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ANNOUNCEMENT

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OPENING STATEMENTS

Overview of Contents

The Advocate emphasizes trial advocacy this month with its lead article by Major Estele Elkins and in "Side-bar." Major Elkins, relying on his extensive experience as both an advocate and a judge, provides an informative and entertaining viewpoint on the role of trial defense counsel. The "Side-bar" offers counsel a "back to basics" refresher on some essential advocacy skills. Our second article by Captain Peter Huntsman discusses the constitutional issues raised by Article 125's prohibition of consensual sodomy. The Ethics Roundtable addresses the troublesome area of defining a defense counsel's ethical duty when confronted with a defective specification.

* * *

The Advocate encourages the submission of articles by our readers. We are pleased to publish articles submitted by our readers, many of whom speak from a unique perspective and can offer fresh insights on defense advocacy.

* * *

Additional copies of our special issue "Project: The Administrative Consequences of Courts-Martial" (Vol. 14, No. 4) are available upon request. Sufficient quantities are available to furnish copies to all legal assistance officers.

Staff Notes

The Advocate welcomes to the staff Captains Marcus C. McCarty and Brenda L. Lyons. Captain Gunther O. Carrle is now the Managing Editor of The Advocate.

SOME OBSERVATIONS ON CREATIVE DEFENSE ADVOCACY

*By Major Estel E. Elkins, Jr.**

MAR. My Lord Aumerle, is Harry Hereford armed?

AUM. Yea, at all points, and longs to enter in.

MAR. The Duke of Norfolk, sprightly and bold,
Stays but the summons of the appellant's trumpet.

AUM. Why, then, the champions are prepared, and stay for
nothing but his majesty's approach.

Shakespeare, Richard II, I, iii, 1-5.

I. Introduction

Military defense counsel have enjoyed a perceived experience advantage over their prosecution counterparts since the advent of the U.S. Army Trial Defense Service. This advantage is rapidly dwindling with the necessary assignment of fledgling attorneys to trial defense assignments directly from the JAG Basic Course and with the development of the Trial Counsel Assistance Program.

What would otherwise be merely a return to the pre-TDS status quo, has been exacerbated by a significant change in the criminal justice substantive arena. The policy thrust of the Military Rules of Evidence, coupled with a new aura emanating from the Court of Military Appeals, curtails the continuation of "technical" defense victories.

While these atmospheric charges create initial obstacles for a new defense counsel, they also promise a renaissance of creative advocacy skills. Acquittals must now come, not from government pretrial errors or defects, but through resourceful, imaginative defense advocacy grounded upon the facts of a specific case.

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There are many books detailing advocacy techniques.¹ All should be eagerly read by aspiring defense counsel. Yet, few of these publications discuss advocacy in a military context.

Military advocacy is born of courtroom experience. Time and error are its midwife. This painful process can be eased by the occasional balm of experienced advice.

II. Practical Advocacy

The world of the military defense counsel is unique, peopled with strange figures that have no parallel in a normal civilian jurisdiction. These peculiar features of the military justice process offer chances to dispose of charges by means other than court-martial, or, at worst, reduce the level of the proceedings. Astute defense counsel grasp these chances to benefit the accused.

For example, the convening authority, often maligned by civilian authors as one bane of military justice, actually affords the defense advocate opportunities unavailable to a civilian defense attorney.

1. The following nonexhaustive list of books may be of benefit to a defense counsel interested in developing his advocacy skills:

F. Bailey and H. Rothblatt, Fundamentals of Criminal Advocacy (1974).

F. Bailey and H. Rothblatt, Cross-Examination in Criminal Trials (1978).

H. Rothblatt, Success Techniques in the Trial of Criminal Cases (1961).

R. Givens, Advocacy, The Act of Pleading a Cause (1961).

L. Schwartz, Proof, Persuasion, and Cross-Examination (1973).

G. Shadoan, Law and Tactics in Federal Criminal Cases (1964).

F. Welkman, The Act of Cross-Examination (1931).

A civilian attorney, hoping to quench prosecutorial sparks before conflagration, can go only to the prosecutor. Military defense counsel may go, like a supplicant, hat in hand, to the convening authority prior to dealing with the prosecutor. Admittedly, the military prosecutor normally lacks that degree of discretion in disposing of charges common to civilian prosecutors. But the advantage still lies with a military defense counsel.

In order to capitalize upon the convening authority's role, a new defense counsel must become "of" as well as "in" the army. Hours set aside for participation in battalion, brigade or other unit training activities, presence at unit officer calls and social functions, or participation in physical training and sports programs will pay dividends when the court-martial convening authority is undecided as to disposition of charges against your client.

This does not imply any sort of improper or sycophantic action by defense counsel. Any officer's recommendations to a commander are weighed by the commander in terms of the officer's credibility, both as an officer and a technician. Sincere interest and participation in the convening authority's unit functions enhance one's credibility and may indirectly benefit the accused.

More direct benefits accrue from the defense counsel's relationship with other members of the Staff Judge Advocate Office and CID or Military Police personnel. Many new TDS counsel succumb to the "them and us" attitude with respect to other actors in the military justice drama. This attitude fosters role playing, which inevitably hardens underlying suspicions or distrust.

A wise defense counsel maintains a close professional relationship with the Staff Judge Advocate. Indeed, the Staff Judge Advocate may be the most experienced and knowledgeable criminal lawyer in the office. Only an immature attorney would jeopardize this source of information.

As with the convening authority, defense counsel's relationship with the Staff Judge Advocate can be strengthened through regular, enthusiastic participation in office activities, including physical training, CBR, weapons qualifications, and other programs. Defense counsel should, to the fullest extent consistent with their primary defense duties, support all SJA operations.

Other members of the SJA office deserve equally courteous, respectful treatment. Acrimony between trial and defense counsel serves no purpose. Their relationship should be adversarial in the courtroom only. Too

frequently, defense counsel injure the accused through rash pretrial behavior which goads trial counsel into extraordinary preparation for trial.

Virtually all good courtroom advocates remain on friendly terms with their adversary outside the courtroom's dark and bloody ground. Indeed, a new defense counsel can learn a great deal from an experienced prosecutor who has just demolished the defense case. A court-martial post-mortem between trial and defense counsel is invaluable, especially for the more inexperienced of the two.

There is, however, a requirement to use discretion in those places where one's client might misconstrue a cordial relationship between counsel. A soldier facing serious charges, finds scant solace in the fact that his defense counsel and the prosecutor appear to be good friends. Solace is even rarer after conviction. Thus, the adversarial relationship must remain intact whenever the appearance of impropriety may be a factor. As a general rule, even the use of first names should be avoided while the accused is present.

An adversarial attitude toward CID or other law enforcement personnel is counterproductive. Defense counsel who earn the respect of those men and women have a priceless courtroom edge. Respect can be earned several ways. The most obvious route is through zealous, but fair representation of the accused in the courtroom. Several hard won acquittals in serious cases garner sometimes grudging but genuine respect. Consequently, law enforcement personnel are more open with the defense. They will frequently volunteer helpful information and will generally function as a true criminal investigator, rather than a bloodhound for the prosecution.

Rapport can also be developed through simple everyday contact. Investigators and military police should be treated like professionals. Basic leadership skills are important. Many investigators, especially the younger ones, are still learning their craft. Occasional tactful advice from defense counsel as to how they can improve their courtroom demeanor or investigative skills usually elicits surprised appreciation. Expressing a sincere personal interest in their personal lives, families, and aspirations, just as a good commander does toward his men, will yield pleasant results.

Cross-examining a CID agent who respects the cross-examiner uncovers much more favorable results than those obtained from a malevolent agent eager for an opening to stike back. The practical impact on advocacy is obvious.

A defense counsel's dealings with all of the above individuals are exposed to public view. The relationships serve as a foundation, either fragile or unshakable, for future actions with respect to the accused.

III. Relationship With The Accused

Dealings with an accused are not subject to public view. An accused is the raison d'etre for defense counsel. All other considerations are, subject to rigid ethical standards, subservient to one all-powerful duty of the defense counsel to the accused. Trial counsel dwell in a wonderfully ordered world where justice is the touchstone. Somewhere far removed in a cluttered, shadowed world, the defense counsel raises his advocacy shield and broadsword to champion his client's cause above all things.

The object of this noble calling is likely to appear in the garb of an illiterate unfortunate with a fetish for falsehoods and a burning hatred for all things uniformed, including his defense counsel. He may also appear as a field grade officer of impeccable pedigree.

Whatever the accused's garb, the defense counsel's duty never changes. During the initial interview with the accused, defense counsel must mold a relationship of understanding, if not trust. There are many important aspects to the initial encounter with an accused. Various interview checklists and forms are available to smooth the process. New counsel will profit from their use.

First impressions, as the cliché goes, are lasting ones. Defense counsel should evince consideration and concern for the accused's plight. Encourage the accused to tell his entire side of the story. If capable, the accused should also write a complete statement detailing everything that he knows about the situation. In all cases, defense counsel should investigate the charges before seeing the accused. If that isn't possible, at least obtain copies of any statement or charge sheets.

Even limited pre-interview preparation impresses the accused with the fact that defense counsel is actually concerned with his welfare. Advance preparation also alerts the defense counsel to discrepancies in the accused's story which merit further investigation. From the very outset, defense counsel should be alert for any theme to be ultimately distilled through the closing argument.

Throughout the investigation and subsequent interviews of defense and other witnesses, a defense advocate never forgets that "the only

thing that is different from one time to another is what is seen and what is seen depends upon how everybody is doing everything."²

At the conclusion of the initial interview with the accused, a thorough defense counsel is usually on the spoor of "how everybody was doing everything." The track will be irregular, blurred, purposefully obliterated at places, but always leading toward those things which a successful defense counsel must learn. In exchange for the beginning of an advocacy trail, the accused should be convinced that his counsel will do everything ethically permitted in his behalf. He should also be aware that the defense counsel is in firm control of the case.

IV. Choice of Forum

As trial approaches, the defense counsel conducts his investigation, and begins to make final trial preparation. After having discussed possible court composition with the accused, the defense counsel should, at a reasonable time prior to trial, notify the trial counsel as to court composition.

Many factors influence this choice. Experienced defense counsel, familiar with the "track record" of a particular military jury or judge can provide valuable insight for a green defense counsel. Before selecting court composition, some thought must be given to probable trial strategy, for forum choice may be affected by strategy. Conversely, forum choice might influence strategy.

As a general matter, purely military offenders fare best in bench trials before a military judge alone. Military judges are mature individuals whose prospective is broader than that of a special court-martial, composed, for example, of lieutenants and captains deliberating the fate of a private charged with disrespect to his company commander. As implicit in the example, common sense is often the touchstone of forum choice.

There are areas, nevertheless, where common sense doesn't always help. Statistics support the conclusion that military judges impose discharges more frequently than juries. Although this observation is based only on personal experiences, military judges are more apt to conclude guilt in contested cases of a non-military offense nature.

2. G. Stein, "Composition or Explanation," in Selected Writings of Gertrude Stein, at 456 (1946).

Given the dearth of reliable rules in selecting court composition, defense counsel participation in local military activities may reveal the attitudes and proclivities of potential court members.

V. Final Witness Preparation

After making a forum selection and providing appropriate notice, final witness preparation looms on the agenda. Witness preparation, accurately, if pejoratively, described by some as witness rehearsal, is essential to a successful defense. Experienced defense counsel treat all witnesses as Chopin treated his piano: ". . . like a gentleman. He never gives it a note that it cannot sing, he is always scrupulous toward its whims, he indulges it like a spoilt child."³

If conditions permit, witnesses should be prepared on the actual witness stand where they will finally testify. Preparation of defense witness includes anticipated cross-examination. Surprise is an unwelcome guest in the courtroom. Adequate preparation withdraws the invitation for fatal surprise.

Witness preparation can be overdone. If so, the crucial elements of sincerity and spontaneity may suffer. Shrewd defense counsel view all witnesses with a jaundiced eye. Unless they materially help in attaining defense trial objectives, they should not be called.

One problem that a defense counsel inevitably encounters is the "lying buddy." If a witness is lying, ethical considerations obviously preclude calling him as a witness. On an entirely practical level, if the lie is patent to the defense counsel, it may also be to the jury. A witness who appears to be untruthful is usually disastrous to whichever side puts them on the stand.

VI. Motion Considerations

Defense counsel credibility is also involved in motion practice during pretrial sessions. New defense counsel are usually enamored with motions. There is something pleasantly talismanic about intoning those sacred words: "Your Honor, I move to" The love affair may be a bitter one.

3. A. Symons, "Christian Trevalga," in Spiritual Adventure, The Collected Worlds of Arthur Symons, reprinted in Greet, Edge, and Monroe, The Worlds of Fiction, at 49-61 (1964).

In light of the plethora of motions available in almost every case, mature defense counsel carefully nurture only those which have a reasonable likelihood of blooming, either at the trial or appellate level. The "likelihood" is usually premised upon the peculiarities of a specific judge, factual strength of the motion, or whether the legal issue is one which, as appellate attorneys like to say, is "moving." Not making such a motion when the issue is pending before appellate courts signals incompetence, or its handmaiden, carelessness. Careful study of advance sheets and granted issue summaries distributed by both TDS and the Government Appellate Division assures care in this area.

On the other hand are those motions made just because they exist. Some defense advocates favor this scattergun approach. There are practical drawbacks. Motions which are sent aloft, fluttering somewhere below frivolous clouds, harm the accused. A military judge is the leading actor in a court-martial. In a contested jury case, his interplay with counsel is weighed by the court members. They study his nuances and if those signals, subtle and suppressed as they may be, are unfavorable to the defense, the accused is in harm's way.

