cf. United States v. Kaplan, 554 F.2d 577 (3d Cir. 1977) (stating Brady did not require disclosure of nonexculpatory records in advance of trial, although obtainable by virtue of Rule 16).

11. 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. Brady and his cohort Boblit were convicted of murder in perpetration of a robbery and sentenced to death. Brady's defense counsel requested that the prosecution allow him to examine Boblit's statements. Several of Boblit's statements were shown to the defense, but apparently through oversight, a statement in which Boblit admitted the homicide was withheld by the prosecution. This suppression, although not an act of malfeasance, was violative of due process.

12. See Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); United States v. Keogh, 271 F.Supp. 1002 (S.D.N.Y. 1967), order aff'd in part, 391 F.2d 138 (2d Cir. 1968) (non-disclosure of inculpatory testimony by a key prosecution witness before a grand jury did not violate due process), aff'd, 417 F.2d 885 (2d Cir. 1969), aff'd, 440 F.2d 737 (2d Cir. 1971).

13. Bergenthal v. Cady, 466 F.2d 635 (7th Cir. 1972), cert. denied, 409 U.S. 1109, 93 S.Ct. 913, 34 L.Ed.2d 690 (1973).

14. For a discussion of possible use of such evidence, see Gilliam, Defense Testing of Physical Evidence at Government Expense, 11 The Advocate 184 (1979); and Trant, Defense-Requested Lineups, 11 The Advocate 161 (1979).

Pre-Brady Law

Although Brady is the benchmark case in the area, a review of its predecessors is helpful in determining the breadth of the rule. In Mooney v. Holohan,¹⁵ the Supreme Court, in dictum, stated that deliberate suppression of evidence favorable to the accused is a violation of due process and requires reversal. The prosecution in that case had knowingly withheld information that one of its witnesses had given perjured testimony. Many years later, the Court in Almeida v. Baldi¹⁶ held it was a violation of due process to suppress, deliberately, evidence that the defendant - convicted of killing a policeman - had not fired the fatal shot. These and other cases in the area focused on intentional non-disclosure of information material to the defendant. Thus, what is noteworthy about Brady is its extended scope to include, as violative of due process, suppression of favorable evidence "irrespective of the good faith or bad faith of the prosecution."¹⁷ No longer was it necessary to show that the prosecution had consciously acted in a culpable manner.

Materiality

As earlier stated, the substance with which Brady is concerned is evidence "favorable to the defense." Before meaningful relief can be expected upon proof of its non-disclosure, however, that evidence must be material.¹⁸ Its probative value

15. 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

16. 195 F.2d 815 (3d Cir. 1952), cert. denied, 345 U.S. 904, 73 S.Ct. 639, 97 L.Ed. 1341 (1953).

17. 373 U.S. at 87, 83 S.Ct. at 1197, 10 L.Ed.2d at 218.

18. See Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) (non-disclosure of a diagram of the position of a witness' chair, which indicated the witness would not have been looking toward the door through which the appellant allegedly entered, was not found to be material so as to vitiate the conviction); United States v. Horsey, 6 M.J. 112 (CMA 1979). The defense requested the results of a photographic display and a walk through identification by the victims of a robbery. Although the prosecution was unable to produce these results, the Court found that in light of

is not restricted to the issue of guilt or innocence alone. The evidence is also within the ambit of Brady if it is relevant to an appropriate sentence.¹⁹

How probative or critical the evidence must be is a matter of some judicial debate. Plainly, non-disclosure of "vital" evidence will deprive the accused of due process.²⁰ Indeed, some courts have held that that is the test, suggesting that anything less would not infringe due process rights.²¹

The Army Court of Military Review, in United States v. Higdon, asserted that "[t]he materiality of information requested under Brady . . . encompass[es] more than mere relevancy or importance to the defense. . . . [T]he evidence must be critical and highly significant."²² Earlier in the same opinion, while discussing the inadvertent withholding of

18. Continued.

independent positive identifications, the inconsistencies sought to be shown by the defense were trivial and immaterial for Brady purposes. The issue of materiality was also involved in United States v. Webster, 1 M.J. 216 (CMA 1975). After the disclosure of an immunity grant, the prosecution refused to inform the defense of the reasons for the grant. The Court found that the reasons for granting immunity were irrelevant, and thus their disclosure was not required (the reasons were in the pretrial advice). See, e.g., United States v. Alford, 8 M.J. 516 (ACMR 1979).

19. Brady v. Maryland, supra; Almeida v. Baldi, supra.

20. Id.

21. See United States v. Higdon, 2 M.J. 445 (ACMR 1975); United States ex rel. Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955), cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955). The accused contended he was intoxicated and unable to formulate the requisite intent for first degree murder. The prosecution called one policeman who testified that the accused was not intoxicated, not disclosing that another policeman indicated that the accused was intoxicated. The court found that this suppressed testimony was vital.

22. United States v. Higdon, supra at 451-52.

evidence by the military judge - a factor of some import - the Court found that "the availability of any of the items to the defense would [not] likely have resulted in a different verdict by the jury,"²³ adopting the notion that the evidence must be of such merit that its revelation would alter the course of the trial. Consider also the view indicated in the cases of United States v. Horsey, supra, and United States v. Agurs.²⁴ "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."²⁵ Other cases stop short of such tests and find error if the withheld evidence might reasonably have influenced the fact finder, or might have raised a reasonable doubt.²⁶

Under the present status of the law, a determinative factor may be the existence or nonexistence of a specific request for the particular evidence, since a higher standard of materiality is required absent such a request.²⁷ The law

23. Id. at 451. But see United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (the defendant should not have to prove the evidence would have resulted in an acquittal).

24. 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (non-disclosure of victim's criminal record, not requested by the defense, which may have been consistent with the accused's self-defense theory did not violate due process).

25. Id. at 112-13, 96 S.Ct. at 2402, 49 L.Ed.2d at 355.

26. Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966) (prosecution was required to reveal that two bank officials could not recall what should have been a memorable bank transaction which might have led to a reasonable doubt); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) (the withholding of fingerprint and ballistic tests indicating that the accused might not have been the assailant was a violation of due process since its disclosure might have generated a reasonable doubt).

27. United States v. Agurs, supra. However, the reasonable doubt standard is inapplicable where there has been a specific request for the information or where prosecutorial misconduct is fundamentally unfair.

and logic of the above cases is suggested reading for defense counsel. Nonetheless, it is generally undisputed that non-disclosure of marginally probative or merely cumulative evidence is not likely to result in error.

Evidence Relating to Credibility

Evidence which relates to the credibility of a prosecution witness is considered to be material.²⁸ A predicate to a finding of reversible error, though, may be a determination that the impeaching evidence would have been persuasive on a contested point or as to the credibility of a witness. Even then, non-disclosure of information which would have little likelihood of affecting the outcome of the trial or would not impeach the testimony of an important witness may not be an error of constitutional dimensions,²⁹ and in the absence of a specific request for the impeaching evidence, its non-disclosure generally will not be reversible error unless it would have resulted in the creation of reasonable doubt.³⁰

Consider the reasoning of the Court in United States v. Higdon, supra, that although defense requested evidence may have completely impeached the testimony of a witness, its disclosure still would not have affected the verdict, thus there was no prejudicial error. Such a decision was fortunate for the prosecution. There should be no doubt that in many instances, withholding evidence of such consequence, albeit inadvertent, could prejudice the accused's case and be reversible error.

28. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); United States v. Webster, supra; United States v. Mouganel, 6 M.J. 589 (AFCMR 1978); United States v. Brakefield, 43 CMR 828 (ACMR 1971), pet. denied, 21 USCMA 604, 43 CMR 413 (1971); United States v. Harris, 462 F.2d 1033 (10th Cir. 1972).

29. Johnson v. Benett, 386 F.2d 677 (8th Cir. 1967), vacated on other grounds, 393 U.S. 253, 89 S.Ct. 436, 21 L.Ed.2d 415 (1968); Link v. United States, 352 F.2d 207 (8th Cir. 1965), cert. denied, 383 U.S. 915, 86 S.Ct. 906, 15 L.Ed.2d 669 (1966).

30. United States v. Agurs, supra.

Admissibility of the Evidence

Not surprisingly, the prosecution is often quick to argue that the evidence complained of would not be admissible under the rules of evidence, and therefore that its suppression would not result in error. Griffin v. United States³¹ appeared to establish such a principle, and judicial decisions are occasionally couched in terms of the admissibility of the sought-after material.³² Still, it appears that the question of admissibility is but one factor among many to be considered in determining whether the evidence falls within the purview of Brady. If evidence is inadmissible, however, a showing of materiality may be more difficult.

Noteworthy is the decision of the Air Force Court of Military Review in United States v. Mouganel, supra. The Court found that the results of polygraph tests administered to a government informant should have been provided to the defense, in spite of the inadmissibility of polygraph results in trials by court-martial. Since neither the trial nor the appellate court was provided with the questions, answers, or results of the polygraph, their probable impact on the trial was left unresolved. The Court, reasoning that the results might have been effectively utilized in cross-examination or discovery of other impeaching information, dismissed the affected specification.

Diligence

While it is the duty of the prosecution to provide favorable evidence in its possession to the defendant, it is nonetheless incumbent upon the defense to use due diligence to seek out favorable information through specific requests and inquiries. Reflection upon the panorama of cases in the area reveals that, absent voluntary prosecutorial compliance, undisclosed evidence may never come to light, and lacking omniscience, the defense cannot know what is not revealed. Yet, a defense request may prompt the prosecution to come

31. 183 F.2d 990 (D.C. Cir. 1950).

32. See, e.g., Link v. United States, supra (the potential inadmissibility of evidence of an unsuccessful search for tool bags was suggested as an alternate rationale for finding that its suppression did not require reversal).

forward with favorable evidence, or alert the prosecution to the significance of evidence previously undisclosed because it was thought to be immaterial or meaningless. It should also be observed that the appellate courts may turn a deaf ear to an accused who, with ready access to the evidence, sits back expecting the prosecution to wait the defense table.³³ While this is no invitation to the prosecution to shirk its obligation - numerous cases are reversed in spite of alleged inaction by the defense - it is a charge to defense counsel to be ever vigilant. Brady itself indicates that the defense should request the favorable evidence, and a failure to act with diligence may factor in an adverse ruling on the suppression issue.³⁴ It behooves the defense to make specific requests, since a lower and therefore defense oriented standard of materiality applies when there is a specific, as opposed to a general, demand for evidence. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."³⁵ Although myriad cases have declined to make a specific request for production a prerequisite to prosecutorial error for non-disclosure, it is a word to the wise and an element the appellate courts weigh heavily.

