THE ADVOCATE

A Monthly Newsletter for Military Defense Counsel

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

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This is the second and last notice before unrenewed subscriptions will be lapsed.

PRESENTING THE WATSON DEFENSE TO NARCOTIC OFFENSES

[Editor's note: In the September, 1970 issue of THE ADVOCATE, (Vol. 2, No. 7 at page 23), we reported the decision of the US Court of Appeals for the District of Columbia Circuit in Watson v. United States, 7 Crim. L. Rep. 2328, in which the court discussed, but did not decide, whether Robinson v. California, 370 U.S. 660 (1962), which barred the punishment of an addict for his addiction, may also bar the punishment of the addict for possession of the drugs necessary to sustain his addiction. The following article was originally prepared by Mr. Peter R. Kolker, Esquire, of the Public Defender Service for the District of Columbia, and much of it first appeared in Volume I, No. 1 of the PDS Bulletin, a news letter published under the auspices of the Public Defender Office. Although this article was prepared primarily for the defense lawyers practicing in the District of Columbia, it is a valuable adjunct to the offerings we have made in the defense of drug cases. We thank Mrs. Barbara Bowman, Director of the Public Defender Service for the District of Columbia, for her permission to adapt this article for our publication.

In passing it should be noted that the new appellate court for the District of Columbia recently decided in United States v. Williams, 8 Crim. L. Rep. 2460 (D.C. Super. Ct., March 4, 1971), that a non-trafficking addict may be convicted constitutionally for possession of heroin. However, the Court emphasized the easy availability of methadone in the District of Columbia. Where methadone is not freely available, as in the military services, the Watson defense should remain viable.]

With the advent of Albert Watson v. United States, ___ U.S. App. D.C. ___, ___F.2d___ (Slip Opinion No. 21,186, decided 7/15/70, en banc) considerable attention has focused on addiction as a defense to narcotic-related crimes. While the holding of Watson is relatively narrow (it makes Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. § 4251 et seq. available to certain defendants as a sentencing alternative regardless of their prior felony records), an equally important feature of the opinion is its suggestion that prosecutions under the Harrison Narcotic Act (26 U.S.C. § 4704 et seq.) and the Jones-Miller Act (21 U.S.C. § 174 et seq.) probably violate the Eighth Amendment to the Constitution as well as the legislative intent of the statutes if it can be shown that the defendant's possession of drugs was tied to his narcotics addiction. Since both the Harrison and Jones-Miller Acts have been repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513, hereinafter cited as the "Controlled Substances Act"), it is necessary to determine whether Watson offers a shield to the addict charged after that date with a narcotics related crime. The Watson Court's implicit approval of an Eighth Amendment or at least a mens rea defense to possession for personal use suggests the possibility of continued application of Watson to narcotics crimes. However, even the present value of the decision is far from clear since some judges view it as nothing more than dicta while others accord it at least limited significance and still others have extended it to protect addicts alleged to sell as well as use drugs. A recent decision by Judge Belson in the D.C. Superior Court in United States v. Gorham, Smith and Williams, Nos. 42860-70; 29895-70 and 28001-70 has held that Watson does not forbid prosecutions under the Uniform Narcotics Act (D.C. Code § 33-402) or the statutes forbidding possession of

implements of a crime (D.C. Code § 22-3601) or presence in an illegal (narcotics) establishment (D.C. Code § 22-1515 (a)). This article explores the availability of the Watson defense under presently applicable statutes and forecasts its application under the new Controlled Substances Act.

To determine whether a Watson defense is available, counsel must ascertain (1) whether the defendant is an addict; (2) the extent of his addiction; (3) whether the amount of drugs and other paraphernalia allegedly found in his possession conforms to his level of addiction; and (4) if not, the reason for his possession of a greater amount.

Most addicts measure their addiction by reference either to the cost per day of the habit or the number of capsules ("caps") consumed. The key terms which counsel should know to ascertain the probable use to which the narcotics were to be put include the following:

QUANTITY	PRICE *
1 Cap (sometimes called a pill, but usually a #5 size gelatin capsule)	$ 1 - $1.50
1 Spoon = 22-25 caps (usually packaged in a tinfoil packet rather than capsules)	$22
A Quarter = 4 spoons = 1/4 ounce = 85-100 caps	$90
A Piece = 4 quarters = 1 ounce	Unknown

*The prices are for drugs that have been "cut" (diluted) and are ready for use by the average addict.