Defense counsel can apply a simple test before sending up the motion balloon: what is the objective of the motion? The answer to that question may forestall frivolous motions, which have no place in the skilled defense advocate's arsenal.

Motions, when made after mature consideration, should be made in the form of concise statements of relief sought, the issue involved, and the present state of the law. Written briefs, again concise and well-written, enhance the viability of a motion.

A viable motion should be made with both trial and appellate considerations in mind. As an example, if the court denies a defense motion-in-limine, and that denial practically precludes the accused from testifying, astute defense counsel familiar with United States v. Cofield,⁴ will, as a minimal measure, seek reconsideration of the ruling prior to the presentation of the defense case.

4. United States v. Cofield, 11 M.J. 422 (CMA 1981). See also United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), at 1186, where the court advises that in order to preserve the issue for review, "a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenge convictions [or other in-limine matters] are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court and reviewing court can do the necessary balancing contemplated. . . ."

Despite the frequent importance of motion practice for appellate purposes, appellate victory is a pyrrhic one. The accused, having already served at least one year of confinement, doesn't share the philosophical vindication experienced by his defense counsel. The place to win a court-martial is in the courtroom.

VII. Trial Considerations

Only there, before a stern judge and the discerning eye of a military jury, can defense counsel practice their craft to the limits of creative ability.

Once in the courtroom, nothing should be left to chance. Done properly, every gesture, every word, every witness, is calculated to produce results leading to a decision to acquit. Done improperly, the defense presentation is a discordant reaction to the stately pavane performed by the government.

There will be occasional instances where a blunderbuss defense may be the only alternative. But most acquittals result from an integrated defense linked to a simple factual, evidentiary, or legal theme. Once this central motif is chosen, all efforts should focus on using the motif, perhaps something as basic as provocation in an assault case, to seize the initiative from the trial counsel.

Some seasoned defense advocates seriously urge doing something so trivial as moving the lectern or counsel table from the position where trial counsel has placed it. The object is to show the jury that the defense, not the trial counsel, is in control of the situation. While extreme, the example reflects a significant point: once in front of the jury, everything is advocacy.

VIII. Voir Dire

Voir dire is the first stage call before the jury audience for the defense counsel. Only a few defense counsel use voir dire skillfully.⁵

5. See A. Ginger, Jury Selection in Criminal Trials (1977). For an exotic approach to voir dire, see J. Burke, Jury Selection: The TA System For Trial Attorneys (1980). For a useful treatment of voir dire in a specific military setting, see Trecker and Rosenberg, Developing An Effective Relationship Between Defense Counsel and Court Members During Voir Dire Examination, 10 The Advocate 250 (1979).

Voir dire functions in two separate dimensions. First, voir dire grants an advocate an early opportunity to develop rapport and credibility with the court members. Second, the procedure permits limited exploration of the fact finder's preconceptions and disposition.

Voir dire cannot be an afterthought. Without thorough preparation, it is merely a waste of court time. In its first dimension, voir dire permits a skilled advocate to implant those concepts which must germinate in the mind of the fact finder. At the same time, the court member has an opportunity to assess the defense counsel. Does he or she appear credible? Is counsel confident and at ease? Does the advocate's military appearance help or harm the accused? Personal appearance preferences of counsel are of no importance. One's duty to do all things to benefit the accused transcend mere personal likes or dislikes, and dictate strict adherence to the highest standards of military appearance and demeanor.

One caution need be observed in attempting to use voir dire as an active vehicle for advocacy. Know the military judge. A step over his boundary may result in a rebuke with adverse credibility consequences. Nevertheless, the line should be etched as thinly as possible. If defense counsel develops favorable ethos with the court members during voir dire, the acquittal equation loses some complexity.

Hawthorne once allegorized the human heart "as a cavern; at the entrance there is sunshine and flowers growing about it. You step within but a short distance, and begin to find yourself surrounded with a terrible gloom, and monsters of divers kinds."⁶ These "divers monsters" may be stalked in voir dire's second dimension.

Many defense counsel send questionnaires through trial counsel to court members prior to trial. Field personnel files are also available for pretrial study by defense counsel. Unfortunately, these easy methods seldom surface significant information.

Significant targets of voir dire are relatively obvious. For a defense counsel defending a rape case, the fact that a court member's teenaged daughter was once raped is nice to know. Other less obvious areas of inquiry include court members' familiarity with and opinion of potential witnesses, attitudes toward the offense, punitive philosophy, and many other areas limited only by defense counsel's imagination and the military judge's whims.

6. N. Hawthorne, The American Notebooks, at 18 (1932).

Above all else, the defense counsel must never forget that throughout this limited reconnaissance of the mind, the court members are also appraising counsel. Here, the two dimensions merge. If the defense counsel establishes his sincerity, its corona will brighten what lies ahead.

Sincerity permeates all that an effective defense counsel does. A single false note during voir dire, or elsewhere in the trial, may destroy all chances for an acquittal. If we substitute "defense counsel" for "instrumentalist and singer," the following passage is a treasure trove of advocacy advice:

. . . the instrumentalist as well as the singer has a psychologically sensitive medium at his disposal; so the value and dangers of personal feeling are the same for the one as the other. As long as personal feeling is concentrated on the musical content, i.e.: the significance of the piece, it is the very nerve and 'drive' of the artist's work. It is the dynamism which makes him create the audible symbol in the way that seems to him clearest, most fully perceivable, most impressive. This is intense conception, which makes for the utmost power of musical expression.

Every tension and movement in the frame of created time seems like a personal emotion, but one that lives apart from the concerns of the actual delivery.⁷

A successful defense case necessarily comes from an advocate's legal knowledge, experience, head, and heart, regardless of personal feeling toward the accused or the crime.

IX. Opening Statement

One fundamental tenet of any form of instruction is that the instructor must first gain the attention of the student. Opening statements offer defense counsel a perfect medium for application of the tenet. In essence, an opening statement instructs the student jury about the book, or case, which they are about to open. Consequently, waiving opening argument is usually bad practice.

7. S. Langer, Feeling and Form: A Theory of Art, at 145-46 (1953).

As many counsel have learned from a military judge, opening statements are not "arguments." Yet, no other stage of the trial serves creative defense advocacy so well. The defense statement even follows that of the government, giving the defense a rare opportunity for the last word, ephemeral as it may be.

Despite the "argument" limitations imposed on the opening statement, defense counsel can create an atmospheric mood which may last throughout the trial. The key lies in animating legal concepts. Defense counsel can freely discuss concepts which will control the outcome, such as presumption of innocence and burden of proof, both common and central elements to all courts-martial.

If the defense counsel, through creative imagery and presence, can, like an alchemist, make dross into gold by breathing life into abstract legal concepts, only good things follow. Words, the defense counsel's broadsword, always convey less to others than the things represented by the words. Defense counsel's creative imagination must bridge this conceptual abyss.

There are many ways to make the word flesh. To be effective, the method chosen must complement the defense counsel's personality and style. One successful example simply symbolizes the term "presumption of innocence" as a silver uniform worn by the accused along with his class "A" uniform. Before a finding of guilt may occur, that uniform of innocence must be shredded by the prosecutor's evidence. Variations are endless. Delivery and creativity are the passwords.

Merely intoning a cliched litany replete with legal phrases after an aggressive prosecutor's opening statement only provides the prosecutor with a few last minutes for organization. Unless the defense opening statement whispers insistently in a court member's ear throughout the prosecutor's case-in-chief, the opening statement is a hollow shell.

Some defense counsel prefer to reserve their opening statements until the opening of the defense case. While justified under some conditions, reserving opening usually reinforces the impact of the government's case. A competent prosecutor's opening statement will move the court members toward a conclusion of guilt. Defense counsel can restore the essential presumptive balance by a strong opening immediately after the prosecutor's statement.

There is also a danger in the conception of a court-martial as being composed of two distinct parts: the government and the defense cases. For the creative defense advocate, the entire court-martial is the defense

case. Therefore, reserving opening statement violates the mandate of total advocacy. Unless immediately countered, the government's opening statement will establish an unshakable tone for the trial.

Defense counsel's opening statement should be an unlatched shutter clattering throughout the otherwise tidy structure of the government's case-in-chief. Every court member, or at least more than one-third of them, must constantly hear "the busy claw of some midnight mole in the ground."⁸

X. All The World's A Stage

As the court-martial develops following opening statements, successful advocacy doesn't denote constant oral exercise. In fact, there may be times when a prudent defense counsel capitalizes upon circumstances and the difficulties of the trial counsel. Some military judges anger easily. If their anger is directed toward trial counsel, as it often is, the best defense tactic is to let the judge become an advocate. At the same time however, defense counsel must be scrupulously fair with trial counsel. Inexperienced or truly aggressive trial counsel are a boon for the defense, so long as defense counsel impresses the jury as a fair, evenhanded advocate.

Some of a trial's most influential evidence comes from what is left unsaid, both by witnesses and in counsel arguments. Although difficult to achieve, emphasis by omission or silence is highly effective. Hemingway reorganized this when he noted that "the dignity of an iceberg is due to only one-eighth of it being above water."⁹ Cautious application of this device will also avoid the dangerous tendency to "talk down" to court members. Unlike many civilian juries, court-martial members are perceptive and highly educated.

Tales about imprudent cross-examination are legion. Nevertheless, defense counsel violate this basic rule of cross-examination. Never, never cross-examine beyond those areas essential to the defense objective. When the object is obtained, cease fire. Defense counsel unwisely demonstrate a reluctance to simply say, "The defense has no questions of this witness."

8. H. Melville, Pierre or The Ambiguities, at 358 (1949).

9. E. Hemingway, Death in the Afternoon, at 192 (1955).

Other fundamental errors include the submission of documentary evidence containing information damaging to the accused. In one recent general court-martial, defense counsel offered the accused's medical records. The accused was charged with rape, and his credibility was very much at issue. Buried in the medical records was a reference to the accused's involvement in illegal drug use. Fortunately, a highly ethical prosecutor noted the problem outside the presence of the jury, and the records were retracted prior to submission to the jury. Even superb advocacy cannot atone for careless errors.

Everything that fills the void between the defense opening statement and final argument serves but one purpose - to provide fuel for the closing argument. Every question, direct and cross, and every witness, defense or government must be directed toward this one pivotal purpose.

Unless defense counsel has attained the respect of the court members through sincerity and demeanor as an officer and attorney, closing arguments are futile gestures. Therefore, all that a defense counsel does or fails to do must be done in light of the court members' unwavering appraisal.

While this may seem difficult for a new counsel, the simple solution lies in maintaining a dignified, sincere attitude toward all actors in the courtroom drama. Of course, this precept should not and does not restrict the fervor and intensity of advocacy. But there is no place for belittling, badgering, or haughtiness toward witnesses or opposing counsel.

There finally comes a time for the defense to rest, despite F. Lee Bailey's assertion to the contrary. Although not collectively as guilty as newly minted trial counsel, defense counsel often manifest fear about concluding their case. They drag in a few more tepid witnesses while court members begin to shift irritably in their seats. At best, the process dilutes the defense case.

Brevity is a laudatory trait in a defense counsel, both in oral arguments and witness presentation. Thorough pretrial preparation should assuage any fears of leaving something out. Rest when the case is concluded. Rest with satisfaction and conviction. Defense counsels' credibility suffer while they hesitate before the jury by shuffling nervously through jumbled papers as the judge kindly inquires if they have concluded their case.

XI. Instructions

Few defense counsel employ tailored instructions to their maximum effect.¹⁰ A properly tailored instruction pleases the military judge by saving him work. More important, a tailored instruction, if adopted by the military judge, personalizes the accused to the jury and, parenthetically, enhances defense credibility. Tailored instructions, particularly those cataloging factors favorable to the accused also force the government into a defensive posture prior to their impending closing argument.

Counsel often underestimate the impact of instructions on court members. Court members, especially new ones, adhere to instructions almost religiously. Deviations usually benefit the accused, except in cases involving mental competency or entrapment. In any event, defense counsel should incorporate some instruction language in their closing argument. Creative language avoids any problem of interference with the judge's sole instructional role. Later, explicit rendition by the military judge of concepts touched upon by the defense counsel reinforces all important credibility.

XII. Creative Closing Arguments

Closing arguments may be flamboyant, urbane, evangelical, witty, or any variant thereof. Acquittals flow from any style argument if there is one additional element - sincerity.

Sincerity is the hallmark of effective closing arguments. Coupled with sincerity, creative advocacy yields a high acquittal rate. A creative advocate makes all things into something possessing form and substance, alive and discernible to the court members' touch. If the defense counsel does his job creatively, closing arguments, like the poet's pen, grasp legal concepts and "turns them to shapes, and give to airy nothing, local habitation and a name."¹¹

10. Fletcher, Instructions - An Under-Utilized Opportunity For Advocacy, 10 The Advocate 8 (1978).

11. W. Shakespeare, A Midsummer Night's Dream, V, i, 15-17.

Rudimentary oral skills must be mastered. Absent being blessed with a natural flair for creative speaking, there are no easy paths. Some things that may help include frequent reading aloud, videotape rehearsals, controlling distracting mannerisms, and thorough preparation. Participation in amateur drama productions increases poise and confidence. There is, after all, much of the actor in a good trial attorney.

But advocates, like actors, can never be found obviously acting. Again, sincerity is the shiboleth. Eye contact with every member of the court is essential. Phrases such as "the defense believes . . . , the defense contends . . . , the defense theory," and other legalisms should be banished from a defense advocate's lexicon. Advocates don't say, "the defense believes the evidence fails to prove guilt." Advocates say, "the evidence fails to prove guilt."