On the matter of diligence beyond requesting production, consider the declaration of the Court of Military Appeals in United States v. Lucas that:

33. DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975) (the court found no suppression of arguably inconsistent testimony where it was a matter of public record as a part of the preliminary hearing which was as available to the defense as to the prosecution); United States v. Ordoneaux, 512 F.2d 63 (5th Cir. 1975) (the inadvertent non-production of an envelope with a date contradicting government testimony did not violate due process where the same impeachment could have been achieved by utilizing a check already in evidence).

34. See United States v. Agurs, supra; United States v. Harris, 498 F.2d 1164 (3d Cir. 1974), cert. denied, 419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 665 (1974); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965).

35. United States v. Agurs, supra at 106, 96 S.Ct. at 2399, 49 L.Ed.2d at 351.

[T]he Government . . . need not furnish the accused with information he has or which through reasonable diligence, he could obtain himself.

. . . .

Consequently, we believe lack of diligence on the part of the trial defense counsel, rather than suppression by the prosecutor, ultimately prevented the statements . . . from going before the military judge.³⁶

In Lucas the civilian defense counsel had requested witness statements which the prosecution erroneously claimed were nonexistent. Finding that the statements were contained in the record of the pretrial investigation which was available to the defense, the court came to the conclusion that it was the inaction by the defense, rather than the misleading statement of the prosecutor, that prevented the evidence from being aired at trial.

Prosecutorial Conduct

Another issue which frequently arises is the extent to which the conduct of the prosecution, or its lack of good faith, is a factor in finding non-disclosure to be error. Brady held that there could be prejudicial suppression "irrespective of the good faith or bad faith of the prosecution."³⁷ A subsequent case³⁸ delineated three areas for consideration: (1) bad faith suppression, or the suppression of highly probative evidence; (2) deliberate non-disclosure in the face of a defense request, absent any consideration of good or bad faith; and (3) inadvertent non-disclosure of material evidence. The court opined that different standards of materiality would

36. 5 M.J. 167, 171 (CMA 1978).

37. 373 U.S. at 87, 83 S.Ct. at 1197, 10 L.Ed.2d at 218.

38. United States v. Keogh, supra.

be applied in each area. A similar view espoused in United States v. Rosner,³⁹ was followed in United States v. Higdon: "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, 'a new trial is warranted if the evidence is merely material or favorable to the defense.'"⁴⁰ United States v. Agurs,⁴¹ however, focused on the character of the evidence rather than the character of the prosecutor, suggesting error if highly probative evidence is overlooked, but, conversely, no error even if there is the intentional suppression of evidence which is immaterial. Still, the courts are concerned with deliberate violations of fundamental fairness.⁴²

Application of the Rule

The following is a suggested analysis of how the courts may apply the Brady rule under various circumstances. Factors to consider are: diligence by the defense; probative worth of the evidence; prejudice to the accused; and fundamentally unfair conduct on the part of the prosecution.

39. 516 F.2d 269, (2d Cir. 1975), cert. denied, 427 U.S. 911, 96 S.Ct. 3198 (1976).

40. United States v. Higdon, supra at 450-51 (citations omitted).

41. 427 U.S. at 110, 96 S.Ct. at 2400, 49 L.Ed.2d at 353.

42. Compare United States v. Agurs, supra (declaring, on the one hand, that the standard is not the moral culpability of the prosecutor, while on the other hand asserting that conduct which is fundamentally unfair, such as the use of perjured testimony, requires reversal if there is any reasonable likelihood that it affected the judgment of the jury), with Kyle v. United States, 297 F.2d 507 (2d Cir. 1961), cert. denied, 377 U.S. 909, 84 S.Ct. 1170, 12 L.Ed.2d 179 (1964) (The government, at trial, was unable to produce 105 letters supposedly supporting the accused's position in a mail fraud case, which had been turned over to it by the accused. The court suggested, depending on the gravity of the act, a sliding scale analysis); United States v. Keogh, supra; and United States v. Higdon, supra.

Assume that in the face of a defense request for the release of specific favorable evidence possessed by the Government, the prosecution consciously decides to conceal material evidence which, if disclosed, would clearly raise a reasonable doubt in the minds of the jurors and result in an acquittal. Suppression under these circumstances would be reversible error. The same result should lie even if the prosecution was merely negligent in its non-disclosure, and whether or not the defense had requested the evidence, because a new trial is justified when the non-disclosed evidence, along with the evidence adduced at trial, would create a reasonable doubt about guilt.⁴³

The next situation to consider is a bad faith suppression by the prosecution of evidence which is material but does not raise a reasonable doubt. The court may reverse nonetheless, because there has been prosecutorial misconduct,⁴⁴ and certainly should if the conduct is fundamentally unfair, such as the non-disclosure of evidence of perjured testimony, or if there was a specific request for the evidence.

What then of the prosecution's merely negligent failure to disclose evidence in the absence of a specific defense request? The sliding scale analysis should be applied here. If the evidence plainly would not have changed the course of the trial, or, in conjunction with the other evidence admitted during the trial, would not have raised a reasonable doubt, then it should be considered harmless error. If there is a substantial chance that the course of the trial would have been altered, or if a reasonable doubt would have been raised, the court should reverse.⁴⁵ However, in a close case, the

43. United States v. Agurs, supra; cf. United States v. Keogh, supra; Smallwood v. Warden, 205 F.Supp. 325 (D. Md. 1962), cert. denied, 365 U.S. 882, 81 S.Ct. 1032, 6 L.Ed.2d 193 (1961) (although finding no improper motive on the part of the prosecution, the non-disclosure of an alleged rape victim's syphilitic condition, previous claim of rape in distant past, and her questionable habit of frequenting taverns, was prejudicial to the accused).

44. See Kyle v. United States, supra.

45. Compare United States v. Agurs, supra, with United States v. Keogh, supra, and Kyle v. United States, supra.

failure of the defense to request specific disclosure may tip the scales in favor of the prosecution.⁴⁶ Finally, absent fundamentally unfair suppression, the courts will not likely find reversible error upon the mere possibility that the outcome of the trial would have been altered.

Duties of the Defense Counsel

To achieve the maximum benefit from Brady, then, the defense should be prepared at all stages of the adversary proceeding to utilize available discovery procedures and make a record of its actions at trial. This will refute any allegation of a failure to act diligently to discover what was readily available. The defense discovery request should be precisely tailored to the desired information, e.g., criminal records; psychiatric, mental, or physical evaluations impacting on competency or credibility; or other evidence affecting the credibility of witnesses or inconsistent with evidence the prosecution intends to introduce. Also, any indications of suppressed evidence and misconduct or negligence by the government should be made a part of the record. As related in United States v. Mouganel, supra, even if the evidence would not have been admissible at trial, other permissible uses of it are important, and should be disclosed.

Of paramount importance is for trial defense counsel to inform their appellate counterparts of any violations which come to light subsequent to the trial, and the potential impact the evidence would have had on the trial.

Conclusion

Fundamental fairness entitles an accused to evidence in his favor. It is in the interest of justice, and the duty of the defense, as well as the prosecution, to assure that such evidence is revealed. Evidence beneficial to the accused, and thus conducive to a just proceeding, should be equally available to all.

46. See United States v. Agurs, supra; United States v. Keogh, supra.

A PRACTICAL APPROACH TO REQUESTS FOR DEFERMENT

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With the recent decision of United States v. Brownd,¹ the United States Court of Military Appeals has assumed an appellate role in the handling of requests for deferment of service of sentence to confinement. Furthermore, distinct and specific guidelines have been adopted to aid the convening authority in his decision making and to measure the soundness of his decision on appeal. As trial defense counsel now have specific guidelines upon which to ground a request for deferment, and upon which to base an appeal if deferment is denied, this area is ripe for action by defense counsel seeking post-trial sentence relief for their clients.

Basis for the Request

The right to request that service of the sentence to confinement be deferred is established by Article 57(d), Uniform Code of Military Justice, 10 U.S.C. §857(d) [hereinafter cited as UCMJ]. Article 57(d) provides the following:

(d) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The

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1. 6 M.J. 338 (CMA 1979).

deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

Article 57(d), UCMJ, is supplemented by paragraph 88f, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969] and paragraph 2-30, Army Reg. 27-10, Legal Services - Military Justice (Cl7, 15 Aug. 1977) [hereinafter cited as AR 27-10].

The decision to request deferment of a sentence to confinement should be based on a consideration of a number of factors. First of all, paragraph 48k(4), MCM, 1969, requires the defense counsel to advise the accused of his right to make application for deferment of service of confinement in all cases where the sentence includes confinement at hard labor. Therefore, it is mandatory for the defense counsel to notify his client of this possible relief and, by implication, to advise him as to the probable merits of such a request. During this discussion the defense counsel should advise the accused that deferment is not a form of clemency, and that unlike suspension it will only serve temporarily to delay service of confinement, unless the sentence to confinement is later disapproved or suspended.² Hence, the wisdom of delaying the confinement should be discussed.

If the purpose of the deferment is to allow the client to put his affairs in order prior to service of confinement and will be of very limited duration, then the delay of serving confinement should have little negative impact. If, however, the defense counsel believes that the client has an exceptionally strong issue for appeal which could result in the dismissal of charges, a rehearing, or a reduction in sentence, this would be an added reason to delay the service of confinement pending action or the resolution of the issue on appeal. On the other hand, the client might be doing himself a disservice if he is in effect only delaying the inevitable and is avoiding the rehabilitative benefits which might be gained through service of the sentence.