Heroin can be "cut" with any material that looks similar, i.e., a fine, white, water soluble powder. The most common cutting materials are quinine, confectioner's (milk) sugar, and baking soda, but anything from talcum powder to Ajax can be used. Since the specific densities of these materials vary considerably, a given volume of diluted heroin will weigh different amounts depending on

the cutting material with which the drug is mixed. Moreover, the amount of material that can be packed into a #5 capsule depends on the technique utilized. While the average capsule probably weighs 60 milligrams, anywhere from 40 to 100 milligrams may be found in a capsule. These variables make it difficult for counsel, who is informed only of the weight of the drugs found on a defendant, to determine precisely the number of capsules that could be produced.

Whether a defendant intended to use the drugs found in his possession to support his own habit or whether he intended to sell some of them can be inferred not only from the amount of drugs he possessed but from surrounding circumstances, such as the form the drugs were in, or the presence of a large quantity of cutting paraphernalia (e.g., strainers, milk sugar, cellophane bags). For instance, if an addict is using drugs at a rate of 50 caps or more per day, it is likely that he is buying drugs for his own use in "spoon" quantity. Since a spoon is a loose measure of drugs, and since the using addict would have no reason to package the spoon into capsules, can an intent to sell be inferred where a substantial user possesses capsules rather than loose powder?

Another problem in determining the use to which drugs can be put is the substantial variation in strength of drugs purchased by addicts. At present, drugs bought by addicts on the street tend to range between 2% - 10% heroin; the balance is cutting material. However, the variation may be considerable. For instance, in New York City a random sample of 32 quantities of alleged heroin seized by the police revealed that 12 contained no narcotics at all and the remaining 20 varied in potency from 1% - 77%. City of New York Health Services Administration, unpublished manuscript, "Treatment Alternative for Heroin Addiction", October 9, 1970. Since drugs of a strength greater than about 20% are much stronger than those used by an addict, an intent to cut and resell might be inferred. Counsel should therefore be careful to ascertain from the Government's chemical report the percentage of pure heroin in the drugs confiscated.

From the foregoing it is clear that quantity alone is not determinative of the addict possessor's intended use of

drugs. Occasionally there may be a question whether the defendant is an addict at all. The only certain objective test to answer this question is a urinalysis, which will reveal the presence of opiates and quinine (a common cutting agent) taken within the past seventy-two hours. Occasionally, the Court will order a defendant to be examined by a psychiatrist in hopes that he can objectively ascertain whether the defendant is an addict. Apart from physical observations (such as needle "track" marks on the subject's veins) and a urinalysis, the psychiatrist must base his conclusion on what the addict tells him. About the best a psychiatrist could do would be to convey the defendant's admission to drug use and complement it with an assessment of whether his character is compatible with addiction. However, ex-addicts employed by various addict rehabilitation centers may have more expertise in this area than psychiatrists, and could rebut a psychiatrist's opinion.

Other ways to corroborate the defendant's claim of addiction include use of prior narcotic arrests and/or convictions, records of treatment at a Public Health Service hospital, doctor's office, or drug treatment agency. To obtain these records, the defendant will have to execute a release for use by his attorney. Other official forms in which an arm of government (such as the police) characterize the accused as an addict should be subpoenaed. For instance, the District of Columbia police keep records on medical treatments given to jailed addicts undergoing withdrawal.

Client Interview

Counsel is well advised to interview all clients charged with narcotics offenses with Watson in mind. The following illustrative questions might be asked:

-- Whether the defendant uses or is addicted to drugs, and if so what kind?

-- Frequency and level of use at time of alleged offense?

-- History of use and methods used: "snorting" (inhaling); "skin-popping" (injecting subcutaneously); or "mainlining" (injecting in vein)?

-- Treatment received, where and when?

-- Previous narcotic-related arrests and dispositions?

-- Previous admissions of addiction to police?

-- Friends, relatives, or doctors who could corroborate addiction?

-- If the defendant admits to possession in instant case, what quantity did he possess and for what purpose?

-- What other paraphernalia of addiction were seized at time of arrest? Any explanation for large quantity of paraphernalia, or larger amount of drugs than daily use would require?

How to Raise Watson Defense

The majority opinion in Watson suggests two distinct methods of raising the defense against drug possession charges: (1) a motion to dismiss the indictment because the statutes are unconstitutional and beyond legislative intent if applied to non-trafficking addicts; and (2) an affirmative defense, akin to, but not the same as, the insanity defense, to the effect that a non-trafficking addict cannot be held criminally liable for possession of drugs.