Argument style and content are bedfellows. Closing arguments are frequently referred to as "summing up." Some defense counsel, unfortunately, do just that. Parroting the evidence certainly provides bulk for a closing argument, but the method is creatively barren. Military court members are insulted by such an approach. They are usually expert at retaining data, estimating situations, and appraising character. Thus, defense counsel should concentrate on those themes or motifs which provide an appropriate passageway for acquittal.

Throughout the case, defense counsel should have provided compelling reasons why the accused is not guilty. The military judge's instructions should offer a legal way to effectuate those reasons. A creative defense closing argument blesses the marriage of the reasons and the way.

Closing argument should be as brief as the case permits. Yet, the argument must be sharply focused. If, for example, self-defense is involved, it would be more effective to avoid a long account of the murder scenario by simply describing the flash of a knife seen in the victim's hand instants before the accused fired the killing weapon. The impact of creativity is intensely direct.

And over and through it all, sincerity must dominate.

XIII. Post-Conviction Triste

Assuming proper functioning of the military justice system and competent trial counsel, even a good defense counsel will experience more convictions than acquittals. That is an inescapable reality of the trade. Convincing one's client of this fact after conviction is a form of pure advocacy in itself. With forceful counsel advice, most cases bearing the

seeds of an eventual conviction can be handled through negotiated guilty pleas. Even a relatively inexperienced defense counsel can, after thorough case preparation, accurately predict the probable outcome of a case.

Still, there will be cases where conviction comes as a surprise, or those in which the accused simply chose to cast his lot with the court-martial system. Consequently, waiting until the jury announces a guilty finding is not an appropriate time to begin considering sentencing tactics.

Even though, experienced defense counsel tend to sublimate sentencing considerations. This is regrettable because sentencing tactics are of obvious importance to the accused. A conviction is often the subdued ping of a "spotting round" on the hull, signalling that the main round of the sentence is on the way.

Astute defense counsel can, like the mythical phoenix, resurrect a charred accused through the sentencing procedure.

Sentencing or extenuation and mitigation witnesses must be prepared with meticulous care. Witnesses who become confused about "reputation for veracity" or other terms of art reflect inadequate defense counsel preparation.

Counsel should be constantly glancing over their shoulder at potential rebuttal by the government. If the defense, through its witnesses, "opens the door," the government may introduce damaging evidence which would otherwise never come to the jurors' attention. It is generally better to avoid calling a lukewarm character witness if his testimony prepares the way for a damning rebuttal witnesses. Under such conditions, the accused may fare better by simply introducing matters from his personnel records.

Most military judges are liberal in their determination of when and how far the evidentiary door has been opened. Fear of rebuttal need not inhibit defense counsel's sentencing efforts, but conscientious counsel must weigh all probabilities in advance.

Even though unsworn statements are also rebuttable, they can be useful, particularly when the accused is inarticulate or so upset by his conviction that his testimony during sentencing would be unpredictable. Creative defense counsel can suppress the unsworn nature of the testimony by making the statement themselves. Doing so offers another opportunity for creative advocacy. In effect, defense counsel becomes a "cerbatana," a medium through which one says what he does not wish to say himself.

The same creative advocacy requirements apply to sentencing arguments. Brevity is again important so long as the desired information is instilled in the jury. Defense counsel who reap light sentences for their clients are paragons of sincerity.

One technique of proven effectiveness is to portray the potential sentence in terms personally concrete to the jury members. If the jury has the power to impose lengthy confinement, defense counsel should force each court member to imagine how long that confinement period would be in terms of the jury member's own life and feelings.

After sentencing, the active advocacy of defense counsel ends. The defense role as counsel continues.¹² A convicted soldier facing confinement is usually scared. He needs professional reassurance and reasoned advice. If the deliberations as to sentence or findings were protracted, defense counsel should aggressively pursue a petition for clemency.

Convening authorities are vulnerable to a petition for clemency signed by court members, individuals with whom the convening authority has daily professional contact. Even if an individual court member declines, as some obviously will, to join in the petition, the member may make some comments about the trial which may improve defense counsel's advocacy skills.

12. Defense counsel must perform the following post-trial duties: (1) advise the accused of appellate rights and related procedural matters; (2) advise of the right to request deferment of confinement; (3) review the record of trial; (4) review post-trial review and comment as appropriate; and (5) maintain attorney-client relationship. In addition, defense counsel should consider certain optional post-trial actions, including (1) preparation of request for clemency; (2) inform accused of clemency, parole and rehabilitation procedures; and (3) submit Article 38(c) brief; (4) prepare an "Application for Relief Pursuant to Article 69"; (5) request new trial or rehearing; (6) seek extraordinary relief from CMA; (7) maintain liason with defense appellate counsel; (8) safeguard trial notes and file; (9) provide assistance to accused's family; (10) advise on Article 138 rights; (11) consider Article 90, UCMJ, action; (12) explain "excess leave" provisions. For a more detailed treatment of the above and other avenues of appellate relief, see Annot., The Administrative Consequences of Courts-Martial, 14 The Advocate 214 (1982); Reardon and Carroll, After the Dust Settles: Other Modes of Relief, 10 The Advocate 274 (1978).

Some accused are difficult to deal with after conviction. Most are appreciative of counsel's efforts, and are interested in appellate and other relief possibilities. The difficult ones are likely to allege incompetency of counsel if they believe doing so will help them.

Allegations of incompetency may well increase as the impact of the Military Rules of Evidence and more conservative review decisions reduce other avenues of appellate success. Defense counsel should not let this possibility interfere with their paramount advocacy responsibility toward the accused. In fact, creative advocacy is the best defense against any determination of incompetency. New defense counsel should, however, adequately document their advice or actions in rare, appropriate cases.

The responsibilities of a new defense counsel are awesome. Other JAG officers pontificate over administrative matters of paper and ink. Trial counsel appease convening authorities while worshipping at the shrine of abstract and erratic justice.

Only defense counsel hold the heart of another living person in their hands. Through their decisions and judgment, other men remain free or are deprived of liberty. Such responsibility is the stuff of deathwatch awakening when blackness and shivering cover all. Creative advocacy offers a way to the light.

Article 125: Sodomy and the Right of Privacy
by Captain Feter R. Huntsman*

I. INTRODUCTION

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.¹

Article 125 of the Uniform Code of Military Justice² prohibits all sodomy,³ be it consensual or forcible, heterosexual or homosexual,

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1. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

2. 10 U.S.C. § 925 (1976). Article 125(a) provides:

Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

3. At common law, the word sodomy described only penile penetration of an anus, be it human or animal. 2 Wharton's *Crim. Law and Proc.* § 751 at 571 (1957). See also *Rose v. Locke*, 423 U.S. 48, 53 (1975) (Brennen, J., dissenting); *United States v. Harris*, 8 M.J. 52, 61 (CMA 1979) (Perry, J., dissenting).

public or private.⁴ In the United States military the offense of sodomy has been held to include cunnilingus,⁵ fellatio,⁶ and buggery.⁷ In 1978, the Court of Military Appeals addressed the constitutionality of Article 125 in United States v. Scoby.⁸ While Judge Cook's lead opinion rejected the proposition that Article 125 trenchd upon an individual's right of privacy by prohibiting "unnatural or deviant sexual intercourse between adults in private,"⁹ Judge Perry concurred in the result only, and Chief Judge Fletcher expressly limited his concurrence to the facts of the case, viz that Article 125 is not vague or uncertain and that public fellatio between consenting males may be prohibited.¹⁰ As Judge Perry did not make known the basis for his limited concurrence, it is Chief Judge Fletcher's concurrence that sets the boundaries of stare decisis in this area.¹¹

4. This article will not discuss the propriety of the addition of the element of force to the crime, with the concomitant increase in punishment, as a result of paragraphs 127c and 204, Manual for Courts-Martial, United States, 1969 (Revised edition). Nor will it discuss the constitutionality of excluding persons from military service based upon their status as homosexuals.

5. United States v. Harris, 8 M.J. 52 (CMA 1979). Cunnilingus is the oral stimulation of the vulva. Fellatio is the oral stimulation of the penis. Webster's Seventh New Collegiate Dictioary (1961). The Oxford English Dictionary (1933) mentions neither cunnilingus nor fellatio, perhaps because these words were then considered obscene.

6. United States v. Scoby, 5 M.J. 160 (CMA 1978).

7. United States v. Barnes, 2 CMR 797 (AFBR 1952).

8. 5 M.J. 160 (1978).

9. 5 M.J. at 166.

10. Id.

11. See Leflar, Appellate Judicial Opinions 209-210 (1974). Justice Rehnquist has noted, that "[i]t is well established that stare decisis does not have the same weight in constitutional interpretation as in other cases." Rehnquist, The Supreme Court: Past and Present, 59 A.B.A.J. 361, 363 (1973).

Nowhere in Scoby is the legitimacy of categorizing as "unnatural" various forms of sexual union other than conventional heterosexual intercourse addressed. Jurists have simply assumed that such practices are "unnatural", "deviant", or "obscene" and have focused their attention on whether such statutes constituted a legitimate exercise of legislative authority, and on whether the prohibition was clearly phrased.¹²

This article will discuss current case law concerning the scope of an individual's right to privacy and show that Judge Cook's articulation in Scoby¹³ that Article 125 does not "trench" upon the constitutional right of privacy is not in accordance with the "general rule" in the United States. This article proposes that Article 125 is unconstitutional with respect to consensual acts of heterosexual sodomy committed in private by adults and, as many of the legal principles derived from that argument are sex-blind, perhaps an identical result is possible for similar homosexual conduct.¹⁴

12. For example, in Scoby Judge Cook recited that

Article 125 proscribes modes of copulation that deviate from those the general military community regards as "natural" or normal. Appellate defense counsel refer us to respectable medical and lay opinion to the effect that no mode of sexual activity is unnatural or deviant. Here, we are concerned only with the definition of the prohibited conduct. More specifically, would a person of ordinary intelligence understand from a reading of Article 125 that deviant ways of carnal copulation are interdicted?

5 M.J. at 162. Clearly, such a reader of ordinary intelligence might so conclude. But it is uncertain whether he would include oral-genital contacts as being within the proscription.

13. 5 M.J. at 166.

14. Of course all of the military caveats would apply, such that even if private, consensual homosexual conduct between adults is found to be protected, such acts between a superior and a subordinate, or an officer and an enlisted person, could be prohibited - just as simple heterosexual

II. Sodomy: A Societal Taboo

For centuries the societal prohibitions against sodomy have been accepted with little question. The Bible denounces homosexual buggery and bestiality but does not explicate the basis for such condemnation.¹⁵ This Biblical prohibition, like the dietary laws, may be rooted in health considerations or may be related to the ecclesiastical prohibition on sex without procreation. The Oxford English Dictionary of 1933 evidenced society's attitude towards sodomy in the following examples of the word's usage in literature:

The abominable sinne of Sodomie . . . is plainly forbidden [1577, Bullinger's Decades (1592) 236].

Wicked Sodomy, a sin so hateful to Nature it self that she abhors it [1650 Bulwer Anthropomet 198].

14. (Continued)

fornication is prohibited in such situations - to preserve the integrity of the rank and promotion structure. Further, any analysis of private, consensual homosexual conduct in the military must consider the special military interests set forth in note 111, infra. Questions which would have to be addressed in such an analysis of private, consensual homosexual conduct include: why the infrequent decision to utilize criminal rather than administrative channels for elimination of homosexuals is made; the implications of this seeming preference for administrative separation; and the effect of Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), where the Air Force was required to present a reasoned explanation of its decision to discharge administratively Sergeant Matlovich for admitted homosexuality, in light of an Air Force regulation (AFM 39-12 [change 4] Oct 21, 1970, para. 2-103) permitting - but not requiring - retention of homosexuals.

15. See, e.g., Genesis 19:1-11; Exodus 22:19; Leviticus 18:22-23; Deuteronomy 23:17. Romans 1:18-27 implies that unnatural sexual relations (in context, homosexual relations) are a manifestation of and result from "godlessness and the wickedness of men who suppress the truth . . . (and, rejecting God, have) exchanged the glory of the immortal God (for idolatry)." This Biblical observation does not address heterosexual conduct at all. The Kama Sutra of Vatsyayana, rather than prohibiting certain acts, as does the Bible, extols the virtues of erotic behavior between adults in the institution of marriage. Translation of Burton, 1883.

In the military, the Court of Military Appeals has held that sodomy involves moral turpitude, but declined to discuss the nature of the "depravity."¹⁶ The Air Force Board of Review once described cunnilingus as "detestable and abominable."¹⁷

III. Development of the Right of Privacy

A. The Supreme Court

The constitutional right of privacy was first articulated by Mr. Justice Brandeis in 1928.¹⁸ No further mention was made of this constitutional right until 1965 when it was cited by the Supreme Court in striking down a law prohibiting the use of contraceptives in Griswold v. Connecticut.¹⁹ Since Griswold, the Supreme Court has expanded the right of privacy to include the right of adults to possess obscene material privately,²⁰ the right of single persons to obtain contraceptives,²¹ and the right of a woman to terminate her pregnancy before the

16. United States v. Hooper, 9 USCMA 637, 647, 26 CMR 417, 427 (1958).

17. United States v. Barnes, 2 CMR 797, 799 (AFBR 1951).

18. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See quotation at note 1, supra.

19. 381 U.S. 479 (1965). Mr. Justice Black suggested, in his dissent in Griswold v. Connecticut, 381 U.S. 479, 510 n.1 (1965), that the idea of a right of privacy first surfaced in Brandeis and Warren, The Right to Privacy, 4 Harv. L. Rev. 193.