2. Paragraph 88f, MCM, 1969.

The defense counsel should also discuss with his client the factors which the convening authority is required to consider in making a determination. The accused has the "burden of demonstrating improbability of flight or lack of likelihood of crime, intimidation of witnesses, or interference with the administration of justice."³ Those guidelines, which were established for the convening authority in United States v. Brownd, supra, are an adoption of the American Bar Association Standards dealing with post-trial release from confinement pending appeal of a conviction. These standards state:

Release should not be granted unless the court finds that there is no substantial risk the appellant will not appear to answer the judgment following conclusion of the appellate proceedings and that the appellant is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice. In making this determination, the court should take into account the nature of the crime and length of sentence imposed as well as the factors relevant to pre-trial release.

ABA Standards, Criminal Appeals §2.5(b) (1970).

Framing the Request

Once the decision to request deferment is made, the defense counsel must follow the procedure which has been established by legislation and regulation. To begin with, the request for deferment must be in writing, and the application should be made by the accused or through counsel at any time after the adjournment of the court which imposed the sentence.⁴ There is no set format for the request for deferment, but several matters should be discussed therein.

The request should be addressed to "the convening authority or, if the accused is no longer under his jurisdiction,

3. United States v. Brownd, supra at 340.

4. Paragraph 88f, MCM, 1969.

the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned."⁵ The request should detail the case's history: the charges, date of trial, pleas, findings, and sentence. Furthermore, the request should review the client's military service and civilian background, if this would be beneficial. Most importantly, the request must address the four basic issues upon which the accused carries the burden of persuasion.⁶

First, the applicant must demonstrate the improbability of flight during the period of deferment. The following considerations, if applicable and favorable to the accused, should be shown: (1) no pretrial restraint of the accused and no attempt on the part of the accused to flee pending trial, (2) substantial family or community ties to include ownership of a substantial amount of property, (3) a lack of a prior history of absence without leave or other criminal offenses, (4) the length of the adjudged sentence, and (5) any other relevant factors.⁷

Second, the applicant must demonstrate the lack of likelihood of criminal activity during the period of deferment. The accused can point to the amount of time that has passed without incident since the last offense, his reputation as a law-abiding citizen (aside from his conviction), and any steps taken toward rehabilitation such as pleas of guilty, counselling, restitution, good conduct, and good duty performance. The final issues - lack of likelihood of intimidation of witnesses, and non-interference with the administration of justice - can likewise be demonstrated by several of the previously mentioned factors. Other matters that could be included, if they argue for deferral, are the nature of the

5. Paragraph 88f, MCM, 1969. This is an opportunity for the defense counsel to forum shop between two convening authorities by delaying his request until after the action is taken, so long as the sentence has not been ordered executed or the sentence served. However, as discussed hereinafter, delay may moot any appellate issue if the request is improperly denied. Accordingly, counsel is best advised to submit the request as soon as possible.

6. United States v. Thomas, 7 M.J. 763 (ACMR 1979).

7. United States v. Brownd, supra.

offense(s), the client's reputation for peacefulness, geographical separation from adverse witnesses, past conduct toward adverse witnesses, and specific needs of the client, or his military unit, which require his presence in the community.

The request for deferment should be as detailed as possible, not only to convince the convening authority of its merits, but also to include as much as possible in the record in the event an appeal of the convening authority's decision becomes necessary. The request can be in part a repetition of any evidence of extenuation or mitigation presented at trial and, if necessary, that evidence can be expanded upon.

In drafting the request for deferment, the defense counsel must carefully tailor the request to the facts and circumstances of each case. The goal of the request is to meet the burden of persuasion which the defense carries. The use of a preprinted form which merely sets forth conclusions without suggesting evidence and arguments has been labeled as inadequate by the United States Army Court of Military Review in United States v. Thomas, 7 M.J. 763 (ACMR 1979). Furthermore, a mere recitation of good military service was deemed inadequate to meet the defendant's burden in United States v. Alicea-Baez, 7 M.J. 989 (ACMR 1979). Although an exemplary service record may be beneficial to meeting the defense burden, it must be closely linked with other evidence to prove specifically that the petitioner is neither a danger nor a flight risk. Mere conclusions are not enough, as the convening authority and the appellate courts will examine the evidence which support those conclusions to determine whether the petitioner has met his burden. If the petitioner cannot survive this threshold examination, then there can be no abuse of discretion by the convening authority for denial of the request. See United States v. Petersen, 7 M.J. 981 (ACMR 1979).

One additional step would be to request a personal audience with the convening authority, so that the client, defense counsel, and any character witnesses can make a personal appeal. Of course, the personal interview should be requested only in cases where the client and witnesses would make a favorable impression upon the convening authority. However, whether the convening authority grants such a personal audience is totally within his discretion, and is not a matter of right in the deferment process. If a personal audience

is granted, a memorandum of record should be prepared for attachment to the initial request for deferment. This documents the meeting for subsequent use if an appeal becomes necessary. All correspondence concerning the request for deferment is to be included or forwarded for inclusion in the record of trial.⁸

Appeal

If the request for deferment of confinement is denied, the applicant has the right to appeal that determination. The procedure for appealing the convening authority's adverse determination is set forth in paragraph 2-30b(1), AR 27-10. Basically the appeal is forwarded to the next superior convening authority, unless the record of trial is subjected to review pursuant to Article 66, UCMJ. In the latter case, the review is conducted by The Judge Advocate General. The standard for reversal of the denial of the request for deferment is a showing that the action was arbitrary and capricious.

If no relief is acquired from the appeal of the denial through administrative channels, then the matter can be raised during the course of judicial appeal and review pursuant to Article 66, UCMJ.⁹ The basic holding of United States v. Brownd, supra, is that the military appellate courts are required by their "judicial responsibility to conduct a review of the convening authority's action to determine whether he has abused his discretion."¹⁰

As a result of the delays incident to the judicial appellate process, the matter of the deferment of confinement may

8. Paragraph 88f, MCM, 1969.

9. Whether failure to administratively appeal the denial precludes raising the issue on judicial appeal has not been decided. United States v. Thomas, supra at 768 n.6. However, the Court of Military Appeals has held that military regulations may not create a condition precedent to an accused's exercise of his rights under the Code or Manual. United States v. Kelson, 3 M.J. 139 (CMA 1979).

10. 6 M.J. at 339.

be rendered moot, even when the deferment request has been improperly denied by the convening authority, as the confinement may be fully or substantially served during the interim. United States v. Brownd, supra; United States v. Sitton, 5 M.J. 394 (CMA 1978). One course of action which would seemingly be available is to petition for extraordinary relief. Unfortunately, the United States Court of Military Appeals has been less than willing to entertain extraordinary writs in the area of requests for deferment. See Corley v. Thurman, 3 M.J. 192 (CMA 1977); Brownd v. Commander, 3 M.J. 256 (CMA 1977).

Defense counsel should continue to pursue the avenue of extraordinary relief even though there has been little success in this area thus far. The traditional prerequisite for the availability of extraordinary relief - the immediate threat of irreparable harm to the petitioner - is usually present where a request for deferment has been improperly denied. Ordinary appellate delay will normally render the issue moot, or the relief insufficient. Illegal post-trial confinement can be adequately remedied only via the expeditious route of extraordinary relief, as the substance "of the illegality suffered is confinement awaiting appellate review." Corley v. Thurman, supra at 193 (Perry, J., dissenting).

Although the United States Court of Military Appeals established guidelines and standards for evaluating the convening authority's exercise of discretion, it has failed to provide an adequate remedy or sanction for abuse of that discretion. Presently, the service member is entitled to a review of the exercise of discretion in the normal course of appellate process; however, he is not entitled to relief from an abuse of discretion where post-trial confinement has been served. The very nature of the normal appellate process aggravates the problem since the review of the abuse will often be so delayed that the error is no longer susceptible to adequate remedy. Therefore, although the appellant is entitled to a review of the convening authority's action, he, in essence, is afforded no relief from the convening authority's improper actions. As the right to deferment of sentence in appropriate cases is unenforceable, the right itself is threatened with extinction. These factors should be stressed to the Court in any extraordinary writ filed concerning this issue.

Conclusion

In appropriate cases, the guidelines for granting deferral of service of sentences to confinement can be used as an effective tool by the defense counsel. Whether deferral is used to allow the client to get his personal affairs in order before entering confinement, or to avoid confinement while an important issue is litigated on appeal, the benefits for the client can be invaluable. Trial defense counsel should pursue this relief where it appears to be in the client's best interest, and where there is evidence to support the defense burden of persuasion. Requests for deferment should be specifically tailored to the facts and circumstances of each case, and should be as comprehensive as possible so as to not only adequately support the request, but also to provide an adequate record should an appeal become necessary.

PREJUDICIAL ARGUMENT BY TRIAL COUNSEL

Howard D. Lewis, Jr.*

Introduction

In virtually every court-martial, the Government concludes its case with closing arguments on the findings and the sentence. Although counsel are permitted "a reasonable latitude"¹ in presenting their arguments, closing argument is one phase of the trial which harbors great potential for abuse. Because a trial defense counsel's failure to object to an improper argument by trial counsel will often constitute waiver,² it is imperative that defense counsel remain continuously alert for remarks which are potentially prejudicial to his client.

The standard by which trial counsel's argument is judged is set forth in United States v. Doctor³, wherein the United States Court of Military Appeals wrote:

Trial counsel has the duty of prosecuting a case and he is permitted to comment earnestly and forcefully on the evidence, as well as on any inferences which can be reasonably supported by the testimony. He may strike hard blows but they must be fair. Beiger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). If his closing argument has a tendency to be inflammatory, we must make certain it is based on matters found within the record. Otherwise it is improper. The issue, facts and circumstances of the case are the governing factors as to what may be proper or improper. United States

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1. Manual for Courts-Martial, United States, 1969 (Revised edition), para. 72**b** [hereinafter cited as MCM, 1969].
2. See, e.g., U.S. v. Nelson, 1 M.J. 235 (CMA 1975).
3. 7 USCMA 126, 133, 21 CMR 252, 259 (1956).

v. Socony-Vacuum Oil Co. 310 U.S. 150, 60
S.Ct. 811, 84 L.Ed. 1129 (1940).