(1) Motion to Dismiss Indictment. The primary attack would seem to be by motion alleging that the defendant is an addict, and that any heroin possessed by him was for his own use, thus precluding Harrison or Jones-Miller prosecution. The argument is that Robinson v. California, 370 U.S. 660 (1962), which held that an addict could not constitutionally be punished for the status of addiction, likewise prohibits punishment for such concomitant "acts" as possession. While Powell v. Texas, 392 U.S. 514 (1968), gave Robinson a narrow reading, Easter v. District of Columbia, 124 U.S. App. D.C. 33, 361 F.2d 60 (1966), preventing the punishment of chronic alcoholics charged with public drunkenness, may

provide further authority for the Robinson argument. The impact of Powell on Robinson and Easter and the net effect of the three decisions on the Watson rationale was carefully analyzed in United States v. Leroy Lindsey, ___ F. Supp. ___ (Memorandum Opinion of Gasch, J. in Criminal No. 2277-70, decided 1/25/71). The Court there held that Powell had so eroded Robinson as to make the cruel and unusual argument virtually unavailable to the narcotic addict seeking an escape from criminal punishment for drug possession. However, Judge Gasch concluded that Easter, which rested not only on Eighth Amendment grounds but also on an analysis of criminal responsibility, offers an escape from criminal liability to a non-trafficking addict possessor, if he can show that the physical and/or psychological compulsions of addiction so overbore his controls and ability to abstain from drug usage as to negate mens rea. Whether Powell cut the supports from under Robinson as Judge Gasch asserts, or whether Powell can be read more narrowly as not extending Robinson to the chronic alcoholic, counsel is clearly on safer ground if he can demonstrate compulsion than if he is forced to rely on a "cruel and unusual punishment" argument for his motion to dismiss.

The motion to dismiss should also assert that Congress did not intend the non-trafficking addict possessor to be within the scope of the Harrison or Jones-Miller Acts. The Court treated this argument almost by innuendo (Slip Opinion pp. 19-20, n. 9) and while it should be raised by counsel, the Robinson argument is seemingly stronger. After May 1, 1971 the legislative intent argument has become academic, since the new "Comprehensive Drug Abuse Prevention and Control Act of 1970" (P. L. 91-513) will supplant both the Harrison and Jones-Miller Acts. Still another ground for the motion to dismiss could be the failure of the indictment to allege that the defendant trafficked in narcotics (See Slip Opinion, p. 23).

Since the motion to dismiss could resolve most cases, it should be heard prior to trial. At the hearing on the motion, the defendant, as the moving party, has the burden of going forward and the burden of persuasion. To sustain the burden, counsel should be expected to produce evidence-- usually from his client -- to the effect that he was an addict and that he had the drugs for his own use. This

should probably include: (1) a history of the defendant's addiction; (2) his habit at the time of arrest, i.e., how many capsules per day, how often, what method of taking; (3) the quantity and quality of the drugs he had at time of arrest compared with his usual dosage (this could be especially important where the defendant possessed a larger amount than his normal dosage if the drugs were weaker than usual). The above testimony could be corroborated in one or more respects by friends or family familiar with the defendant's addiction or by a physician who treated the addict with methadone for withdrawal after arrest. Also, police, jail, and treatment reports could be subpoenaed to substantiate the defendant's narcotics history. Care should be taken in planning the presentation of the motion to account for the possession of a large number of empty capsules, cutting paraphernalia or several "sets of works", since these items, unexplained, could suggest that defendant was a trafficker.

The Watson Court did not articulate what burden the defendant must carry on his motion to dismiss. Normally, however, the moving party must prevail by a preponderance of the evidence. Occasionally, the beyond a reasonable doubt standard is imposed pre-trial, but this seems to attach when the Government is seeking to establish an element of the case at the time of the motion. (See, e.g., Pea v. United States, 130 U.S. App. D.C. 66, 397 F.2d 627 (1967), where the Court held that the Government must prove beyond a reasonable doubt the admissibility of a confession).