20. Stanley v. Georgia, 394 U.S. 557 (1969).

21. Eisenstadt v. Baird, 405 U.S. 438 (1972).

fetus attains viability.²² Unlike Griswold which relied on the marital relationship to identify the right of privacy, these subsequent decisions, which touch on various aspects of human sexuality and its expression, have found the right of privacy to be an individual right.

In Griswold, the Court grounded the right of privacy in the concept "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."²³ The opinion in Griswold, and the concurrences, mentioned the first, third, fourth, fifth, ninth and fourteenth amendments as protecting various aspects of the right of privacy.²⁴

In Stanley v. Georgia²⁵ the Court relied on the first amendment, as made applicable to the states through the fourteenth amendment, in holding that a state may not prohibit mere private possession by an individual of obscene materials. The right of unmarried persons to purchase contraceptives enunciated in Eisenstadt v. Baird²⁶ was grounded on the equal protection clause of the fourteenth amendment.²⁷

22. Roe v. Wade, 410 U.S. 113 (1973).

23. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

24. The dissenters accused the majority of engaging in judicial legislation of the type discredited in Lochner v. New York, 198 U.S. 45 (1905).

25. 394 U.S. 557 (1969).

26. 405 U.S. 438 (1972).

27. 405 U.S. at 443. Justice Douglas felt that the law was a violation of First Amendment rights. 405 U.S. at 455. Justices White and Blackman felt the record itself did not support the conviction. 405 U.S. at 460. The Chief Justice, in dissent, attacked the majority for engaging in judicial legislation through the vehicle of substantive due process. 405 U.S. at 465.

The abortion decisions, Roe v. Wade²⁸ and Doe v. Bolton,²⁹ were bottomed on the due process clause of the fourteenth amendment, with the result that abortion can now be regulated only when a compelling state interest is shown for that regulation. During the first trimester of pregnancy the woman's interest per se outweighs that of the state.³⁰ From the end of the first trimester until the fetus attains viability, the state may regulate abortion procedure in ways reasonably related to maternal health, but the woman's interest still presumptively outweighs the interest of the state. Only after the fetus attains viability does the state's interest outweigh the woman's to the extent that it may prohibit all abortions except when the mother's life or health is endangered.³¹

In California v. Larue³² Justice Marshall explicitly stated in dissent that he has "serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults." Larue was not a sodomy case, however, but decided the question of whether a state could prohibit naked and lewd entertainment when issuing a liquor license.

B. Inferior Federal Courts

Lower federal courts have used the right of privacy to prohibit state regulation of certain consensual sexual acts. In Cotner v. Henry,³³ private consensual marital relations were said to be protected

28. 410 U.S. 113 (1973).

29. 410 U.S. 179 (1973).

30. 410 U.S. 113, 163, 164 (1973).

31. Id.

32. 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissenting).

33. 394 F.2d 873, 875 (7th Cir. 1968), cert. denied, 393 U.S. 847 (1968).

by the right of privacy from regulation by state criminal law. In Buchanan v. Batchelor,³⁴ a three-judge District Court held that private, consensual acts of married couples could not be regulated by the state. A different judge of the same District Court has recently expanded this rule, holding that a Texas statute which prohibits deviant sexual intercourse between consenting homosexuals, but not between consenting adults of the opposite sex, violates the right of privacy and the equal protection clause.³⁵

In Lovisi v. Slayton,³⁶ a District Court ruled that while sexual acts between consenting adults in private are protected by the constitutional right of privacy, petitioners had forfeited that right by allowing their teenaged children to find the explicit photographs taken of these acts. Although the Court of Appeals affirmed the District Court's ruling, emphasizing that petitioners had forfeited the right of privacy by allowing another male to be present and to participate in the acts, the court also stated that private marital intimacies are protected.³⁷

34. 308 F.Supp. 729 (N.D. Tex. 1970), vacated and remanded for reconsideration on jurisdictional grounds sub nom. Wade v. Buchanan, 401 U.S. 989 (1971).

35. Baker v. Wade, ___ F.Supp ___, 51 U.S.L.W. 2149 (N.D. Tex. 17 Aug. 1982).

36. 363 F.Supp 620 (E.D. Va. 1973), aff'd 539 F.2d 349 (4th Cir. 1976), cert. denied sub nom. Lovisi v. Zahradnick, 429 U.S. 977 (1976).

37. Id.

Two decisions relied upon by Judge Cook in Scoby merit special attention. The first is Doe v. Commonwealth's Attorney for City of Richmond.³⁸ This was a civil action in which prayers for a declaratory judgment invalidating a Virginia statute which expressly prohibited consensual sodomy and for an injunction precluding prosecution under that statute were denied.³⁹ Although the District Court in its opinion addressed the constitutionality of the statute and concluded that it was not invalid, the Court's disposition included no declaration of constitutionality, but merely denied the relief requested and dismissed the complaint. A summary affirmance of this dismissal without explication followed in the United States Supreme Court. This disposition by the Supreme Court does not necessarily signify approval of the lower court's reasoning.⁴⁰ Apart from the limited precedential value of a summary affirmance,⁴¹ the petitioners in Doe presented no evidence of threatened prosecution under the Virginia statute--a factor arguably relevant to their standing to maintain the action.⁴² Thus, the Supreme Court's affirmance of the District Court's dismissal of the action may have

38. 403 F.Supp 1199 (E.D. Va. 1975), aff'd mem, 425 U.S. 901 (1976). The District Court relied in part upon State v. Lair, 62 N.J 388, 301 A.2d 748 (1973), a decision later questioned by the New Jersey Court. See text at notes 66-69, infra.

39. 403 F.Supp. 1199 (E.D. Va. 1975).

40. Fusari v. Steinberg, 419 U.S. 379, 391-92 (1976) (Burger, C.J., concurring).

41. See, e.g., Edelman v. Jordan, 415 U.S. 651, 671 (1974); Hart and Wechsler, Federal Courts and the Federal System (1977 Supp.), at p.112 n.1.

42. See O'Shea v. Littleton, 414 U.S. 488 (1974) (actual case or controversy necessary to invoke power of federal courts, and general assertions speculating that petitioners may be harmed in the future are insufficient). See also Younger v. Harris, 401 U.S. 37, 41 (1971) (court expressed no view as to whether federal courts could act when no prosecution pending in state court). See also Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex. 1970), vacated and remanded for reconsideration on jurisdictional grounds sub nom. Wade v. Buchanan, 401 U.S. 989 (1971).

been predicated on the petitioners' lack of standing. Subsequent to this affirmance, six justices of the Supreme Court noted that they had not yet "definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes from regulating such behavior among adults."⁴³ Accordingly, Doe is of questionable precedential value.

Next, attention must be directed to Judge Cook's citation of Enslin v. Bean,⁴⁴ a denial of certiorari by the Supreme Court. It is well settled that a denial of certiorari imports no expression of opinion on the merits of a case,⁴⁵ especially when, as here, the decision of the District Court was unreported, and the Court of Appeals affirmed summarily.⁴⁶

C. State Courts

Since decisions in Roe v. Wade⁴⁷ and Eisenstadt v. Baird⁴⁸ implicitly expanded the right of privacy, state courts have begun to reassess their laws prohibiting sodomy in light of this right. Arkansas was apparently the first in Carter v. State,⁴⁹ That court declined

43. Carey v. Population Servs. Int'l., 431 U.S. 678, 688 n.5 (1977). See also note 17 at page 694, where the statement is repeated and a plurality concurs. Only Justice Rehnquist disputed this statement. 431 U.S. at 698 n.2 (Rehnquist, J., dissenting).

44. Cert. denied, 436 U.S. 912 (1978).

45. See, e.g., Sunal v. Large, 332 U.S. 174, 181 (1947).

46. Enslin v. Bean, 436 U.S. 912 (1978), denying cert. to Enslin v. Wallford, 565 F.2d 156 (4th Cir. 1977) (summary affirmance of unreported decision of District Court of North Carolina).

47. 410 U.S. 113 (1973).

48. 405 U.S. 438 (1972).

49. 255 Ark. 225, 500 S.W.2d 368 (1973).

to find that a constitutional "right of privacy in matters of intimate personal preference" could be inferred from Griswold, Stanley, Roe, Eisenstadt, and other decisions of the Supreme Court.⁵⁰ Oklahoma, in Canfield v. State,⁵¹ decided after Roe and Eisenstadt, made no mention of these cases or their impact on the law, citing instead its 1971 decision rejecting a similar claim in that state.⁵² Based upon outdated case law, Canfield is of little use in determining the contemporary boundaries of the right of privacy.

The next court to consider the issue was the Supreme Judicial Court of Massachusetts, which stated in Commonwealth v. Balthazar⁵³ that a law prohibiting "unnatural and lascivious acts"⁵⁴ must be construed to be inapplicable to private, consensual conduct of adults.⁵⁵ The Iowa Supreme Court, ruling on Iowa's sodomy statute⁵⁶ in State v. Pilcher,⁵⁷ held that it is "unconstitutional as an invasion of fundamental rights, such as the personal right of privacy, to the extent [the state] attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex."⁵⁸ The Iowa Court's decision was based upon the sanctity of the marital relationship noted in Griswold, and the Equal Protection ration-

50. 255 Ark. at 229, 500 S.W.2d at 371.

51. 506 P.2d 987 (Okla. Cr. 1973).

52. Warner v. State, 489 P.2d 526 (Okla. Cr. 1971).

53. 366 Mass. 298, 318 N.E.2d 478 (1974), rev'd on other grounds sub nom. Balthazar v. Superior Court of Mass., 578 F.2d 698 (1st Cir. 1978).

54. Mass. Ann. Laws Ch. 272 § 35 (Michie/Law. Co-op. 1972).

55. 366 Mass. at 302, 318 N.E.2d at 481. This view was reaffirmed in Commonwealth v. Gallant, 373 Mass. 577, 583, 369 N.E.2d 707, 713 (1977), without the limiting language of Balthazar, suggesting that the Court has accepted an expansive view of the right of privacy.

56. Iowa Code Ann. § 705.1 (West 1978).

57. 242 N.W.2d 348 (Iowa 1976).

58. 242 N.W.2d at 359.

ale of Eisenstadt.⁵⁹ Similarly, the Supreme Court of Pennsylvania, relying on the equal protection clause and Eisenstadt, invalidated that Commonwealth's voluntary sodomy statute⁶⁰ in Commonwealth v. Bonadio,⁶¹ noting particularity that "the marital status of voluntarily participating adults would bear no rational relationship to whether a sexual act should be legal or criminal."⁶² The New York Court of Appeals invalidated that state's sodomy prohibition⁶³ in People v. Onofre,⁶⁴ resting its decision squarely on the individual's "right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint -- . . . referred to . . . as 'freedom of conduct'."⁶⁵ The New York Court found that the acts in question were protected by the right of privacy and that by virtue of the equal protection clause unmarried adults, be they heterosexual or homosexual, could not be denied the right to engage in such acts. Finally, though rendered academic by its legislature's repeal of the state's sodomy law,⁶⁶ the Supreme Court of New Jersey in State v.

59. 242 N.W.2d at 358-59.

60. Pa. Cons. Stat. Ann. § 3124 (Purdons 1973). The law prohibits voluntary deviate sexual intercourse.

61. 490 Pa. 91, 415 A.2d 47 (1980).

62. 490 Pa. at 96, 415 A.2d at 51. The concurring opinions of Chief Judge Eagen and Judge Larsen limited the holding of the Court to a finding that the statute violated the constitutional right of equal protection. 490 Pa. at 97, 415 A.2d at 52 (concurring opinions of Eagen, C.J., and Larsen, J.).

63. N.Y. Penal Law § 130.38 (McKinney 1975).

64. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.2d 947 (1980).

65. 51 N.Y.2d at 485, 415 N.E.2d at 939, 434 N.Y.2d at 949.

66. N.J. Stat. Ann. § 2A:143-1 (repealed 1978).

Saunders⁶⁷ questioned the validity of its holding in State v. Lair, where it had sustained against a constitutional challenge the state's prohibition of all sodomy save that within marriage.⁶⁸ In Saunders, the Court found that the state could not constitutionally prohibit fornication between consenting adults and in a footnote questioned the continued vitality of its holding in Lair.⁶⁹

In 1980, the Court of Special Appeals of Maryland rejected, in Kelly v. State,⁷⁰ a contention that either the right of privacy or the equal protection clause protected private acts of fellatio as between consenting adults of the opposite sex. The Maryland Court relied upon the District Court's opinion in Doe v. Commonwealth's Attorney,⁷¹ despite the limited holding of that case⁷² and two decisions of intermediate New York Courts, since overruled by People v. Onofre.⁷³ Indiana, New Mexico, and Washington, sources of four decisions cited as supporting authority by the Maryland Court,⁷⁴ have since decriminalized these acts.⁷⁵

67. 75 N.J. 200, 381 A.2d 333 (1977).

68. 62 N.J. 388, 301 A.2d 748 (1973).

69. 75 N.J. at 217 n.7, 381 A.2d at 341 n.7. See also State v. Ciuffini, 164 N.J.Super 145, 395 A.2d 904 (1978).

70. 45 Md.App. 212, 412 A.2d 1274 (1980).

71. 403 F.Supp. 1199 (E.D.Va. 1975).

72. Id. at 1203. See text accompanying notes 42-47, supra.

73. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980). The decisions relief upon by the Maryland Court were People v. Mehr, 87 Misc.2d 257, 383 N.Y.S.2d 798 (1976) and People v. Rice, 87 Misc.2d 257, 383 N.Y.S.2d 799 (1976), aff'd on other grounds, 41 N.Y.2d 1018, 363 N.E.2d 1371, 395 N.Y.S.2d 626 (1977).