Thus, the trial counsel should "carefully limit his arguments to evidence in the record, to fair inferences therefrom, and matters relevant to the appropriateness of punishment."⁴ His primary duty is to "seek justice, not vengeance."⁵

The purpose of this article is to assist trial defense counsel in spotting objectionable arguments. While definitive categories of improper argument are tenuous at best, the following are areas in which the threat of prejudice is most imminent: (1) comments by trial counsel on the accused's failure to testify, thereby infringing upon his right against self-incrimination; (2) trial counsel's reference to evidence or testimony not admitted on the record; (3) appeals to passion or prejudice; and (4) trial counsel's injection of personal opinion or belief into the proceedings.

Comment On Accused's Failure To Testify

As a general rule, the Fifth Amendment's proscription against compulsory self-incrimination precludes trial counsel from commenting on an accused's failure to testify.⁶ In United States v. Mills,⁷ the Army Court of Military Review noted that while the prosecution's comments on an accused's failure to testify can be cured by corrective instructions, the court must be convinced beyond a reasonable doubt that they had no prejudicial effect upon the accused, since such remarks are error of constitutional dimension. In United States v. Johnson, supra, the Court of Military Appeals affirmed.

4. United States v. King, 12 USCMA 71, 73, 30 CMR 71, 73 (1960).

5. United States v. Johnson, 1 M.J. 213, 215 (CMA 1975).

6. Griffen v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); United States v. Albrecht, 4 M.J. 573, 576 (ACMR 1977); MCM, 1969, para. 72b.

7. 7 M.J. 664 (ACMR 1979).

that the accused has a "fundamental right" to plead not guilty. Trial counsel's closing argument included a reference to guilty pleas by the co-accused and a remark that the accused's plea of not guilty meant he had not "learned his lesson." The court held that these statements were clearly improper.

In another case,⁸ the accused was charged with failure to obey an order. The court held it was error for trial counsel, in closing argument, to contend that the only defense available to the accused would require an explanation of why he failed to obey the order.

A trial counsel who, in closing, questioned why the accused had not come forth with the story he related at trial, when he was first interviewed, found himself reversed. Moreover, the corrective instructions that no adverse inferences could be drawn from the accused's pretrial silence were deemed insufficient.⁹

In United States v. Russell,¹⁰ the accused was charged with carnal knowledge. There was an 85% chance that a blood test could exclude the accused, but he did not take the test. The Court of Military Appeals held it was prejudicial error for trial counsel to comment upon the accused's failure to take the test, noting that such comment goes to the very essence of the accused's right against self-incrimination. The court said that perhaps proper instructions would have corrected this error, but, since no instructions were given, the conviction had to be overturned. Trial defense counsel's failure to object did not constitute waiver, since, in this case, waiver would have resulted in a miscarriage of justice.

Not every comment by trial counsel on an accused's silence is automatically violative of the Fifth Amendment. In United

8. United States v. Skees, 10 USCMA 285, 27 CMR 359 (1959).

9. United States v. Stegar, 16 USCMA 569, 37 CMR 189 (1967).

10. 15 USCMA 76, 35 CMR 48 (1964).

States v. Cain,¹¹ the accused was charged with robbery. Subsequent to the offense, but prior to arrest or the preferral of charges, the accused was confronted with an allegation by the victim that he had taken the money. He made no verbal response to this accusation. At trial, during his argument on findings, the prosecutor referred to this failure to speak as "an admission by silence." The Army Court of Military Review did not find the statement improper, since the accused had not been under arrest or in custody at the time. The court also cited paragraph 140a(4) of the Manual which states that an admission by silence may permissibly be inferred in certain situations.

In United States v. Dupree,¹² trial counsel's comments on the accused's failure to explain the offenses of which he was convicted were not prejudicial because they pertained only to sentencing and, therefore, could not have affected the findings. Moreover, the accused had taken the stand to make an unsworn statement, and, since an accused cannot be cross-examined regarding such a statement, the Government was entitled to "fair and reasonable comment" upon such testimony.

The trial counsel, however, may not assert that this inability to cross-examine the accused on an unsworn statement prevents a full disclosure of the truth. In United States v. Lewis,¹³ the court held that such a statement "unfairly focuses on the accused's action in availing himself of his right to present evidence prior to sentencing in a manner of his own choice," and is tantamount to commenting on the failure of the accused to take the stand.¹⁴ The error can be corrected by a cautionary instruction from the bench that no adverse inferences can be drawn from the accused's decision to make an unsworn statement.

11. 5 M.J. 844 (ACMR 1978).

12. 40 CMR 444 (ACMR 1968).

13. 7 M.J. 958 (AFCMR 1979).

14. Id. at 961.

Reference To Evidence Not In The Record

During argument on sentence, trial counsel referred to a "secret" document, not in evidence, which he implied pertained to the active participation, by the accused and his family, in activities "inimical to the best interests of the United States." The Court of Military Appeals held that this was not only the equivalent of unsworn testimony, but that it also constituted an improper appeal to passion and prejudice.¹⁵ The court reversed, even though the trial was before a military judge sitting alone.

In a case in which the accused was on trial for perjury,¹⁶ for having allegedly given false testimony regarding an altercation to which he was a witness, his testimony remained the same as it had been when he was a witness. In closing, trial counsel argued:

Now gentlemen, it's possible for the Government to get everybody else that was standing around that circle to testify for the same facts, but the Government feels that three witnesses are an adequate amount of witnesses to present the fact of that issue.¹⁷

The Army Court of Military Review found this to be "astonishingly unprofessional" conduct, since these remarks took evidence outside the record and used it to corroborate properly admitted evidence. Although the defense counsel did not object to these comments, the Court of Military Review held that waiver did not attach in this case because the error seriously affected "the integrity [and] public reputation of judicial proceedings."¹⁸

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

16. United States v. Tawes, 49 CMR 590 (ACMR 1974).

17. Id. at 592

18. Id. at 593

The Court of Military Appeals has also addressed this issue. Although it was not necessary for the disposition of the case,¹⁹ the court admonished a trial counsel not to remark that other witnesses are available to support the Government's position. "Such statements, even though they may not be misunderstood, are without justification. They serve no valid purpose and often invite disaster."²⁰

Trial counsel may not refer to sentences imposable in other cases. The prosecutor who discussed such sentences as an aggravating factor in United States v. King, supra, was rebuked by the Court of Military Appeals which stated that this was "clearly erroneous, for . . . facts in aggravation should be concerned with heinous circumstances surrounding the offense"21

Similiarly, trial counsel's argument in United States v. Davis²² included references to punishments imposable in other jurisdictions for the same crime with which the accused was charged. The Army Court of Military Review held such comment erroneous because trial counsel must restrict his arguments to matters contained in the record. Nevertheless, an examination of the sentence, combined with the trial defense counsel's failure to object, led the court to conclude that no reversible error had occurred.

A trial counsel who suggests to the court that mitigating circumstances may be considered elsewhere also treads on thin ice. In United States v. Simpson²³ trial counsel, in his argument on sentence, noted, over defense objection, that a bad-conduct discharge could be purged from the accused's record by the Board for the Correction of Military Records in Washington D.C. The Court of Military Appeals held that "it was highly improper for trial counsel to refer to possible ameliorative

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

20. Id. at 233, 36 CMR at 389.

21. United States v. King, supra at 73-74, 30 CMR at 73-74.

22. 47 CMR 50 (ACMR 1973).

23. 10 USCMA 229, 27 CMR 303 (1959).

action by an administrative agency."²⁴ In United States v. Carpenter,²⁵ trial defense counsel, in his presentencing argument, touched upon a number of factors that the court should consider in mitigation. In reply to these arguments, trial counsel agreed that these factors should be taken into consideration, but noted that it was the job of the convening authority to consider those mitigating factors in determining the type of court to which the charges are referred. The Court of Military Appeals recognized this was error, but held it was cured by the military judge's instructions.

Another type of argument which exceeds the scope of the record is a reference to United States relations with foreign nations. The accused in United States v. Cook²⁶ was charged with killing a Philippine national. Trial counsel asked the court members to consider the potential effect of the outcome of the case on the relations between the United States and the Philippines. The Court of Military Appeals held this tactic improper. The fact that the accused received a relatively light sentence did not indicate that the comment had no effect. Rather, except for trial counsel's improper remarks, the accused might have been acquitted.

Similarly, in United States v. Boberg,²⁷ the Court of Military Appeals ruled that it is improper for trial counsel to suggest that the court-martial's verdict will affect relations between the military and civilian communities. The absence of an objection will not constitute waiver in such a case, and it is immaterial whether the argument pertains to findings or sentence. Although Boberg dealt with circumstances emanating from the Vietnam conflict, it was later cited as controlling in United States v. Spence²⁸ in which the trial counsel referred to the Government's efforts to control the flow of drug traffic in foreign nations.

24. Id. at 232, 27 CMR at 307.

25. 11 USCMA 418, 29 CMR 234 (1960).

26. 11 USCMA 99, 28 CMR 323 (1959).

27. 17 USCMA 401, 38 CMR 199 (1968).

28. 3 M.J. 831 (AFCMR 1977).

Attempts to inject any form of command influence into the closing argument are also inappropriate, since they exceed the scope of the record. For example, when trial counsel inserted into his closing arguments the convening authority's opinion regarding an appropriate sentence, the Court of Military Appeals held²⁹ this was clear error. The Court noted that the trial judge should have taken corrective action sua sponte.

In United States v. Allen³⁰ the accused was convicted of sale of marijuana. In his argument on sentence, the prosecutor attempted to read to the court a Secretary of the Navy policy directive concerning drug abuse. The Court of Military Appeals held this to be a form of command influence which constituted general prejudice, notwithstanding instructions to disregard the challenged statement.

In a similar vein, the Air Force Court recently found error in a prosecutor's argument on sentencing which included:

Consider where he [the accused] works, he works in the hospital where he is charged with caring for sick people, military as well as non-military patients, and can we be guaranteed that these people receive the care they need if it is known he is a seller of drugs. Will a seller be tolerated among those responsible for their care, I think, of course, that this makes an even more serious punishment necessary.³¹

Since the charged offenses were not facilitated by the accused's position in the hospital, and since the accused did not abuse his position in committing them, counsel's reference to the accused's duty assignment was improper.