If the defendant testifies at his hearing on the motion to dismiss the indictment, the question arises whether this testimony can be used against him. Simmons v. United States, 390 U.S. 377 at 394 (1968), offers a basis for arguing that it should not. In Simmons the Court held that a defendant could not be forced to sacrifice his Fifth Amendment right to remain silent when he asserted his Fourth Amendment right to suppress evidence illegally seized. In Watson defense cases there is arguably the same sacrifice involved in the assertion of the Eighth Amendment right. Also, a defendant arguably would be forced to forego an important defense if his testimony at the motion to dismiss could be used against him at trial, which would pose a Fifth Amendment due process violation. The application of Simmons is less clear if the

Watson motion to dismiss is viewed as resting on construction of legislative intent rather than the Eighth Amendment. However, Harris v. New York, ___U.S.___, 8 Crim. L. Rep. 3139, (Decided 2/24/71) would seem to allow the defendant's testimony -- particularly his admission of possession -- at a pre-trial Watson hearing to be used as impeachment material at trial even if Simmons would bar such admissions from coming in as part of the Government's case in chief. Where the defendant has a defense on the merits to possession, as well as a Watson defense, the problem must be taken into account in planning the pre-trial hearing.

Watson seems to authorize explicitly a defense only for the non-trafficking addict possessor. But what of the person who sells -- or at least allegedly sells -- occasionally to support his own habit? In United States v. Ashton, ___F. Supp. ___ (Memorandum decision of Gesell, J., Criminal No. 1524-69 - decided 10/8/70), the Court indicated that the mere allegation of undercover sales (such as appears in affidavits in support of search warrants) would not preclude the raising of a Watson defense. More important Ashton implied that since all addicts occasionally sell or give away narcotics in furtherance of their habits, the Court of appeals did not intend "trafficking" to mean any sale or exchange of drugs, since to attach such a meaning to the word would render nugatory the whole Watson rationale. Manifestly, "trafficking" must mean repeated sales of drugs -- sales which can be proven in Court. Ashton must be viewed as resting on Eighth Amendment rather than statutory construction grounds, since the legislative intent of Harrison was clearly to punish all traffickers, regardless of addiction. Query: Could not the Watson defense apply equally well to addicts who commit larceny, or robbery, to support their habits? Or, does the Ashton argument prove too much?

(2) Watson as an Affirmative Defense. The Court also stated that Watson may be asserted affirmatively at trial, and that an instruction may be requested to the effect that possession by an addict of drugs for his own use is a complete defense to the Harrison and Jones-Miller charges (Slip Opinion, p. 22). The opinion is not clear as to whether a defendant can proceed both by motion to dismiss and, if he loses that, by raising an affirmative defense. But the defendant could well argue that a denial of his motion to

dismiss simply reflected the Court's view that he did not meet the burden of persuasion, and should not preclude him from his effort to raise a reasonable doubt to the jury. Moreover, the questions of whether and to what extent the defendant was addicted and for what purpose he possessed the drugs are for the jury as finder of fact.

After a defendant makes a prima facie showing that he was an addict in possession of the drugs for his own use and was not a trafficker, the Government would be required to prove the negative beyond a reasonable doubt, according to the suggested procedure in Watson (Slip Opinion, p. 22).

Although arguably the uncontradicted word of the defendant that he is a non-trafficking addict should be sufficient to support a motion for judgment of acquittal or not guilty verdict, it seems likely that to win a Watson defense at trial, it would be advisable -- if not absolutely essential -- to present expert and other evidence about the nature and effects of addiction generally, and on the particular client. Presentation of such evidence would bring the Watson defense very close, in a practical sense, to the defense of pharmacological duress. In Castle v. United States, 120 U.S. App. D.C. 398, 347 F.2d 492, cert. denied, 381 U.S. 929 (1965), a duress defense was validated as a possibility in drug-related offenses, but it has been seldom used. Evidence supporting the Watson defense, such as the scope of the defendant's narcotic habit, which makes it physically and psychologically necessary for him to possess drugs would also be admissible on the duress defense. To counter the defendant's assertion of duress, the Government may bring forward evidence tending to show that the defendant did in fact have an alternative to his addiction, i.e., he could have participated in a methadone program such as that offered by the Narcotic Treatment Agency. In some cases, psychiatric testimony might be offered in rebuttal showing that such a program would not have psychologically relieved or satisfied an addict with the defendant's particular personality.

Controlled Substances Act

The foregoing discussion pertains to indictments charging Harrison or Jones-Miller Act violations. Is there

a Watson defense to prosecutions under the Controlled Substances Act? If the Watson opinion is viewed as resting on more than legislative intent, whether the "more" be Eighth Amendment grounds or a mens rea analysis, then the non-trafficking addict possessor would seem still able to argue against criminal treatment for an incidence of his addiction sickness.