74. Dixon v. State, 256 Ind. 266, 268 N.E.2d 84 (1971); State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976); Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (1971); State v. Rhinehart, 70 Wash.2d 649, 424 P.2d 906, cert. denied, 389 U.S. 832 (1967).

75. Ind. Code § 35-41-4-2 (1976); N.M. Stat. Ann. 30-9-10 to 13 (1975); Wash. Rev. Code §§ 9A.88-.100 (1975).

North Carolina's Supreme Court considered and rejected due process privacy claims and equal protection claims in State v. Poe.⁷⁶ That Court interpreted Eisenstadt only as striking down a statute which allowed married individuals but not unmarried persons to purchase and use contraceptives, and thus served as a per se ban on use of contraceptives by single people. This literal reading of Eisenstadt seemingly ignores the plain fact that Eisenstadt broadened the right of privacy noted in Griswold and Stanley, and that Eisenstadt itself has been extended by Roe and Carey.

D. State Legislative Action

Wholly apart from decisional law based upon the federal and various state constitutions, a majority of state legislatures have recognized that governments should not purport to regulate private, consensual heterosexual acts between adults.⁷⁷ Indeed, few states now assert

76. 40 N.C. App. 385, 252 S.E.2d 843 (1979).

77. Alaska Stat. § 11-41.410-.470 (1978); Cal. Penal Code § 276 (West 1975); Colo. Rev. Stat. § 18-3-402 (1971); Conn. Gen. Stat. Ann. §§ 53a-65, 67(c) (West 1969); Del. Code Ann. tit. 11 §§ 772-767 (1973); Hawaii Rev. Stat. § 707-733-5 (1972); Ill. Rev. Stat. 38 §§ 11-2 and 3, 124-1 (1961); Ind. Code § 35-41-4-2 (1976); Iowa Code, § 705 (1978); Kan. Crim. Code Ann. § 21-3505 (Vernon 1974); Ky. Rev. Stat. § 510 (1975); Me. Rev. Stat. Ann. tit. 17A, § 251-5(1975); Mo. Rev. Stat. § 566.060 (1978); Mont. Code. Ann. § 45-5-505 (1975); Neb. Rev. Stat. § 28-800 (1977); N.H. Rev. Stat. Ann. § 632-A:2 (1975); N.M. Stat. Ann. 30-9-10 to 13 (1971); Ohio Rev. Code Ann. § 2907.01-.09 (Page 1972); Or. Rev. Stat. §§ 163.305-.465 (1971); R.I. Gen. Laws § 11-37 (1969); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1976) (only buggery proscribed); S.D. Comp. Laws Ann. § 22-22 (1976); Tex. Penal Code Ann. § 21.06 (1974); Vt. Stat. Ann. § 3251-5 (1977); Wash. Rev. Code §§ 9A.88-.100 (1975); W.Va. Code § 61-8-B (1976); Wyo. Stat. § 6-4-301 (1977).

the power to prohibit private, consensual, heterosexual coitus.⁷⁸ This fact is especially interesting given the non-criminality of fornication in the military.⁷⁹ Notable also is the Model Penal Code of the American Law Institute, which consciously omitted a subsection which would have made consensual sodomy a misdemeanor.⁸⁰ The Massachusetts Court noted such change in Balthazar, observing that community standards are neither monolithic nor static, but may evolve over time.⁸¹

78. Only eleven states prohibit private, consensual fornication as such. Ala. Code tit. 13, § 8-1 (1975); Ga. Code Ann. § 16-6-18 (1977); Idaho Code § 18-6603 (1972); Ill. Ann. Stat. Ch. 38, § 11-8 (Smith-Hurd 1978); N.C. Gen. Stat. § 14-184 (1969); R.I. Gen. Laws § 11-6-3 (1969); S.C. Code Ann. § 16-15-60 (Law. Co-op. 1976); Utah Code Ann. § 76-7-104 (1978); Va. Code § 18.2-344 (1975); W.Va. Code § 61-8-3 (1977); Wis. Stat. Ann. 944.15 (West Supp. 1978) Two states prohibit habitual fornication. Miss. Code Ann. § 97-29-1 (1972); N.D. Cent. Code § 12.1-20-08 (1976). Florida's law prohibiting fornication has been voided by that State's Supreme Court. Purvis v. State, 377 So.2d 674 (Fla. 1979). Massachusetts' law prohibiting fornication has been effectively voided by the Commonwealth's Supreme Judicial Court. Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974), rev'd on other grounds sub nom. Balthazar v. Superior Court of Mass., 578 F.2d 698 (1st Cir. 1978).

79. United States v. Snyder, 1 USCMA 423, 427, 4 CMR 15, 19 (1952).

80. The omitted subsection is § 207.5 Subd. [4]. ABA-ALI Model Penal Code, Proposed Official Draft, § 213.2, Status of Section, pp. 145-146; Tent. Draft No. 4, pp.93, 276.

81. 366 Mass. at 301, 318 N.Ed.2d at 480. This change may also be noted in the many studies on the subject of sex, including: Kinsey, et al. Sexual Behavior in The Human Male (1948), and Sexual Behavior in The Human Female (1953); Masters and Johnson, Human Sexual Response (1966), Homosexuality in Perspective (1979), Human Sexual Inadequacy (1980); Masters, et al, The Pleasure Bond (1976); Hite, The Hite Report (1976).

While prohibition of homosexual acts is still accepted in the majority of jurisdictions,⁸² it seems clear that the law will eventually evolve to protect private, consensual homosexual acts, either as a result of the continuing development of the right of privacy, or on equal protection grounds.⁸³

E. Accepted Analytic Framework for Constitutional Determination

From the foregoing cases, the following principles emerge. First, courts will look to the individuals involved. If they are husband and

82. Ala. Code § 13A-6-65(a)(3) (1978); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1977); Ark. Stat. Ann. § 41-1813 (1977); Fla. Stat. Ann. § 800.02 (West 1976); Ga. Code Ann. § 26-2002 (1977); Idaho Code § 18-6605 (1978); Kan. Stat. Ann. § 21-3505 (1974); Ky. Rev. Stat. § 510.100 (1975); La. Rev. Stat. Ann. §§ 14:89, 14:89.1 (West 1978); Md. Ann. Code §§ 27-553, 27-554 (1977); Mich. Comp. Laws §§ 750.158, 750.338, 750.338a (1968); Minn. Stat. Ann. § 609.293 (West 1978); Miss. Code Ann. § 97-29-59 (1972); Mo. Ann. Stat. § 566.090 (Vernon 1978); Mont. Code Ann. § 45-5-505 (1975) (1975); Nev. Rev. Stat. § 201.190 (1977); N.C. Gen. Stat. § 14-177 (1969); Okla. Stat. Ann. tit. 21, § 866 (West 1951); R.I. Gen. Laws § 11-10-1 (1969); S.C. Code Ann. § 16-15-120 (Law Co-op. 1976); Tenn. Code Ann. § 39-707 (1975); Utah Code Ann. § 76-5-403 (1977); Va. Code § 18.2-361 (1978); Wis. Stat. Ann. § 944.17 (West 1978). The similar statutes in New York, Pennsylvania and Texas have been held unconstitutional. See text accompanying notes 35, 60-65, supra.

83. See, e.g., Baker v. Wade, ___ F.Supp. ___, 51 U.S.L.W. 2149 (N.D. Tex. 17 Aug. 1982); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980). If such acts by homosexuals do become accepted by a significant majority of the states, and this is the direction of the courts and legislatures, a question arises concerning how compelling the showing of "military necessity" must be to justify the significant penalty of disqualifying homosexuals from military service based upon their status as such? A more difficult question is whether this "military necessity" could be sufficiently compelling, even amid societal acceptance, to allow application of criminal sanctions to such acts?

wife and if the sodomy occurred consensually and in private, few courts will even address the issue of a legitimate state interest;⁸⁴ under Griswold there is none.

Second, courts will look to the conduct involved. The more intimate the behavior, the more compelling must be the state's interest to interfere and proscribe.⁸⁵ One District Court has stated:

It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of privacy.⁸⁶

Third, the place and time of the challenged activity must be examined.⁸⁷ The greater the expectation of privacy of the individuals involved, the greater must be the state interest to allow regulatory intrusion.

84. One court which has implied that it might so inquire is North Carolina's. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (1979). Judge Cook intimated the same, although he couched this in terms of application to the unique needs of the military community. United States v. Scoby, 5 M.J. 160, 166 (CMA 1978).

85. For example, neither legislatures nor courts have had any difficulty finding a compelling state interest when the situation involves sexual abuse of a child, even if consenting. See, e.g., Iowa Code § 705.1 (1978), and Commonwealth v. Gallant, 373 Mass. 577, 369 N.E.2d 707 (1977).

86. Lovisi v. Slayton, 363 F.Supp. 620, 625 (E.D. Va. 1973), aff'd 539 F.2d 349 (4th Cir.). cert. denied sub nom. Lovisi v. Zahradnick, 429 U.S. 977 (1976).

87. Even sodomy occurring in "public" may be protected if entry is sufficiently restricted. See Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

Fourth, the court must determine whether any potential for harm exists to the individual, be it physical or moral, and to the community, be it societal or moral, flowing from the acts in question and whether that potential harm is sufficient to warrant state intrusion.

Fifth, the court must consider the level of intrusion which would be necessary to regulate the acts. In this instance, full enforcement of the law would necessitate the state's prying between the bed covers of married and unmarried couples during sexual intimacy.

Sixth, if married couples may engage in certain acts, the court must discern whether there is any rational basis for discriminating against unmarried couples by criminalizing their performance of those acts.

Finally, a balancing test must be applied, comparing the primary rights and interests of the individual with those compelling interests of the state. Most courts have required the states to overcome a significant hurdle in order to justify any intrusion into the private affairs of consenting adults.⁸⁸

IV. The Scoby Decision

Scoby involved a soldier convicted of homosexual fellatio in a public place, observed by others. In writing his opinion, Judge Cook went far beyond these limited facts to discuss the constitutionality of Article 125 in general, even as it applied to the private, consensual acts of husband and wife.⁸⁹ As noted above, Judge Perry only concurred in the result,⁹⁰ with no further comment, and Chief Judge Fletcher limited his concurrence to the facts of the case.⁹¹ Yet despite the

88. See, e.g., Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974), rev'd on other grounds sub nom. Balthazar v. Superior Court of Mass., 573 F.2d 698 (1st Cir. 1978); State v. Pilcher, 242 N.W.2d 248 (Iowa 1976); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

89. 5 M.J. at 165-66.

90. 5 M.J. at 166.

91. Id.

limited precedential value of Judge Cook's opinion, analysis of that opinion in light of developing law will assist in making a final determination of the constitutionality of Article 125.

Judge Cook recognized that if any sexual conduct was to be protected by the right of privacy, it must perforce occur in private.⁹² This is in accord with prior military practice, inasmuch as public fornication has been held to be proscribed,⁹³ while private fornication has been stated to be no offense under military law.⁹⁴

Judge Cook also noted that, in certain areas, differences in treatment are permitted as between soldiers and civilians.⁹⁵ No conclusion was reached, however, as to whether there existed any valid governmental reasons for prohibiting in the military sexual conduct acceptable between civilians.⁹⁶ Instead, Judge Cook concluded that since the "weight" of judicial authority permitted states to regulate even the private, consensual, heterosexual conduct of adults, no different result would obtain in the military.⁹⁷

As noted earlier, two cases relied upon by Judge Cook -- Doe v. Commonwealth's Attorney⁹⁸ and Enslin v. Bean⁹⁹ -- are of limited precedential value. A third, State v. Lair,¹⁰⁰ was later questioned by

92. 5 M.J. at 164.

93. United States v. Berry, 6 USCMA 609, 614, 20 CMR 325, 330 (1950).

94. Id. United States v. Snyder, 1 USCMA 423, 427, 4 CMR 15, 19 (1952).

95. 5 M.J. at 164.

96. Interestingly, the military apparently decriminalized private fornication long before most United States civilian jurisdictions.

97. 5 M.J. at 166.

98. 403 F.Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976).

99. Cert. denied, 436 U.S. 912 (1978). See note 46, supra.

100. 62 N.J. 388, 301 A.2d 748 (1973).

the deciding New Jersey Supreme Court¹⁰¹ before the state legislature repealed the statute in question. The last case relied upon, Lovisi v. Slayton,¹⁰² stands essentially for the proposition that public sexual activities are not protected. While Lovisi contains language suggesting that only private marital sodomitic acts are protected, this dicta resulted from an expansive reading of the effect of the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney.¹⁰³ This interpretation of Doe, as discussed previously, is questionable at best.¹⁰⁴

No contrary authority, i.e. Commonwealth v. Balthazar,¹⁰⁵ or State v. Pilcher,¹⁰⁶ was discussed by Judge Cook. Further, the case Judge Cook relied upon to reject the equal protection argument of unmarried versus married heterosexual couples, State v. Lair,¹⁰⁷ has been shown to be of doubtful value as precedent.¹⁰⁸

In his discussion, Judge Cook admitted the possibility that married couples could engage in private, consensual sodomitical practices with impunity.¹⁰⁹ Once this right is established, however, the right of unmarried heterosexual couples to do the same must inevitably follow,

101. State v. Saunders, 75 N.J. 200, 217 n.7, 381 A.2d 333, 341 n.7 (1977).

102. 363 F.Supp. 620 (E.D. Va. 1973); aff'd, 539 F.2d 349 (4th Cir.), cert. denied sub nom. Lovisi v. Zahradnick, 429 U.S. 977 (1976).

103. 403 F.Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976).