29. United States v. Lackey, 8 USCMA 718, 25 CMR 222 (1958).

30. 20 USCMA 317, 43 CMR 157 (1971).

31. United States v. Goodson, 7 M.J. 888, 891 (AFCMR 1979).

Trial counsel may also exceed the scope of the record by arguing that "general deterrence" is a separate factor which justifies an increase in an otherwise individualized sentence.³² As the Court of Military Appeals pointed out in United States v. Varacalle,³³ there is a "critical distinction between an enlargement of a sentence for the purpose of general deterrence only without consideration for the particular accused, and the sentencing authority saying as to this individual with all the matters peculiar to him, we make an example of him and all others like him so disposed."³⁴ In United States v. Jenkins,³⁵ the Air Force Court of Military Review reiterated the notion that general deterrence, while a "valid and necessary factor in punishments imposed," cannot serve to enlarge a sentence without consideration for the particular accused. "The key," according to the Court, "is that the sentence must be individualized to meet the needs of the accused . . . while concurrently protecting society from future similar conduct."³⁶ Despite suggestions to the contrary in United States v. Ludlow,³⁷ general deterrence arguments are not impermissible per se; instead, those arguments will generally be held to be improper only if they prejudicially circumvent individualized sentence determinations. Courts of Military Review often cure the error by reassessing the sentence³⁸ or finding that no prejudice resulted.³⁹

32. United States v. Mosely, 1 M.J. 350 (CMA 1976). See generally Basham, General Deterrence Arguments, The Army Lawyer, April 1979, at 5.

33. 4 M.J. 181 (CMA 1978).

34. Id. at 183.

35. 7 M.J. 504 (AFCMR 1979).

36. Id. at 505.

37. 5 M.J. 411 (CMA 1978).

38. See, e.g., United States v. Simpson, 2 M.J. 831 (ACMR 1976); United States v. Fornash, 2 M.J. 1045 (ACMR 1976).

39. See, e.g., United States v. Bates, 1 M.J. 841 (AFCMR 1976); United States v. Davic, 1 M.J. 865 (AFCMR 1976).

Referring to a request for discharge, under the provisions of Chapter 10, AR 635-200, in lieu of court-martial, is also improper. In United States v. Pinkney,⁴⁰ trial counsel, in his sentencing argument, interjected comments of the accused's previous request for a Chapter 10 discharge. He contended that the request indicated the accused did not care whether or not he remained in the Army. The Court of Military Appeals, while recognizing the error of injecting collateral matters into the case, declined to reverse, holding that trial defense counsel's failure to object constituted waiver.

The importance of an objection by trial defense counsel cannot be stressed too heavily. In United States v. Barclay,⁴¹ the facts were almost identical to those of Pinkney, except that trial defense counsel objected to the introduction of the accused's Chapter 10 discharge request. The Army Court of Military Review reversed, finding the admission of this evidence, over specific defense objection, to be prejudicial error.

Of course, arguing a position inconsistent with a point conceded earlier by the Government is likewise improper. In United States v. Gerlach,⁴² trial and defense counsel stipulated that the accused had been kicked in the groin and that he assaulted the victim, in the belief that the victim was the man who had delivered the kick. Arguing on findings, trial counsel asserted that the evidence demonstrated that no one had kicked the accused. Emphasizing the binding effect of a stipulation, the Court of Military Appeals reversed.

40. 22 USCMA 595, 48 CMR 219 (1974).

41. 6 M.J. 785 (ACMR 1978).

42. 16 USCMA 383, 37 CMR 3 (1966).

Appeals To Passion or Prejudice

The American Bar Association standard, which asserts that "[t]he prosecutor should not use arguments calculated to influence the passions or prejudices of the jury,"⁴³ was explicitly adopted by the Air Force Court of Military Review in United States v. Collins.⁴⁴ Recent opinions of the Army Court of Military Review leave no doubt that the ABA standards also apply to the Army.⁴⁵

Appeals to passion or prejudice may take many forms. In United States v. Priest⁴⁶ the accused was charged with making statements disloyal to the United States. Arguing on findings, trial counsel compared this alleged disloyalty to three recent assassinations and rampant civil strife. The court conceded this was error, but did not reverse, holding that the accused had not been prejudiced. The absence of a defense objection was considered persuasive.

In United States v. Wood,⁴⁷ the accused was charged with taking indecent liberties with three boy scouts of the troop of which he was scoutmaster. Trial counsel, in his closing argument, suggested, inter alia, that the court members imagine their own sons as the objects of the alleged sex offenses. The Court of Military Appeals held this was error since any court member who had been the father of one of the victims would have been disqualified from sitting on the case.

Additionally, the prosecutor in Wood upbraided the court members and, in effect, threatened them with ostracism by their peers if they reached a verdict other than that suggested by the Government. The Court held that this, too, was patent error. Nevertheless, the Court failed to reverse, holding that counsel's voir dire of the court members during the preliminary stage of trial revealed that they could remain impartial.

43. ABA Standards, The Prosecution Function §5.8(c).

44. 3 M.J. 518 (AFCMR 1977).

45. United States v. Tanksley, 7 M.J. 573 (ACMR 1979); United States v. Mills, 7 M.J. 664 (ACMR 1979).

46. 46 CMR 368 (NCRM 1971).

47. 18 USCMA 291, 40 CMR 3 (1969).

The method of testing an argument for prejudice as set forth in Wood was specifically overruled in United States v. Stramberger.⁴⁸ There, trial counsel invited the court members to place themselves in the position of the rape victim's husband, who had been held down while his wife was subjected to multiple rape. Defense counsel did not object immediately, but did so later, and moved for a mistrial before the jury retired to deliberate. The motion was denied as being "untimely." The Court of Military Appeals reversed and reiterated its holding in Wood wherein it had stated that it is clearly improper "to ask a court member to place himself in the position of a near relative wronged by the accused" ⁴⁹ The court also noted that such arguments are violative of the ABA standards.

In a case where the accused was charged with sale of marijuana, trial counsel, in the presentencing argument, "related the horrors of drug sales to naive victims on more than one occasion."⁵⁰ He also asked the court members to envision family members as victims of the offense. The Air Force Court, while viewing these statements highly improper, decided they were not so inflammatory as to require a rehearing on the sentence, absent an objection by trial defense counsel.

What constitutes an inflammatory remark must be considered in light of the surrounding circumstances. In United States v. Cooper,⁵¹ where the accused was on trial for rape, the defense sought to impugn the victim's testimony by characterizing her as a prostitute. In view of such tactics, the Army Court of Military Review held it was not error for trial counsel to refer to the victim's statements to the authorities as "calling the cops" and "blowing the whistle."

48. 1 M.J. 377, 379 n.2 (CMA 1976).

49. Id. at 379.

50. United States v. Moore, 6 M.J. 661, 663 (AFCMR 1978).

51. 5 M.J. 850 (ACMR 1978), pet. denied, 6 M.J. 104 (CMA 1978).

Trial Counsel's Personal Opinion

"It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."⁵² The leading case in the area is United States v. Nelson, sometimes known as "the Hitler case" because trial counsel likened the testimony of a defense witness to the tactics employed by Hitler: "[T]ell the people the biggest lie you can imagine and they'll believe it."⁵³ The Court of Military Appeals held this was improper for three distinct reasons: (1) it was trial counsel's personal opinion as to the truth or falsity of testimony; (2) it was based on matters clearly beyond the scope of the record; and (3) it was highly inflammatory. However, the court held this was not so prejudicial as to require a sua sponte correction by the military judge, absent a defense objection. Still, the conviction was reversed, since trial counsel also referred to other evidence which would have been available "but for a 'legal technicality'." The Court of Military Appeals analogized this to a reference to other witnesses who could have been called to testify but were not.

In a later case, United States v. Kinckerbocker,⁵⁴ trial counsel launched an attack against the accused's credibility and injected his personal belief that the accused was lying. Despite the failure of trial defense counsel to object, the Court of Military Appeals held this was plain error requiring reversal. Reconciling this case with Nelson, it may be inferred that the Court of Military Appeals would have reversed Nelson on similar grounds had they not had another error on which to base their ruling. However, this is highly speculative, and trial defense counsel would be most unwise to rely on such a possibility.

52. ABA Standards, The Prosecution Function §5.8(b).

53. 1 M.J. 235, 237 (CMA 1975).

54. 2 M.J. 128 (CMA 1977).

In United States v. Ryan,⁵⁵ the prosecutor's argument equated high rank with greater credibility. This argument was plain error; the military judge's instructions "to attach" such importance to trial counsel's arguments as the "recollection of the evidence compels" exacerbated, rather than corrected, the error. The arguments were especially prejudicial since there was a substantial difference in rank between the prosecution and defense witnesses:

No doubt an inference of reliability and truthfulness may properly be drawn from the fact that an individual has had such long and dedicated service in an armed force to merit promotion to a high rank. That inference, however, cannot, in our opinion, be elevated to a legal axiom that the degree of rank carries a corresponding degree of credibility.⁵⁶

It appears that, if trial counsel employs phrases such as "the Government suggests" or "the prosecution says", the court will usually conclude that they do not constitute expressions of personal opinion.⁵⁷ For example, in a case where the accused had been convicted of wrongful possession of marijuana, trial counsel, in his closing arguments on sentence, said:

Gentlemen, it is the government's position that . . . this is not the kind of an offense that you want to give a man a second chance for within the Army. The Army needs to be rid of men like PFC Garcia.⁵⁸

The Army Court of Military Review held this was not improper either as an expression of personal opinion or an invocation of the views of the convening authority.

55. 21 USCMA 9, 44 CMR 63 (1971).