The Controlled Substances Act, unlike the previous federal narcotics laws which it repeals, does not treat all narcotics addicts as a homogeneous class. (The Act also applies to users of non-addictive drugs not discussed here). Instead, three discriminate types of defendants are reached by the Act: 1) a non-trafficking addict possessor -- the prime Watson subject -- is liable only to misdemeanor treatment for possession of drugs [§ 404]; 2) a possessor intending to sell or distribute (or actually doing so) is subject to up to 15-years imprisonment as a first offender, double if a second offender, but without a mandatory minimum [§ 401]; 3) a seller engaged in a "continuing criminal enterprise" of narcotics dealing (a succession of sales amounting to dealing in drugs and yielding "substantial income") would receive a 10-year mandatory miminum sentence [§ 408].

While the Controlled Substances Act treats the non-trafficking addict possessor with considerably more leniency than does the Harrison or Jones-Miller Acts, it still suggests the possibility of criminal punishment for an addict whose only crime is possession. Presumably, the same Eighth Amendment attack available under Powell, Robinson and Easter that could have been mounted for a Harrison charge would be available to the misdemeanor defendant under the Controlled Substances Act. Or, as suggested by United States v. Lindsey, supra, the addiction defense might more properly be raised affirmatively by showing a lack of mens rea, if Powell has obviated the Eighth Amendment argument.

A defendant charged with the felony of possession with intent to distribute under § 401 of the Act could raise his Watson defense in two stages. First, he could demonstrate that his own addiction justified the possession of the quantity of drugs found on him, thereby refuting the Government's proof of intent to sell. To accomplish this,

testimony concerning the fact and extent of his addiction would have to be introduced and the quantity of drugs found on him taken into account. Secondly, he could seek to justify a sale (if one had in fact occurred) as a natural consequence of his addiction, i.e., as an act as directly traceable to the addiction as possession. He could, accordingly seek freedom from criminal liability on the theory that he had lost control or ability to abstain from the activity by virtue of his addiction. Such a proof would approach the pharmacological duress defense outlined in Castle, supra. Whether a Court would accept this theory is problematic. If it did, would the Court logically exempt from criminal liability the addict whose robbing was the direct result of his addiction? This is what Castle might suggest and this perhaps accounts for the dearth of Castle defenses.

A defendant charged with the "continuing criminal enterprise" of drug dealing would seem to be outside the protection afforded by Watson, which, by its terms, is aimed at the non-trafficking addict possessor. Even the pharmacological duress defense would seem unavailable, since, an element of the "continuing criminal enterprise" violation is that the defendant gleaned substantial income from the business, raising some doubt as to the quality of his compulsion.

While the state of the law under Watson remains unsettled, with different judges giving more or less weight to the Court's opinion, it does appear to be counsel's obligation to raise the Watson defense in narcotics cases where the facts support it. In at least two cases decided since Watson, the Court has remanded to District Court with instructions to allow the defendant to raise the Watson defense. Kleinbart v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (Slip Opinion #21,408 - decided 10/9/70); United States v. Tyrone Smith (unpublished order in #24,869 - decided 1/7/71). Since the parameters of the addiction defense have not yet been drawn, defense counsel have a significant opportunity to effect the development of the law in narcotics related cases.

HONEST AND REASONABLE MISTAKE OF FACT ABOUT CONSENT IS NOW A DEFENSE TO RAPE

Although the Court of Military Appeals has consistently avoided deciding if an honest and reasonable mistake of fact aoubt consent is a defense to rape (United States v. Roeder, 17 USCMA 447, 38 CMR 245 (1968); United States v. Short, 4 USCMA 437, 16 CMR 11 (1954)), a panel of the Court of Military Review recently grappled with the issue in United States v. Steele, CM 424118, ___CMR___ (ACMR 30 March 1971).

In this case, the trial judge refused a defense request to instruct the court members that an honest and reasonable mistake on appellant's part as to the element of consent would require his acquittal of the charge. Senior Judge Chalk noted the trial judge's failure to specifically state in his instructions that an alleged rape victim must reasonably manifest her nonconsent or else be deemed to have consented. In view of the evidence indicating a language barrier between the two parties and the absence of evidence of violent struggling, Judge Chalk concluded that the error precluded the Court from affirming the conviction. He declined to determine if an honest and reasonable mistake of fact pertaining to consent constitutes a defense to rape, but enjoined military judges to consider the defense a valid one and to instruct accordingly.

Judge Collins, in a concurring opinion, held such a mistake to be a defense to rape. He viewed the Manual's requirement that victim must reasonable manifest her non-consent as but another way of stating the objective standard to be used in resolving the issue raised by the affirmative defense. Since the trial judge gave neither the Manual requirement nor the requested instruction, he erred.