104. See text accompanying notes 38-43, supra.

105. 366 Mass. 298, 318 N.E.2d 478 (1974), rev'd on other grounds sub nom. Balthazar v. Superior Court of Mass., 573 F.2d 698 (1st Cir. 1978).

106. 242 N.W.2d 348 (Iowa 1976).

107. 62 N.J. 388, 301 A.2d 748 (1973).

108. See text accompanying notes 66-69, supra.

109. 5 M.J. at 165-166.

since "[t]he marital status of voluntarily participating adults would bear no rational relationship to whether a sexual act should be legal or illegal."¹¹⁰

The same analysis applies to private, homosexual sodomitical acts between consenting adults. Indeed, the evolution of the right of privacy has already extended its protection to such acts in certain jurisdictions. Nonetheless, the perceived special needs of the armed forces will operate to prevent or to delay this process in the military.¹¹¹ The close living arrangements, with their almost complete lack of privacy, require that soldiers' attitudes towards homosexuality be considered before such a dramatic step is taken. It should be considered whether the special trust necessary before a unit can achieve its full combat potential can be attained if tensions exist due to a soldier's status as a homosexual.

¹¹⁰. Commonwealth v. Bonadio, 490 Pa. 91, 96, 415 A.2d 47, 51 (1980).

¹¹¹. Enclosure 3 of Department of Defense Directive Number 1332.14, Enlisted Administrative Separations (28 Jan. 1982), sets forth the current army policy concerning homosexuality in the army. This directive states:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military service; and to prevent breaches of security.

(Continued)

V. Conclusion

For the right of privacy to mean anything it must be an individual right, rather than the family-based right suggested by courts which have upheld anti-sodomy laws. A family-based right would bolster, at the expense of single persons, the worth of those who choose to marry. This is unacceptable, for the human significance of those who do not marry is reduced. In the same way the individual significance of husbands and wives is reduced vis a vis the marital unit of which they are a part. In the latter instance, the individual becomes an instrument for the attainment of the "greater" societal goal of the family unit.¹¹²

Rights belong to individuals, not institutions such as marriage. Individual adults should not be penalized for not marrying by being denied the right to be free from governmental scrutiny of their personal

111. (Continued)

Assuming the legitimacy of the military's assertions that homosexuals impair mission accomplishment, are the means -- exclusion of all homosexuals -- the least intrusive to insure the necessary military preparedness "where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted). An issue which the courts will have to address is whether the harsh measure of trial by court-martial is constitutionally permissible if the less intrusive alternative of administrative separation is available. Certainly the analysis changes when other societal norms of the armed forces are violated. These include for example public acts, sexual favors extracted by superiors from subordinates, and similar acts which adversely affect the command structure of the military. Of course, private heterosexual conduct may also run afoul of these norms.

112. See Eichbaum, Privacy and Antonomy, 14 Harv. Civ. Rts. Civ. Lib. L. R. 361 (1969).

sexual conduct. Such a prohibition would suggest that the "majority"¹¹³ is insensitive to "discrete and insular minorities"¹¹⁴ which do not, for whatever reasons, choose to marry.¹¹⁵

With respect to private consensual, heterosexual sodomy by adults, even in the military, the evolutionary direction of the law is clear: such acts are protected.¹¹⁶ No compelling state interest has been postulated which would allow the government to engage in such a fundamental intrusion of an individual's private life, and so Article 125 must be interpreted to be inapplicable to the private, consensual, heterosexual acts of adults.¹¹⁷

113. Of course it is problematic as to whether the majority of American citizens actually disapprove of these acts. See note 81, supra.

114. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

115. As one author has stated:

For the Court to tell active homosexuals that a right of privacy will protect them in traditional marital and family decisions is reminiscent of Anatole France's famous irony: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Eichbaum, *Privacy and Autonomy*, 14 *Harv. Civ. Rts. Civ. Lib. L. R.* at 367, quoting A. France, *Le Lys Rouge* 117-18 (1894).

116. The same trend exists as to similar homosexual conduct in civilian jurisdictions.

117. Does this result render the statute unconstitutional for overbreadth? See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). Do any military exigencies exist which would require different constitutional analysis of an overbreadth question? See *Parker v. Levy*, 417 U.S. 733 (1976). Does the presence of a consenting third person require a different result? Compare *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) with *Lovisi v. Slayton*, 359 F.2d 349 (4th Cir. 1976). These questions are beyond the scope of this article.

ETHICS ROUND TABLE

In this installment of Ethics Round Table, the staff of The Advocate examines the ethical responsibilities attending the failure of defense counsel to object at trial to a specification that does not allege an offense.

You have been detailed as defense counsel for Private Taylor who has been charged with robbery. Private Taylor has confessed to you that he committed the charged offense and after considering his alternatives has decided to plead guilty. The day before trial you discover that the specification in the charge sheet fails to allege the offense of robbery because it does not state that Private Taylor took property from the person or the presence of the victim. You expect the error to be corrected at trial. The next day at trial, after you waive reading of the charges, the trial counsel inserts the specification as set forth in the charge sheet into the record. As the trial proceeds you realize that neither the trial counsel nor the military judge has discovered the error in the specification. You are fairly certain that if you now raise an objection to the specification, the trial counsel will amend the specification and have the charges resworn and re-referred. However, you believe that if the error goes uncorrected at trial and Private Taylor is found guilty of robbery, the appellate court may set aside the findings of guilty of robbery, enter findings of guilty for some lesser included offense and may either reassess Private Taylor's sentence or order a rehearing thereon. What are your ethical obligations?

The dilemma faced by defense counsel is whether to bring the defect in the specification to the military judge's attention so that it may be corrected at trial or to say nothing and rely on the appellate court to correct the error. In evaluating the ethical obligations in the instant case, defense counsel should keep in mind that as a lawyer his duty, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. See ABA Code of Professional Responsibility, [hereinafter cited as ABA Code], EC 7-19.

Guidance as to what constitutes zealous representation within the bounds of the law is found in DR 7-101(A)(1) of the ABA Code which provides:

- (A) A lawyer shall not intentionally:
 - (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . .

To determine the proper course of action in this case, defense counsel must resolve two basic issues. First, he must identify the course of action which would best serve the interests of Private Taylor. Second, he must ascertain whether any ethical obligations require him to modify or reject that course of action. If no ethical obligations constrain the proposed course of action, then defense counsel is bound by the ABA Code to pursue that course of action in his representation of Private Taylor. See ABA Code, DR 7-101(A)(1). See also ABA Code EC 7-1 and 7-9.

In the hypothetical posed above, defense counsel would most likely advance Private Taylor's interests by not objecting to the defective specification. If no objection is raised at trial, the Court of Military Review may find that the specification fails to state an offense¹ and grant Private Taylor some relief on appeal. Alternatively, if an objection is raised at trial, the trial counsel will most likely amend the specification and have the charges re-referred.² The error for appeal

1. See United States v. Hunt, 7 M.J. 985 (ACMR 1979). The Army Court of Military Review, however, has recently reaffirmed that the failure to object to the sufficiency of a specification lessens the government's burden on appeal. See United States v. Schwarz, 12 M.J. 650, 652 (ACMR 1981). Despite this holding, the possibility that some relief may be granted still exists.

2. The identification of the course of action which will maximize the benefits to your client is inextricably tied to defense counsel's assessment of the trial counsel's probable course of action. If it is probable that trial counsel will not move to amend the specification but will proceed on a charge of a lesser included offense, then defense counsel's decision as to the course of action which best serves his client may be altered. The determination of the course of action that is most advantageous to his client is in the first instance a tactical decision.

will then be eliminated. Accordingly, in the present case defense counsel is not faced with a situation where a failure to object would prejudice the accused's case at trial. Instead, by not objecting to the specification, defense counsel merely preserves the opportunity for Private Taylor to gain some relief from the appellate court for the government's error in drafting the specification. Having resolved that Private Taylor's interests will most likely be advanced by raising no objection to the specification, defense counsel must still ascertain whether any ethical obligations require him to inform the court of the error in the specification.

Several preliminary points should be noted. This is not a case where the defense counsel has made an affirmative misrepresentation. See ABA Code DR 7-102(A)(5). Nor is this a case where defense counsel's failure to object may be characterized as an action taken merely to harass or maliciously injure another. See ABA Code DR 7-102(A)(1). The defense counsel has chosen not to object because his client may ultimately benefit from his silence. At most, defense counsel is guilty of inaction. The relevant question, then, is whether defense counsel's inaction in this case is a violation of his ethical obligations.³

Disciplinary Rule 7-102(A)(3), directs that:

- (A) In his representation of a client, a lawyer shall not:
 - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

3. Although the OTJAG Professional Responsibility Advisory Committee has not considered the ethical problems associated with the hypothetical posed by this article, the committee has addressed a similar ethical problem. The committee was asked whether defense counsel must notify the court of a possible jurisdictional defect over the accused. The committee resolved this question in the negative, finding that silence on jurisdictional matters does not constitute presentation of false evidence or perpetration of a fraud on the court. The committee also stated that it was unaware of any legal requirement for a defense counsel to reveal jurisdictional defects or to confirm the accuracy of information presented by the government. The committee, however, did condemn affirmative confirmation of inaccurate information by defense counsel. Professional Responsibility, The Army Lawyer, June 1978 at 21.

In deciding what the law requires him to reveal in his particular instance, defense counsel must ascertain which of two potentially conflicting roles he should play - the role of an officer of the court or the role of advocate. A certain basic level of cooperation among attorneys is necessary if the court is to perform its duties. Beyond this minimum point, whenever a defense counsel subordinates the substance of a case to meaningless procedure, he undermines the system's capability for achieving the purposes of the law. Such tactics should be avoided unless a paramount obligation of the defense counsel directs otherwise. Under the ABA Code, zealous representation of a client is the primary obligation of an attorney. ABA Code EC 7-1. Ethical consideration 7-9 also states that in the exercise of his professional judgment a lawyer should always act in a manner consistent with the best interests of his client. When a client's interests are at stake the ethical presumption is in favor of advocacy rather than cooperation. Without resorting to misrepresentation, a defense counsel should use all of his forensic and procedural skills on his client's behalf,⁴ even if the result is to aggravate the inefficiencies of the judicial system.

The ABA Code recognizes that our system of justice is based upon an adversarial model. ABA Code, Canon 7. As Ethical Consideration 7-1 states:

In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law, to seek any lawful objective through legally permissible means . . .

As a general proposition, it is not improper for defense counsel to seek, through the assertion of rights given by law, a lighter sentence for Private Taylor. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1429 (1978) (military lawyer may advise client to plead not guilty to gain advantage of pretrial plea bargaining). In

4. See ABA Code, DR 7-101(B)(1) (lawyer may exercise his professional judgement to waive or fail to assert a right or position of his client). See also *United States v. Ellingsworth*, 408 F.Supp. 568 (D.Del. 1975) (under DR 7101(B)(1), defense counsel is given broad discretion in conduct of his representation of an accused).

the hypothetical, defense counsel by failing to object is taking advantage of a rule of law which requires the charges against an accused to state an offense before the accused may be convicted of committing that offense. Defense counsel's silence at trial may result in Private Taylor receiving some sentence relief on appeal. This tactic may slow the wheels of justice, but any delay the tactic will cause in the disposition of the case is a price the ABA Code is willing to pay to the adversary system. The ABA Code does not impose an obligation upon defense counsel to perfect the government's case. Zealous representation of Private Taylor directs defense counsel in this instance to stand mute in the face of trial counsel's error.

SIDEBAR

Introduction

This month the sidebar contains a little of the old and the new. It offers some practical suggestions for three critical aspects of a contested trial before court members: the opening statement; some tips on case preparation; and the closing argument. Finally, the imminent start-up of mandatory urinalysis programs and its consequences are discussed.

The Opening Statement

The opening statement is a critical moment during a trial with members because it sets the stage for the entire trial. Recent studies suggest that between 65% to 90% of jurors in state criminal trials decide the issue of guilt or innocence after opening statements. Too often, however, defense counsel wait to make an opening statement until after the prosecution has rested its case without a sound tactical reason or render an opening statement that is an extended apology rather than an instrument of persuasion.

How often have counsel heard the following litany during an opening statement?

"Mr. President and Members of the Court, this is the part of the trial called an opening statement. I will try to be brief. Please remember, and I'm sure the military judge will instruct you that what I say or what CPT X, the prosecutor, says is not evidence, but merely a blueprint as to what we believe the evidence will show. Please pay careful attention to all the evidence. We believe that the evidence will show that . . ."

In this example, the defense counsel has lost a golden opportunity to capture his audience's attention and to plant the seeds that may germinate into an acquittal. During the first few minutes of your opening statement, the court members will give you their complete attention. Seize it. Don't waste time discussing the law relevant to opening statements, tell them what your theory of the case is. The opening statement is not argument, but you must tell the members your theory of the case in order for them to understand where your cross-examination and defense evidence is leading. Presenting your theory of the case is especially effective

when your statement immediately follows the prosecutor's statement. Your comments will remain fresh in the minds of the members, coloring their perception of the government's case.

The following tips may assist you in preparing a strong opening statement:

1. Don't begin with an apology or with a lengthy procedural introduction. A well chosen introduction should rivet the members' attention to your case. Don't lose them with a litany. In most jurisdictions panels of court members sit for several cases and probably are familiar with trial procedure.
2. The objective of an opening statement is to orient the court to your case. Tell the members your theory of the case and the facts you expect to elicit during direct and cross-examination which support your theory. See Para. 44g, Manual for Courts-Martial, United States, 1969, (Revised ed.) [hereinafter MCM, 1969]. Don't make the members guess where the defense is heading. Often, counsel will find that their case rests upon one main issue, for instance, the credibility of a particular witness. If that is the situation, narrow the issue for the members by telling them what is not in issue.
3. Succinctly state the facts of your case. Paint a verbal picture for the court. An effective technique is to state the facts in the form of a story, as seen through the eyes of the accused. This will help the members visualize your case and will create a "mind set" which the trial counsel will have to overcome.
4. Don't Argue. You may forcefully state the facts and your theory of the case, but save your argument for closing. For example, telling the members, that the confidential informant is a liar is argumentative. However you may tell the court that the prosecutor's entire case rests upon credibility of the informant and that the evidence will show that three of the informant's supervisors would not believe him under oath.