56. Id. at 12, 44 CMR at 66.

57. See United States v. Arnold, 6 M.J. 520 (ACMR 1978).

58. United States v. Garcia, 3 M.J. 927, 931 (ACMR 1977).

Conclusion

The foregoing discussion of case law is intended to be illustrative rather than exhaustive. The necessity of a timely objection is stressed throughout. Recently, the Supreme Court of Pennsylvania underscored this point in a case where the prosecutor attempted to convince the jurors to believe that, if they acquitted the defendant, they would be supporting "murder in the streets" and dishonoring the memory of a policeman slain in a totally unrelated incident and that perhaps the defendant "will be happy because he is a homosexual, in prison." Trial defense counsel did not object, and the original appellate defense counsel did not allege ineffective assistance of counsel for such inaction. The court ruled that the defendant in a collateral attack on his conviction could properly claim ineffectiveness of appellate counsel for failing to raise ineffectiveness of trial defense counsel, found error in the prosecutor's remarks, and reversed.⁵⁹

By remaining cognizant of the multifarious forms that prejudicial comments by trial counsel might take, and by maintaining vigilance during the trial itself, defense counsel should be able effectively to thwart an inappropriate argument. A timely objection, even if overruled at trial, provides the accused with a greater opportunity for success on appeal.

59. Commonwealth v. James, 398 A.2d 1003 (Pa. 1979).

CASE NOTES

FEDERAL DECISIONS

VEHICLE SEARCHES - STANDING TO OBJECT

United States v. Lopez, 25 Crim. L. Rptr. 2521 (C.D. Cal. 1979).

The U.S. Supreme Court, in United States v. Rakas, 439 U.S. 128 (1978), indicated that a passenger in a vehicle does not have standing to object to a search of that vehicle, but the Court did not address the question of the standing of a non-owner driver of the vehicle to object.

In Lopez, the district court found the defendant was operating the vehicle with the express permission of the owner, and had control over its operation. He, therefore, had sufficient expectation of privacy to afford him standing to object to the fruits of an illegal search.

CONSTITUTIONAL RIGHT NOT TO VIOLATE ANOTHER'S CONSTITUTIONAL RIGHTS

Harley v. Schuylkill County, 25 Crim. L. Rptr. 2541 (E.D. Pa. 1979).

In a civil suit brought pursuant to the Civil Rights Act, 42 U.S.C. §1983 (1970), the U.S. District Court for Eastern Pennsylvania held that an officer of the state, a prison guard who was allegedly fired for refusing to drag an injured inmate from his cell, has a constitutional right "to refrain from acting in a manner which would deprive another of his constitutional rights."

This decision by the district court may stand for the proposition that in the military, the defense of disobedience of an illegal order may have constitutional overtones.

APPREHENSION IN A PRIVATE DWELLING WITHOUT WARRANT OR EXIGENT CIRCUMSTANCES

United States v. Houle, 25 Crim. L. Rptr. 2522 (8th Cir. 1979).

The 8th Circuit, in conformity with a majority of jurisdictions, held that, absent exigent circumstances, police

may not enter a private home to make an arrest without a warrant even though clothed with probable cause.

This matter is currently pending resolution before the United States Supreme Court (Peyton v. New York and Riddick v. New York, 25 Crim. L. Rptr. 4010) and the Court of Military Appeals, United States v. Mitchell, 7 M.J. 676 (ACMR 1979), pet. granted, 7 M.J. 380 (CMA 1979). See also United States v. Davis, 8 M.J. 79 (CMA 1979); United States v. Jamison, 2 M.J. 906 (ACMR 1976), and Commonwealth v. Terebieniec, 25 Crim. L. Rptr. 2502 (Pa. Super. Ct. 1979).

COURT OF MILITARY APPEALS DECISION

CONFRONTATION - REQUEST FOR LABORATORY EXAMINER

United States v. Stocker, 7 M.J. 373 (CMA 1979) (summary disposition).

The case involved a defense request for the CID Chemist. Judge Cook, in dissent, implied that the request for the chemist, made for the first time at the trial itself, failed to comply with para. 115, MCM. He believed that there must be some showing that the request is not merely a fishing expedition. The holding of the Court, however, was that once the trial defense counsel requests the CID chemist, the government is obliged to produce him. The Court set aside the findings and sentence and authorized a rehearing.

The decision raises the proposition that under United States v. Strangstalien, 7 M.J. 225 (CMA 1979), regardless of when the defense requests the chemist, and regardless that there has been no previous interview with the chemist and no knowledge of what he will say, if the defense requests the chemist for in-court examination, he must be provided.

COURTS OF MILITARY REVIEW DECISIONS

LARCENY - PROOF OF VALUE

United States v. Powell, CM 437948 (ACMR 7 Sept. 1979) (unpub.) (ADC: CPT Holeman).

Appellant was convicted of larceny of a piece of stereo equipment "of a value of about \$100.00", and assault consum-

mated by a battery. The Army Court of Military Review found that the government failed to establish proof of value of "about \$100.00" and reassessed the sentence. The proof used to establish value consisted of one witness, a friend of the victim, who testified the value of the equipment was "around a hundred dollars, give or take ten or fifteen". He was not qualified as an expert and did not testify as to the basis of his knowledge. The equipment was not introduced into evidence nor was there any evidence of date of purchase or its present condition other than that it was operational. The Court concluded that the government only proved that the equipment was of some value.

VOLUNTARY INTOXICATION - SPECIFIC INTENT CRIMES

United States v. MacAulay, CM 437710 (ACMR 12 Sept. 1979) (unpub.) (ADC: CPT Gallaway).

Appellant initially pled guilty to attempted sodomy, indecent acts with a child under the age of 16 years, and assault and battery upon a child under 16 years of age. During the providency inquiry, the military judge indicated he was reluctant to accept the plea to attempted sodomy because the issue of voluntary intoxication was raised to this specific intent crime. Subsequently, a new pretrial agreement was reached pursuant to which appellant pled guilty to two charges, with the government offering no evidence on the attempted sodomy charge.

The Court of Review found appellant's plea to indecent acts with a child improvident because the voluntary intoxication which prevented the formation of specific intent for the attempted sodomy also precluded the specific intent necessary for indecent acts with a child. United States v. Boshears, 23 CMR 737 (AFBR 1956); United States v. Haas, 22 CMR 868 (AFBR 1956), pet. denied, 22 CMR 331 (1956); United States v. Rotramel, 5 CMR 1949 (ABR 1952). However, the Court concluded the plea was provident to the lesser included offense of indecent acts with another, United States v. Jahl, 20 USCMA 327, 43 CMR 167 (1971), for which no specific intent is required. Sentence reassessed.

HEARSAY IMPROPERLY ADMITTED - ARGUMENT OF
TRIAL COUNSEL ON SENTENCING

United States v. Skodje, SPCM 13847 (ACMR 21 Sept. 1979)
(unpub.) (ADC: CPT O'Brien).

The appellant was convicted of possessing, transferring, and selling marijuana. He was sentenced to a bad-conduct discharge, confinement at hard labor for six months, and reduction to the grade of E-1. During the merits portion of the trial, the undercover military policeman testified to the jury that he "was informed that Specialist Skodje had been selling marijuana". Citing United States v. Zone, 7 M.J. 21 (CMA 1979), the Court concluded that this testimony was incompetent hearsay despite the lack of objection. The military judge had instructed the court members not to draw an inference of "evil disposition or a criminal propensity" from this testimony; however, he also instructed the members that they could consider the testimony to show plan, design, or motive of the appellant in selling marijuana. The Court of Review found these instructions further compounded the error. Nevertheless, following Zone, supra, the Court tested the entire record to determine the impact of the error and found the evidence of guilt clear and compelling. Neither counsel mentioned the hearsay testimony in argument on findings. The Court affirmed the conviction.

On sentencing, however, trial counsel argued that appellant was a drug pusher and urged the court to infer that appellant had sold marijuana on many more occasions than the one he stood convicted of. The Court found this argument affected the sentence and reassessed it by affirming only the confinement at hard labor for three months and reduction to E-1.

HEALTH AND WELFARE INSPECTION - GENERAL SEARCH

United States v. Mohler, CM 437824 (ACMR 18 Oct. 1979)
(unpub.) (ADC: CPT H. Lewis).

The appellant's detachment commander decided to conduct an unannounced "health and welfare" inspection for the following reasons: (1) he had found a switch-blade knife in one of the rooms, (2) he had noted an excess of aluminum foil in the rooms and concluded this might indicate the presence of

hashish, (3) some missing linen may have been in the barracks, and (4) he had decided to restore any missing tools to their proper place before a forthcoming change of command inventory. The detachment commander conveyed these reasons to his company commander and received an authorization to conduct a "health and welfare" inspection of the entire detachment, room by room. The inspection encompassed the checking of each individual's military equipment for completeness and condition, but it also included a pat-down frisk of clothing. Small items, such as film containers and open cigarette packages, were inspected as to contents. The detachment commander and a noncommissioned officer conducted the inspection.

When the noncommissioned officer discovered and began to "inspect" a package of cigarettes in appellant's locker, he asked appellant what was in it. The appellant replied, "dope". The Army Court of Military Review held that the heroin was in a place where the appellant had a reasonable expectation of privacy. Further, relying on United States v. Hay, 3 M.J. 654 (ACMR 1977), the Court held that the inspection amounted to a general search which was conducted without probable cause. The charges were dismissed.

WAIVER - COURT-MARTIAL MEMBERSHIP

United States v. Jones, CM 437917 (ACMR 30 Oct. 1979)
(unpub.) (ADC: CPT King).

Among the errors rejected by the Army Court of Review was a complaint that the defendant's court-martial was improperly constituted under Article 25, UCMJ, and the Sixth Amendment because particular classes of persons were systematically excluded from membership on the court (viz., second lieutenants and all enlisted persons E-5 and below).

The Court refused to consider the merits of this issue for two reasons. First, the issue was not raised at the trial level where all pertinent facts could have been elicited. Second, the defendant elected to be tried by judge alone. The Court, in rendering its decision, recognized that its earlier decision on this issue is pending review by CMA. United States v. Manuel, CM 436534 (ACMR 17 Nov. 1978), pet. granted, 6 M.J. 279 (CMA 1979).

LARCENY - INTENT PERMANENTLY TO DEPRIVE

United States v. White, NCM 79 0236 (NCMR 26 July 1979) (unpub.).

The military judge accepted appellant's pleas of guilty to larceny of a government vehicle. During the providency inquiry it evolved that appellant took the vehicle to his home town and had it in his possession five days later when he was apprehended. Appellant admitted taking the vehicle but noted he hadn't been sure whether he should turn himself in with the vehicle or just abandon it. However, he felt that if he did abandon the vehicle, the government would eventually find it.