5. Don't overstate your case. Make sure that everything you promise to present will be backed up by a witness or documentary evidence. Failing to produce evidence that you said would be presented in your case lessens your credibility and detracts from the presentation of the defense. Be especially careful not to summarize the accused's testimony unless you are absolutely certain he will take the stand.
6. Don't read from a prepared text. Most commentators recommend that the opening statement be distilled to a one page outline. Stand directly in front of the court members (and away from the podium). Maintain eye contact throughout your presentation and avoid distracting mannerisms, such as playing with a pen or leaning on counsel table.
7. Maintain military bearing and appearance. If you appear before members wearing a sloppy uniform, with shaggy hair or with unshined brass, the members may be so distracted by your appearance that they may never really hear what you have to say.
8. Prepare both your opening statement and final argument before trial. Know what your theory of the case is before you enter the court room. As in football, have a game plan and stick with it. You can always fill out your closing argument as the case unfolds, or adapt to an unexpected development, but preparing both the opening statement and the closing argument before trial will help keep your theory and the development of the case tight and consistent.
9. Set the stage of the trial in your opening statement, but don't dilute your message with unnecessary details. Save some of your "points" for direct or cross-examination. Some facts, especially when elicited in cross-examination, will have a greater dramatic effect if they came out without prior fanfare.
10. Reveal the weaknesses in your case which will come to the members' attention. This will allow you to explain those facts in the least damaging manner, while enhancing your own credibility.

11. If possible, practice your opening statement with a lay person, such as an understanding spouse. They can tell you better than another lawyer whether you are capturing their attention and staying clear of "JAG jargon." As a quick check, ask your listener to explain the theory of your case. You may also wish to write out the theory of your case in one or two sentences above your opening statement. If you can't state it simply, the court members will be hard pressed to follow your lead.
12. Refer to your client by rank and name, or as your client, but not as "the accused;" it's too institutional and depersonalizing and reinforces an aura of guilt.

The opening statement will often be your best opportunity to seize the court member's attention and to explain the defense's theory of the case. The delivery of this statement is worthy of forethought and careful preparation.

Preparation of the Case-in-Chief

The following matters are offered as suggestions to help you better prepare your case for trial.

1. Think your case through. Are you able to state your theory of the case succinctly in one or two sentences? Your entire trial strategy should be molded around this central theme.
2. Be organized. Many counsel use a trial notebook which they rely upon for every trial.
3. Prepare your exhibits before trial. Mark them, anticipate objections, and present them in a logical sequence.
4. Anticipate your objections to the government's evidence. Don't wait for trial to dream up an objection to a government exhibit. Take advantage of the specific notice you receive under Rules 304, 316 and 321, Mil. R. Evid. to prepare your objection. Refer specifically to the Military Rules of Evidence and appropriate case law when you argue your objection. Prior preparation will also help you avoid meritless objec-

tions which will only draw the member's attention to the evidence and which may cause them to wonder what you wish to hide. Litigate critical objections prior to trial as a motion in limine.

5. Keep an index of the Military Rules of Evidence in your trial notebook for quick reference, unless rule memorization is your strong suit.
6. Know what instructions you want before the judge asks. It is embarrassing to page through the Judges' Benchbook in open court. A copy of the index to the Judges' Benchbook can help you keep track of the instructions you need during trial. Also, know your judge. For instance, some will automatically give the credibility of an informant instruction, others won't in the absence of a specific request.
7. Examine the government exhibits prior to trial to insure that they are accurate and admissible. Pay particular attention to the Article 15's, and ask your client to examine them as well.
8. Know what the maximum punishment is and don't hesitate to raise the issue of multiplicity. Multiplicity cuts three ways - multiplicity for charging, multiplicity for findings, and multiplicity for sentencing. An objection at trial will preserve any of these issues for appeal even in a guilty plea.
9. Control your client. There are certain decisions your client must make, but you must gain his confidence and provide him with sound counsel. Sell yourself and inspire his confidence. Try to prepare your client psychologically; you don't want him "stoned" on the day of trial. Remind your client to get a haircut, shave, and ready his uniform before the day of trial. If your client is improperly uniformed, object strenuously - especially if he has been in pretrial confinement. The trial counsel and company commander are responsible for insuring that the accused is in proper uniform for trial. Do not acquiesce - be adamant. Your client has an absolute right to be in the proper uniform. During the trial, keep an eye on your client. Occasionally he may begin to nod off or may glare angrily at a witness or the panel. Try to un-

obtrusively straighten him out. If it is necessary to talk with him at length, request a recess after a sufficient lapse to avoid inviting further attention to the incident.

10. Cross-examination should also be prepared prior to trial. Leave the brilliant, seemingly impromptu performances to someone else. Cull through the various pretrial witness statements and interview notes, note the key facts you plan to draw out from each witness, and have ready any prior inconsistent statement you wish to address. Write out and enumerate these facts in a logical sequence for each witness. Then you can check off each point as you proceed through cross-examination. In this way, you won't forget anything, and you can turn this into an advocacy technique as the members watch you check the points off. This technique will also assist you in resisting the temptation to: (a) ask the question to which you don't know the answer, and (b) allow the witness to regurgitate all the testimony which was already heard in direct.

Closing Argument

This is your last opportunity to address the court members. After your argument, the prosecutor may argue in rebuttal, the military judge will instruct the panel, and then the court will close to deliberate. In a contested case the closing argument can be decisive. Therefore, it is imperative that you adequately prepare your argument before the trial begins. To scratch out an argument during the trial counsel's argument and then stand up and "wing it" will usually result in a rambling, poorly organized discourse which lacks punch and direction.

There is no formula or set of phrases that will guarantee success, but the following matters should enhance the effectiveness of your argument.

1. The closing argument is not a summary. Avoid boring the panel by reciting the prosecutor's argument, spiced with editorial comment, or by restating all the evidence. Argue the facts, analyze them in the context of your theory of the case, but don't recite them. See generally para. 72, MCM, 1969.

2. Remember the purpose of your argument. Your objective is to provide the court with the "why;" why should your client be acquitted? Therefore you should stick with your theory of the case throughout the trial. The entire argument should develop that central theme. Consequently, be positive. Even if you have a reasonable doubt case, tie in your attacks upon the government's case with the positive features of our system of justice, so that the panel has an alternative position to consider. If possible, relate a weakness in the prosecutor's case to a strength in your own. In the same way, the prosecutor's theory of the case can be effectively attacked by comparing its weaknesses with your theory and with the evidence which supports it. To attack the government's case in "scatter gun" fashion is seldom effective; attack with a purpose. In this way, as you tear down the prosecutor's theory, you are establishing your own theory in the minds of the members. This will tend to place the prosecutor on the defensive and force him or her to devote time and energy in answering your challenges in rebuttal.
3. Prepare your closing argument prior to trial. After reading all the statements of witnesses appearing at the Article 32 and after interviewing the witnesses, there will be few surprises at trial. Prepare an outline that will provide a logical structure to your argument. In this way, you will have time to mesh your opening statement and closing argument and to insure that the theory of your case is developed through-out the course of the trial. Leave space on your outline to "flesh out" points which develop during trial. If you have an outline on the table before you, it will be much easier to briefly note the points that you wish to cover.
4. Be composed and in control. You want to project to the panel a conviction that you sincerely believe in your client's cause and in the court's ability to arrive at a just decision. If you are feeling flustered or need some time to complete your argument, ask for a recess after you rest your case or at the close of the government's rebuttal. Don't feel like you must rush into argument, but don't use this time as a crutch to think out what your going to say for the first time. If you need a recess to organize your thoughts, ask for it.

5. Face the panel and maintain eye contact with all of the members. This is especially crucial with enlisted members who may feel slighted if your eye is constantly with the president of the court. Reading your argument or delivering a memorized address will cause you to lose contact with the members and strip your message of its emotional impact.
6. Use the exhibits during argument. If physical evidence such as a photograph or a chart can be used to make a point, use it during your argument. It will make your argument more interesting and easier to remember.
7. Refer to the key language in the instructions upon which your case rests. If the major issue is self-defense, tell the members how to apply the instruction which they will receive to the facts of the case.

In summary, keep your closing argument tight. Begin with your theory, develop it with an analysis of the pertinent facts in the context of the instructions which the members will receive, attack the prosecutor's theory while you buttress your own, and finish on a strong note which reiterates your theory of the case; then sit down. Don't dilute your effectiveness by droning on. During the trial counsel's rebuttal maintain a poker face; don't let the members see you shake your head in chagrin as you mentally critique yourself over something you forgot to say or blanch as the prosecutor makes a strong point. If you sense that your client is becoming agitated, talk to him and calm him down.

Source Material:

1. S. Goldberg, The First Trial, (Nutshell Series, 1982).
2. T. Mauet, Fundamentals of Trial Techniques, (Little, Brown Co., 1980).
3. Major C. Jacobsen, Thoughts on the Opening Statement.

Urinalysis: New Developments

On 28 December 1981, the Assistant Secretary of Defense issued a memorandum for all of the service secretaries effecting a major policy change towards alcohol and drug abuse. The memorandum states that: "This action eliminates the prohibition against the use in disciplinary

proceedings of evidence obtained from compulsory urinalysis" Enclosure 2 to his memorandum specified that mandatory urinalysis may be conducted during:

"(1) An inspection under Military Rule of Evidence 313;

(2) A search or seizure under Military Rules of Evidences 311-317" .

This enclosure also provides that the results of compulsory urinalysis may be used for disciplinary purposes.

Among the issues raised by the implementation of this policy include:

(1) The "reasonableness" of a forcible bodily intrusion based upon probable cause and exigent circumstances, See Mil. R. Evid. 312(d).

(2) The application of the probable cause and the warrant requirement to a compulsory urinalysis.

(3) Whether it is reasonable for a commander to require all members of his command to submit to a compulsory urinalysis in the course of an unit inspection See Mil. R. Evid. 312(d) and (f).

(4) The reliability of the handling of urine specimens taken at the unit level.

(5) The reliability of the laboratory testing of urine samples. See United States v. Distler, 671 F.2d 954 (6th Cir. 1981).

(6) Whether individuals who are merely passively inhaling hashish will show "positive" for THC? The studies done to date have only dealt with "passive inhalers" of marijuana in a closed room with other persons smoking marijuana. However, what level of THC would a soldier have who had roommates who smoked hashish in the billets? Hashish has much higher levels of THC than marijuana and is readily obtainable in Germany.

CID laboratories will not be used to process compulsory urine testing. Rather, this work will be contracted out to civilian firms which have been certified by the Assistant Secretary of Defense (Health Affairs). Certification is contingent upon the demonstration of acceptable quality control performance.

As this policy is being implemented, the staff of The Advocate invites your feedback, either written or telephonic. In particular, we would like to know when the program begins in your jurisdiction and what action the command is taking against individual's whose tests are positive for controlled substances. Call or write CPT Warren Foote Autovon 289-1195/1087. Future issues of The Advocate will specifically examine various potential trial tactics and defenses which may be useful in a prosecution based upon urinalysis testing.

CMA WATCH

INTRODUCTION

The two most significant areas of military law currently being examined by the court via petitions for review concern the Military Rules of Evidence and post-trial reviews. In United States v. Clemons, ACMR 441549, pet. granted 14 M.J. 113 (CMA 1982), the admissibility of evidence of the good character of an accused under Mil. R. Evid. 404(a)(1) will be examined. Whether a concurrent investigative purpose invalidates an otherwise lawful inventory under Mil. R. Evid. 313(c) will be considered in United States v. Barnett, ACMR 441308, pet. granted 14 M.J. ____ (CMA 1982). The duty of the staff judge advocate to notify defense counsel of new matter raised in his comments of the defense rebuttal to the post-trial review is at issue in United States v. Karlson, ACMR 441336, pet. granted 14 M.J. ____ (CMA 1982) and in United States v. Siders, ACMR 16569, pet. granted 14 M.J. 129 (CMA 1982).

DEFENSES: Character Evidence

In United States v. Clemons, ACMR 441549, pet. granted 14 M.J. 113 (CMA 1982), the appellant was convicted of several larcenies from his barracks while on duty as the CQ. At trial the appellant maintained that he removed the items from the individual rooms because they were unsecured. Prior to trial the government successfully moved to bar any evidence of the appellant's good military character and prior law-abiding behavior. The defense had intended to argue that the takings were acts in conformity with those of a soldier who took his duties as a CQ seriously. The granted issue examines the propriety of the military judge's ruling that Mil. R. Evid. 404 (a)(1) did not provide a basis for the admission of appellant's character evidence.

POST-TRIAL REVIEW: Clemency Petitions

The right of an accused, through his defense counsel, to be fully informed of matters brought before the convening authority in a post-trial review will again be examined by the court in United States v. Siders, ACMR 16569, pet. granted 14 M.J. 129 (CMA 1982). In this case the appellant addressed a letter requesting clemency to the convening authority. The letter was lost after it came into the government's possession and the convening authority received only a summary of the letter attached to the post-trial review. Neither the appellant nor his counsel were advised that the letter was lost nor were they given the opportunity to ensure that the summary written by the acting staff judge advocate accurately reflected the contents of the letter. The Court will decide if this violated the appellant's rights to petition the convening authority for clemency.