The Navy Court of Review held that while one may abandon a vehicle under such circumstances that it appears he intended permanently to deprive the owner of it, the converse is equally likely. Citing United States v. Brookman, 7 USCMA 729, 23 CMR 193 (1957), and United States v. Wooten, 13 USCMA 171, 32 CMR 171 (1963), the Court found that the providency inquiry did not establish facts which supported a finding that appellant intended permanently to deprive the government of the vehicle. The Court reduced the finding of guilty to wrongful appropriation and reassessed the sentence by affirming it.

GREEN-KING INQUIRY

United States v. Nobbs, NCM 79 0670 (NCMR 9 Aug. 1979) (unpub.).

The Navy takes the view that pretrial agreements which provide for probationary suspension of a punitive discharge while also providing that the accused may, nonetheless, be administratively discharged, require the military judge to explain the conditions authorizing administrative discharge in order to make the plea provident under Green-King. Failure of the judge to give the required explanation invalidates the plea. United States v. Miller, 7 M.J. 535 (NCMR 1979); United States v. Tobey, 6 M.J. 917 (NCMR 1979). See also United States v. Williamson, 4 M.J. 708 (NCMR 1977).

DOUBLE JEOPARDY

United States v. Fernandez, NCM 79 0019 (NCMR 13 Aug. 1979) (unpub.).

Appellant was arraigned on a charge of AWOL, and requested and received a continuance after arraignment. When the court reconvened, appellant was in an AWOL status. The military judge entered a plea of not guilty and took evidence on the charge, finding the appellant guilty by exceptions and substitutions. During sentencing proceedings, the military judge inquired into appellant's enlistment termination date. Trial counsel checked into the judge's inquiry during a recess and returned to advise the judge that the convening authority requested that the charges be withdrawn. Trial defense counsel asked that the withdrawal be with prejudice to the government. The judge declined to so rule and adjourned the court. The same charge was later referred to a different court. The Navy Court of Military Review held that this constituted double jeopardy and dismissed the findings of guilty to the charge, citing United States v. Wells, 9 USCMA 509, 26 CMR 289 (1958).

STATE DECISIONS

PROBABLE CAUSE - TINFOIL PACKETS

People v. Young, 25 Crim. L. Rptr. 2560 (Mich. Ct. App. 1979).

The Michigan Court of Appeals rejected the state's contention that "the time has come for the courts to realize that the use of tinfoil packets to facilitate drug trade is so widespread and well known among policemen that the mere sighting of such packets is sufficient to establish the requisite probable cause." The Michigan Court notes that tin and aluminum foils have a vast number of legitimate uses, and that any inference of criminal activity derived from their mere possession is too expansive for purposes of the 4th Amendment.

RIGHT TO COUNSEL

Barber v. Municipal Court, 25 Crim. L. Rptr. 2529 (Cal. 1979).

The California Supreme Court held that the presence of a police officer, in his role as an undercover operative, at a meeting between attorneys and their clients violated the defendants' state constitutional rights to counsel. They held that the appropriate relief was dismissal of charges rather than the exclusion of any tainted evidence, because of the chilling effect this activity had upon the defendants.

ROBBERY - PURSE SNATCHING AS INSUFFICIENT FORCE

People v. Patton, 389 N.E.2d 1174 (Ill. 1979).

The Illinois Supreme Court overturned a robbery conviction and approved a larceny finding of a purse snatcher who, in grabbing the victim's purse from her hand, threw her arm "a little back". Use of force to overcome the force exerted by the victim to control her property doesn't automatically constitute robbery. Instead, only when there is sensible or material violence does the larceny from the person constitute robbery. The court cited in support of its decision the early common law cases that form the basis of para. 201, MCM, 1969, discussing "force" in a robbery charge.

MIRANDA WARNING - CUSTODY

People v. Gutierrez, 596 P.2d 759 (Colo. 1979).

Accused, who was chasing vandals, was stopped by police. The officer asked for the accused's drivers license, and told the accused to stand next to the patrol car. The officer then questioned the accused regarding a shooting involved in the incident and received an incriminatory response. The Colorado Supreme Court held that the accused was "in custody" when his license was taken and he was required to stand in one place. Of primary concern to the court was the question of the reasonable belief of a suspect that he was not free to leave the presence of the officer. As a result, any unwarned admission would be suppressed.

"SIDE BAR"

or

Points to Ponder

1. Booker questions continue to cause skirmishes at the appellate level.

After a long period of denials, the Court of Military Appeals has begun to grant petitions for review of Booker errors involving Article 15's. One area was perhaps laid to rest with United States v. Syro, 7 M.J. 431 (CMA 1979). The Court of Military Appeals ruled that records of Article 15's completed prior to the date of Booker (11 October 1977) could be introduced at post-Booker trials without compliance with the Booker rules.

One might deduce, from the activity here, that the Court will eventually seek to resolve the quandry created by the Booker decision. Until that happens, trial defense counsel should continue to object to the introduction of Article 15's where there is no demonstration that the accused was informed of his right to see counsel and of his right to trial in a criminal proceeding. If the trial judge should perchance take the objection seriously and endeavor to inquire of the accused as to his comprehension of his rights prior to accepting Article 15 punishment, the defense counsel should object to this inquiry of the accused.

To make an effective argument, counsel must necessarily deal with United States v. Mathews, 6 M.J. 357 (CMA 1979), wherein Chief Judge Fletcher, writing for the Court, concluded that Article 31, UCMJ, interrogation rights do not apply to sentence hearings except where evidence could be produced giving rise to another criminal charge. Mathews involved a plea of guilty wherein defense counsel affirmatively waived objection to the admissibility of the Article 15. Where there is a not guilty plea or a defense objection, the judicial inquiry of Mathews arguably should not be followed.

Secondly, it may be pointed out that Mathews considers only Article 31 inapplicable to the sentence hearing. There remains a Fifth Amendment argument that the privilege against self-incrimination should protect one from being subjected to a risk of greater punishment by evidence furnished from his

own lips. This result was reached in United States v. Gordon, 5 M.J. 653 (ACMR 1978), which held that Fifth Amendment rights were not limited to testimony on guilt or innocence, quoting McGautha v. California, 402 U.S. 183 (1971). See generally McCormick on Evidence §256 (2d ed. 1972).

Thirdly, paragraph 53h of the Manual specifically allows the accused to remain silent during the sentencing portion of his trial. If the military judge forces the accused to furnish evidence satisfying the military judge of the admissibility of the documents, he has violated the accused's right to silence. Clearly, the prosecutor would not be allowed to question the accused against his wishes during the sentencing procedure, and neither should the military judge be allowed to lay the foundation for a prosecution exhibit and assume the role of a prosecutor.

An illustration of the problems which could arise in applying the Mathews holding that Article 31 does not apply to extenuation and mitigation hearings follows:

The accused makes a full confession of his crime to a CID agent after being fully advised of and waiving his Article 31 rights. At trial the accused pleads guilty and, after findings are entered, the trial counsel produces the confession and moves its admission as aggravation under paragraph 75b, MCM, 1969. It would appear under Mathews that there is no problem with the military judge's inquiring of the accused about rights warnings at the time of the statement and as to voluntariness of the statement (considering threats, promises, or duress) since Article 31 at the time of the judge's inquiry, arguably, does not apply. According to Mathews, the accused no longer has any Article 31 rights as to the offense. Yet should the military judge be allowed to admit the confession under these circumstances?

It might be useful to pose this hypothetical, or similar ones, to the military judge should he rely heavily on Mathews. In any case, there is much litigation to be done in the Booker area and trial defense counsel should not readily concede that Article 15's are admissible. See the first item in the new section of this issue entitled "USCMA WATCH."

2. Voir Dire reserved to military judge.

In the last issue, we noted that the Court of Military Appeals had granted review in two cases involving the military

judge's refusal to allow general voir dire questions from counsel. The Court has now decided the issue in United States v. Slubowski, 7 M.J. 461 (CMA 1979). The practice of requiring defense and government counsel to submit proposed voir dire questions to the military judge, which he would personally ask, was approved. The counsel were permitted to conduct individual oral voir dire, if warranted, following the judge's questions, and could have submitted additional written questions to the judge. The Court noted that the defense counsel could have submitted any questions he desired, indicating it would not reverse when counsel failed to avail himself of that opportunity. Query whether the rejection by the military judge of a proper, proposed question would be error?

3. Has the Court of Military Appeals blessed taking action before receiving the Goode* rebuttal?

Consider the following sequence of events: On 30 January 1976, the 87th post-trial day, the convening authority takes action on the accused's case. On 2 February 1976 the defense counsel is served with a copy of the post-trial review and on 9 February he submits his response. On 18 February, the convening authority "affirms" his earlier action.

In United States v. Thomas, 8 M.J. 1 (CMA 1979), the accused argued that the failure to serve the defense counsel prior to taking action rendered the action a nullity and caused a Dunlap** violation. The Court rejected that argument and found, from the convening authority's express consideration of the defense counsel's response and the subsequent "affirm[ance]" of the action, a lack of prejudice to the appellant from the late service. No relief was ordered.

The concurring opinion in United States v. Thomas, supra, may give some rationale for the decision. It emphasizes that no defect in the trial proceeding was worthy of a grant of review, and that the staff judge advocate had advised the convening authority that, while he could not withdraw his original action, he could change the place of confinement to make the appellant eligible for restoration to duty. See paragraph 89b, MCM, 1969. This was the ameliorative action requested by the defense counsel in his rebuttal, and it

* United States v. Goode, 1 M.J. 3 (CMA 1975).

** Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974).

could still have been granted despite action having been taken. The implication is that a request for relief beyond what could be granted by the convening authority might call for a different result.

Paragraph 89b, MCM, 1969, prohibits the convening authority from recalling and modifying any action after it has been published or the accused has been officially notified thereof. No acknowledgment of this provision can be discerned in the Thomas majority opinion. As there is no prior Court of Military Appeals decision on this precise point, the Court's reasoning may be in consonance with the logic found in United States v. Hicklin, SPCM 13876, ___ M.J. ___ (ACMR 30 Oct. 1979). In Hicklin, the staff judge advocate prepared an inadequate and incomplete review, and failed to make Goode service before the convening authority took action approving the findings and sentence. After publication of the promulgating order, in a second, complete review, the staff judge advocate advised the convening authority to withdraw his first action as "premature." The second review was served on the defense counsel, who submitted no rebuttal. The prior action was then withdrawn and a second action, again approving the findings and sentence, was taken.

United States v. Hicklin, supra, relied on a body of Court of Military Review case law holding that subsequent, modifying actions are a nullity when those actions come after the case has been forwarded for appellate review. However, when the modifications have occurred prior to forwarding for review, the actions have been judicially approved. Significantly, in all the latter cases, none of the modifications were to the prejudice of the accused.

The import of these cases seems to be that the convening authority can take action prior to serving the staff judge advocate's review on the defense counsel so long as he stands ready to consider the defense counsel's response to the review, and so long as the case has not been forwarded for appellate review. See United States v. Shulthise, 14 USCMA 31, 33 CMR 243 (1963). However, it remains important for defense counsel to prepare a complete Goode rebuttal where the review is erroneous, inadequate, or misleading, to guard against waiver of those problems. Further, any indication that the convening authority has determined not to consider the Goode rebuttal should be documented as that could destroy the presumption of proper action by the convening authority.

USCMA WATCH

GRANTED ISSUES

BOOKER ISSUES

The admissibility of Article 15, UCMJ, punishment during the sentencing portion of trial continues to be the most litigated appellate issue. United States v. Syro, 7 M.J. 431 (CMA 1979), resolved the issue of admissibility of Article 15's given prior to United States v. Booker, 5 M.J. 238 (CMA 1977) (11 Oct. 1977), by declining to apply Booker retroactively. A review of the approximately 30 cases still pending review at CMA on this issue shows both legible and partially illegible copies of Article 15 proceedings being admitted with and without defense counsel objection to the documents' admissibility. In none of the cases surveyed was an inquiry, approved in United States v. Mathews, 6 M.J. 357 (CMA 1979), conducted by the military judge.

GREEN-KING INQUIRY

While United States v. Crowley, 7 M.J. 336 (CMA 1979), disposed of about 75 cases pending review that were tried after United States v. Green, 1 M.J. 453 (CMA 1976) (13 Aug. 1976), and before United States v. King, 3 M.J. 458 (CMA 1977) (17 Oct. 1977), the issue of compliance with the Green-King standard has resurfaced in three recently granted cases involving inquiries conducted after King was decided.

DETERRENCE

Finally, the question of trial counsel argument and military judge instructions to the court to consider the effect of deterrence, if any, of the sentence on others is again on the docket, e.g., United States v. Smith, pet. granted, 8 M.J. 46 (CMA 1979); United States v. Mourer, pet. granted, 6 M.J. 289 (CMA 1979). As Chief Judge Fletcher and Judge Cook appear to be at opposite ends of the spectrum on this issue, resolution will probably be delayed until a new judge is appointed to the court.

GRANTS OF REVIEW VACATED AND SUMMARY DISPOSITIONS

INSANITY

Since October, numerous issues have been removed from the CMA docket as improvidently granted. As a result of two vacations and one summary disposition, United States v. Tyler, 8 M.J. 101 (CMA 1979) (summary disposition), the issue of insanity, applying the United States v. Frederick, 3 M.J. 230 (CMA 1979), standard, has disappeared from the court's calendar. The most interesting of these cases, United States v. Woods, grant vacated, 8 M.J. 77 (CMA 1979), dealt with an unexpected reaction caused by a combination of alcohol and prescribed medication. As the sanity of the accused was not contested at trial, there was insufficient evidence available to make a determination at the appellate level. However, defense counsel should recognize that the defense of involuntary intoxication, resulting in the "substantial impairment" of the accused's mental faculties, may be available in similar factual situations.

FOURTH AMENDMENT - SEARCHES

In the Fourth Amendment area, the grant of review was vacated in United States v. Mitchell, 3 M.J. 641 (ACMR 1977), grant vacated, 8 M.J. 76 (CMA 1979). The government contended this barrack's search should be upheld because United States v. Roberts, 2 M.J. 30 (CMA 1976), should not be applied retroactively, probable cause did exist for such a generalized search, and military necessity (the unit's impending deployment to Alaska) justified the search. Which, if any, of these contentions persuaded CMA is unknown. United States v. Farrer, grant vacated, 8 M.J. 76 (CMA 1979), involved the discovery of LSD in the accused's open wall locker during a routine, daily inspection to insure the barrack's cleanliness and locker security. As the procedures employed by the inspecting NCO were in accordance with the normal practice to prevent thefts, it appears the accused did not have any reasonable expectation of privacy.

ARRESTS - BARRACKS ROOM

United States v. Davis, 8 M.J. 79 (CMA 1979) (summary disposition) (pet. for reconsideration pending), extended the holding of United States v. Jamison, 2 M.J. 906 (ACMR 1976), to arrests

made in barracks. Although a similar issue is pending before the U.S. Supreme Court, CMA joined those federal circuits requiring proper authorization, based on probable cause, before effecting an arrest in a private dwelling, absent exceptional circumstances. This holding, elevating the soldier's barracks room to the status of a private dwelling, can obviously be of help to defense counsel when litigating other Fourth Amendment issues. The government has filed a petition for reconsideration in this case.

ARTICLE 31(b) REQUIREMENT

United States v. Kelley, 3 M.J. 535 (ACMR 1977), grant vacated, 8 M.J. 84 (CMA 1979), perpetuated the disagreement in CMA over the meaning of Article 31(b), UCMJ. Judge Cook, concurring in the vacation of the grant and answering the Chief Judge's dissent, reaffirmed his philosophy that Article 31(b) applies to law enforcement officials gathering evidence for potential prosecution, and to those having apparent disciplinary authority over the person questioned. Chief Judge Fletcher continues to develop the meaning of Article 31(b) in accordance with his opinion in United States v. Dohle, 1 M.J. 223 (CMA 1975). While Judge Cook rejects the "position of authority" test espoused by Chief Judge Fletcher, neither is he a rigid adherent to the "official capacity" test. United States v. Kirby, 8 M.J. 8 (CMA 1979) (Cook, J., concurring). Both judges appear to examine the underlying facts to determine whether the non-law enforcement questioner, or alleged "authority" figure, employs tactics designed to influence the suspect's decision to speak or commit an incriminating nonverbal act. In Kelley, Judge Cook found that Sergeant Day's position as a record custodian, whether one of authority or not, had no influence on Captain Kelley's willingness, if not desire, to speak to him about the wrongful disposition of a record.

PETITIONS FOR RECONSIDERATION GRANTED

OFF-POST JURISDICTION

The flurry of judicial activity at CMA in recent months has also extended to the reconsideration of some of its previous

decisions. Petition for reconsideration has been granted in United States v. Smith, 7 M.J. 327 (CMA 1979)(summary disposition), pet. for reconsideration granted, 8 M.J. 36 (CMA 1979), on the issue of court-martial jurisdiction over the accused for off-post possession of marijuana when considered in light of a conspiracy charge over which jurisdiction existed.

BREAK IN CHAIN OF CUSTODY - REHEARING OR DISMISSAL

In United States v. Guinn, 7 M.J. 475 (CMA 1979) (summary disposition), pet. for reconsideration granted, No. 36,047, 8 M.J. ___ (CMA 31 Oct. 1979); United States v. Tresvant, 7 M.J. 476 (CMA 1979) (summary disposition), pet. for reconsideration granted, No. 36,159, 8 M.J. ___ (CMA 15 Nov. 1979); United States v. McKinney, 7 M.J. 477 (CMA 1979) (summary disposition), pet. for reconsideration granted, No. 36,359, 8 M.J. ___ (CMA 31 Oct. 1979), the Court will decide whether a rehearing should have been authorized after the charges were dismissed for failure to show a proper chain of custody in light of United States v. Nault, 4 M.J. 318 (CMA 1978).

PETITIONS FOR RECONSIDERATION FILED

Petitions for reconsideration have been filed by the government in United States v. Paige, 7 M.J. 480 (CMA 1979), United States v. Reagan, 7 M.J. 490 (CMA 1979), and United States v. Davis, supra, and should be acted upon by CMA in the near future.

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

(Defense Counsel in response to an offer of rebuttal testimony on sentencing).

DC: I fail to see the relevance of the statement made by almost any soldier who says, "I can't wait to get out [of the Army] or I want out." I myself have stated that several times.

* * * * *

TC: Okay, how long did he . . . he grabbed your right breast, and I understand this is sort of embarrassing, did he hold on to it, what did he do when he grabbed it?

VICTIM: Well, it's not really big enough to get a good grip, sir, but he tried to find it and grab it and hold on to it.

* * * * *

MJ: I guess nowadays when we have a health and welfare inspection, they look or check out the health and welfare of the light bulbs too.

* * * * *

(Argument on findings before a military judge).

IDC: The defense is aware of no cases on point, and is attempting to argue logic to the military judge as [you] indicated in the past, that sometimes logic prevails over case law.

MJ: Right. I did say sometimes. It is an imaginative argument, and I congratulate you on that aspect of it. . . .

* * * * *

DC: Your Honor, this is, of course, quite confusing, and I understand I'm standing here with my pants down. . . .

MJ: All right, we will take a brief recess.

* * * * *

MJ: I would ask defense counsel considering that he's been suprised by this, if he would like an opportunity to examine the case law and present anything.

TC: Yes, Your Honor.

MJ: I asked defense counsel. You're the trial counsel.

TC: Excuse me.

* * * * *

(After pen-and-ink corrections by the trial counsel, an accused was convicted of the following aggravated assault).

[B]y striking him on the forehead with a bunk adaptor and did thereby intentionally inflict greivous [sic] bodily harm upon him, to wit: a fist.

* * * * *

MJ: [To DC and accused]. What I plan to do then, gentlemen, rather than tell them that you don't want to answer the questions, which would be highly improper. . . .

TC: But true.

MJ: You're trying for a starring role in The Advocate, I assume.

TC: The last page.

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