SPECIAL WRITS: Mandamus

In Dabzynski v. Green and Gneckow, Misc. No. 82-36/NA 14 M.J. ___ (CMA 1982), the court required the filing of a complete record of all administrative proceedings with respect to nonjudicial punishment administered to the appellant after the government had withdrawn the same charges from a court-martial. The appellant had successfully litigated a motion to suppress evidence and is seeking either an order to the military judge to disallow the withdrawal of charges or an order to the convening authority to vacate the nonjudicial punishment. Judge Cook dissented from the interlocutory order, citing his opinion in Stewart v. Stevens, 5 M.J. 220 (CMA 1978) in which he argued that the court lacked jurisdiction to act on requests for extraordinary relief in cases where no discharge was adjudged.

AWOL: Defense of Impossibility

In United States v. Lee, ACMR 16346, 14 M.J. ___, pet. granted 14 M.J. ___ (CMA 1982), appellant pled guilty to two specifications of unauthorized absence. During the extenuation and mitigation portion of the trial he stated that one period of absence was caused by a mechanical breakdown of his car. The court has agreed to examine whether this factor, coupled with a lack of any admission of dilatory action on the part of appellant, raises the defense of impossibility to return to military control.

ARSON: Proof of Intent

In United States v. Acevedo-Velez, ACMR 441386, pet. granted 14 M.J. ___ (CMA 1982), appellant pled guilty to one specification of aggravated arson and two specifications of simple arson. At trial, appellant denied having any intention of setting fire to the barracks as alleged in the aggravated arson specification. He admitted, however, setting fire to his commander's jacket with a disregard for the consequences thereof and a realization that there existed a great possibility that the building would catch fire. The issue is whether the appellant's admission coupled with his indifference is enough to satisfy the specific intent requirement for arson enunciated by the court in United States v. Greene, 20 USCMA 297, 43 CMR 137 (1971).

POST-TRIAL REVIEW: Defense Rebuttal

COURT MEMBERS: Command Influence

In United States v. Karlson, ACMR 441336, pet. granted 14 M.J. ___ (CMA 1982), appellant pled guilty to the offenses of larceny and communication

of a threat and was convicted. The following day in a different case but one involving the same counsel, one of the court members raised the fact that prior to appellant's trial the court members had discussed a commander's call in which the convening authority had implied that he was dissatisfied with the leniency of recent sentences. The defense counsel raised the issue in his comments to the post-trial review. The staff judge advocate replied to the defense counsel's comments with a summary of the member's testimony during voir dire in the unrelated case and enunciated a legal standard for command influence without allowing the defense to comment on the addendum to the post-trial review. The court has agreed to examine whether there was a risk of command influence and whether the staff judge advocate should have allowed the defense counsel an opportunity to explain or rebut adverse information contained in an addendum to the post-trial review as a follow-up case to United States v. Narine, 14 M.J. 55 (CMA 1982).

SEARCH AND SEIZURE: Inventory Search

In United States v. Barnett, ACMR 441308, pet. granted 14 M.J. ___ (CMA 1982), the court will decide whether the primary purpose in conducting an inventory of appellants' property was to obtain evidence to use in a criminal proceeding. The appellant and three others were arrested for a series of robberies. After the apprehension the CID agents told the appellants' commander that if and when he conducted an inventory of the appellant's property prior to pretrial confinement they wanted to be present. The following day an inventory was conducted in the presence of the CID agents. This case will test the parameters of Rule 313(c), Mil. R. Evid., which excludes evidence obtained during an inventory which is a pretext for an illegal search.

OFFENSES: Missing Movement

In United States v. Graham, 12 M.J. 1026 (ACMR 1982), pet. granted 14 M.J. ___ (CMA 1982), the court will decide whether the offense of missing movement, under Article 87, UCMJ, is committed when a servicemember who is authorized leave en route misses a Military Airlift Command flight for a permanent change of station.

CASE NOTES

Synopses of Selected Military, Federal and State Court Decisions

COURTS OF MILITARY REVIEW DECISIONS

CRIMES: Housebreaking

United States v. Wheeler, SPCM 17454 (ACMR 16 August 1974).

(ADC: CPT Foote)

The appellant entered a barracks room and stole a stereo. He gained entry by using a key voluntarily supplied by the victim's roommate. The court held his guilty plea to housebreaking improvident, since the entry was consented to and therefore not unauthorized.

POST-TRIAL REVIEW: Petition for Clemency

United States v. Phillips, SPCM 16657 (ACMR 19 August 1982).

(ADC: CPT Bloom)

After trial, the accused submitted a petition for clemency giving five separate reasons in support of his request to remain in the Army. The trial judge concurred in the accused's request and urged that the factors be taken into consideration. Despite this, the SJA's post-trial review omitted any reference to the clemency petition or the judge's recommendation.

In accordance with the principle that the SJA review must address significant clemency factors and any recommendation by the military judge for suspension of a punitive discharge, ACMR found error in the post-trial review. The SJA's failure to comment upon the clemency request and judge's recommendation created a substantial risk of prejudice which was not waived by the TDC's failure to object in his Goode rebuttal. In the interest of judicial economy the Court reassessed the sentence rather than return the record of trial for a new review and action.

EVIDENCE: Loss of Evidence

United States v. Bolden, CM 441523 (ACMR 16 August 1982).

(ADC: CPT Gray)

The appellant claimed that the government's delay in prosecuting his case resulted in loss of documents which purportedly would have substantiated his alibi defense. At trial, the accused relied on his own testimony and the somewhat uncertain recollection of his 1SG to establish that he had served as CQ runner on the night in question. The CQ on

that night simply couldn't recall who was his runner. The CQ runner's log which would have corroborated his alibi was destroyed IAW unit procedures approximately one and a half months after the Article 32 investigation. Although the accused had previously made a personal copy of the document at the urging of his TDC, it was misplaced before trial.

ACMR found the loss of the document due to the accused's own negligence. The exercise of ordinary diligence by the defense in preparing for trial could have prevented the destruction of the original. Moreover, the members could have believed that the accused was present for duty as CQ runner, yet returned a guilty verdict based on testimony that the CQ had authority to allow his runner time off.

FEDERAL COURT DECISIONS

EVIDENCE: Suggested Identification
United States v. Ballard, 534 F.Supp 749 (M.D. Ala. 1982).

Two men robbed a store wearing face masks. The robbery victim saw them through the window as they left but at a subsequent line up was able to identify only one. He did not identify Ballard. Through no fault of the government, he saw Ballard at a series of preliminary proceedings at a county courthouse and "got to looking, and just to recognizing him." The court held the victim's in-court identification a denial of due process and ordered a new trial, emphasizing that "improper police conduct is not the only circumstance which can render an encounter unnecessarily suggestive to a witness."

EVIDENCE: Competence of Witnesses
United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982).

At a trial for assault, the defense attempted to call an accomplice who had been found to be criminally insane, incompetent to stand trial, and subject to hallucinations. The trial judge declared the witness incompetent to testify without conducting a hearing in camera even though the witness's physician had testified that he understood the oath and could remember and communicate what he saw. The Court of Appeals reversed and remanded for a new trial by applying the presumption of competence of Fed.R.Evid. 601 and holding that it had not been rebutted.

FIFTH AMENDMENT: Cross-Examination Concerning Pre-Trial Silence
United States v. Ochoa-Sanchez, 676 F.2d 1283 (9th Cir. 1982).

The defendant waived his right to silence prior to trial and gave the police a statement but declined to answer selected questions. The prosecutor cross-examined him concerning these omissions, contending they

were inconsistent with his direct testimony in which he claimed to have given response to all questions. The court affirmed his conviction relying on Anderson v. Charles, 447 U.S. 404 (1980) to distinguish Doyle v. Ohio, 426 U.S. 610 (1976). Where the accused's pretrial silence amounts to a prior inconsistent statement, it may frequently be used to impeach, but the fact that the accused invoked his right to silence is never by itself admissible.

FIFTH AMENDMENT: Right to Refuse to Testify
In re Flanagan, 533 F.Supp 957 (E.D.N.Y. 1982).

Flanagan was subpoenaed to testify before a grand jury concerning a conspiracy to smuggle firearms to Great Britain and Ireland from the U.S. The U.S. gave him immunity. However, he refused to testify, claiming he was not immune from extradition and prosecution in Northern Ireland, Ireland or Great Britain. The district court refused to compel his testimony ruling that assurances that extradition was unlikely were insufficient to obviate the right against self-incrimination.

SEARCH AND SEIZURE: Expectations of Privacy
United States v. Barry, 673 F.2d 912 (6th Cir. 1982).

Employees of a Memphis Federal Express office observed a large quantity of pills labeled "methaqualone" through a tear in a package. This aroused their suspicions that the pills were illegal, especially because the pharmaceutical numbers had been effaced. They opened the package and called in a DEA agent who examined the package and resealed it. When Barry claimed the package, he was arrested. No warrant was obtained for the search of the package, which was performed under procedures outlined in a Federal Express internal memorandum prepared in conjunction with the DEA. The court held that the Federal Express employees had acted as private citizens but that no exigent circumstances had been shown to justify the failure to get a warrant. Barry, however, failed to satisfy the threshold requirement of showing an expectation of privacy. By failing to take precautions to protect the package from the risk of exposure in its bailment to Federal Express, Barry manifested no expectation of privacy in its contents.

STATE COURT DECISIONS

SEARCH AND SEIZURE: Vehicular Searches
People v. Long, 320 N.W.2d 866 (Mich. 1982).

The issue of the lawfulness of an automobile search concurrent with a Terry stop, as opposed to an arrest, was presented here. Long was stopped as a suspect for driving while intoxicated. He got out of the car as the police approached but was unable to respond to questions. The deputies saw a closed folding knife on the floor board as they approached the car.

Long was never charged with an offense concerning the knife. An officer then shined his flashlight into the car and saw "something leather." He entered the car, opened the leather pouch, and found marijuana. Long, who had remained outside and to the rear of the car all this time, was arrested for possession of marijuana. The court reversed, holding that Terry v. Ohio, 392 U.S. 1 (1968) does not authorize the search of an automobile whose contents are not within the detained persons reach at the time. Since Long had not yet been arrested at the time of the search, New York v. Belton, 453 U.S. 454 (1981), which allows extensive searches of automobiles incident to the arrest of their occupants, was not applicable.

State v. Newman, 637 P.2d 143 (Ore. 1981).

The defendant was found intoxicated by the police in a car parked by the road. In what the court held was a nonemergency, noncriminal situation, they searched her purse for identification prior to transporting her to a treatment facility. They found drugs in the purse. The purse, which had been on the ground outside the vehicle, was held not to fall within the rule of New York v. Belton, which allows extensive searches of automobiles incident to the arrest of their occupants, and the search was held to be unreasonable.

SEARCH AND SEIZURE: Consent Searches

State v. Farrell, 443 A.2d 439 (R.I. 1982).

The defendant left his car at a garage for repairs. The next day the police, apparently suspecting that a car similar to the defendant's had been stolen, were informed that such a vehicle was at the garage. The police went to the garage and observed through the car's window that the vehicle identification number had been tampered with. A subsequent check revealed that it had been changed and they then asked if they could take the car to the police station. An employee of the garage drove the car to the station. Farrell was eventually arrested and convicted for possession of a stolen vehicle. The conviction was reversed. The court held that the garage employee lacked authority to consent to a warrantless seizure of the car. Farrell had given the car to the garage for a specific purpose which did not extend to a warrantless search. As a result he retained an expectation of freedom from such searches and seizures.

RIGHT TO COUNSEL: Line-Ups

People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159 (Ct. App. 1982).

The defendant requested an attorney but refused a police offer to procure a legal aid attorney when the particular lawyer he desired could not be located. A line-up was then held at which the defendant was identified. The court observed that under applicable state law, the state

had no obligation to supply counsel at this pre-indictment line-up and affirmed. It went on to note that where a suspect already has counsel, the attorney may not be excluded, but this does not mean that the line-up must be delayed to await his arrival if this would result in inconvenience to witnesses or cause excessive delay in the confrontation with the eye-witness.

Notice

Readers who desire copies of unpublished military decisions in notes may obtain them by writing Case Notes Editor, The Advocate, Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041.

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

DC: Do you remember noticing whether [the victim] was cut or her clothes were . . .

W : I looked at her shirts. They were cut.

DC: Did you see any blood at that time?

W : No, sir. I guess she was so scared she wasn't bleeding.

* * * *

MJ: Any suggestions of what prevented this from being a murder trial instead of an attempted murder trial?

TC: The victim lived.

* * * *

MJ: Now, if I recall correctly, I was the judge where the charges were dismissed because they weren't, in fact, charges. They were garbage. Is that correct?

* * * *

TC: We ask for the maximum punishment not merely to punish this man, although he very much deserves so, but also to act as a deterrent effect for those other soldiers out there in the Division, those other soldiers who might be bordering on being a dirtball.

* * * *

Q : You say you had three men punching at you, kicking you, raping you, you didn't scream?

A : No, ma'am.

Q : Does that mean you consented?

A : No, ma'am. That means I was unconscious.

* * * *

DC: Your Honor, the government would ask - . . I mean the defense rather, would ask for a brief five minute recess.

MJ: Is this a brief five minute recess or a long five minute recess.

DC: A brief five minute recess.

MJ: All right. We'll take five minutes.

(The court recessed at 1727 hours)

(The court was called to order at 1830 hours)

* * * *

(TC questioning victim of indecent assault)

TC: And what did you see when [the accused] pulled down his pants?

W: It looked like a penis, only smaller.