Judge Finkelstein, in a well-written concurring opinion, concluded that an honest and reasonable mistake of fact as to the existence of consent is a defense to rape and, if the defense is reasonably raised by the evidence, the trial judge must, upon timely request, frame his instructions in accordance with the defense theory.

WHAT IS A TRIAL CENTER?

An Army trial center is a legal office which has no other function except the preparation and trial of court-martial cases. The first trial center project of any real size developed in Europe, in an attempt to accommodate the expanded need for lawyers as a result of the Military Justice Act of 1968 to the wide geographical distribution of troops there. In Europe, many headquarters exercising general court-martial convening authority are located substantial distances -- often hundreds of miles -- from many sizeable units of their troops. In the past, trial lawyers often spent almost as much time traveling as practicing law.

Now, in certain key cities (e.g. Nurnburg, Mannheim Kaiserslautern), with large troop concentrations from multiple commands, regional judicial centers have been established to prepare and try the cases arising in their area. A trial center usually consists of a chief, usually a major, who reports directly to the USAREUR Judge Advocate, a prosecution team and a defense team, with these lawyers rated by the trial center chief, and an administrative section which has responsibility for preparing records of trial. The trial center is responsible for every aspect of a court-martial except the pretrial advice and the post-trial review, which are prepared by the staff judge advocate of the accused's command. Thus, the trial center advises immediate commanders who have the initial responsibility for preferring charges, it supervises the Article 32 investigation and its personnel ultimately try the case.

The advantages of this method of trying cases should be obvious, especially for defense lawyers. They are able to spend more time with their clients and in Court and less time traveling. They are also free of other legal and non-legal duties which attend the young defense lawyer in the normal staff judge advocate office. In addition, command influence is less of a problem because all of the trial center personnel report elsewhere than to the convening authorities and the staff judge advocates they service. Although far from giving trial defense counsel the autonomy of an independent defense corps, the trial center does appear to be far more advantageous to the military defense bar than the organizational structure of the usual staff judge advocate office.

Even without the geographical problems encountered in Europe, the trial center concept is a viable alternative to the present way cases are tried in the United States and in Asia. Segregating the trial function from every staff judge advocate office, and placing the trial personnel under the auspices of the Army area staff judge advocate, for example, would go a long way toward terminating the pressures to divert military justice resources to other duties.

Comments are invited from those who have experienced working under both the traditional structure and the trial center concept.

NOTICE

UNITED STATES COURT OF MILITARY APPEALS
OPINION FINDER

With this issue of THE ADVOCATE, selected subscribers will receive copies of the "USCMA OPINION FINDER" which is prepared in the Opinion Digest Section, Navy JAG Law Library. Some 250 copies of this excellent research tool are made available to THE ADVOCATE, and we will endeaver to distribute them to those of our subscribers most in need of up-to-date information on military appellate decisions. Priority will be given to military legal offices first, then individual military subscribers. Others with a "particular need"for this opinion finder are urged to write to THE ADVOCATE and request inclusion on the list of subscribers receiving this service.

POSTFINDINGS DUTIES OF TRIAL DEFENSE COUNSEL

From time to time THE ADVOCATE has presented information and advice concerning defense counsel duties after findings[1/]. Other useful discussions of defense counsel duties are found in Military Justice Handbook, The Trial Counsel and The Defense Counsel, DA Pamphlet 27-10 (November 1962) and in ABA Standards, The Prosecution Function and The Defense Function. This article will attempt to draw together for trial defense counsel a fuller statement of his post-findings duties, as seen by appellate defense counsel.

[1/] Advising Your Client about the Disciplinary Barracks, THE ADVOCATE, August 1969, page 4; Appeal and Review of Special and Summary Court-Martial Convictions, THE ADVOCATE, June 1969, page 5; Appealing Denial of Deferment of Confinement, THE ADVOCATE, March 1970, page 6; Appellate Procedure in the Army, THE ADVOCATE, July 1969, page 4; Argument at Sentence to the Judge Alone, THE ADVOCATE, January-February 1970, page 3. The Article 38(c) Brief: A Forgotten Defense Tool, THE ADVOCATE, October 1970, page 13; Clemency and Parole, THE ADVOCATE, April 1970, page 1; Deferrment Applications, THE ADVOCATE, April 1970, page 9; Deferment of Sentence to Confinement Pending Appeal, THE ADVOCATE, November 1969, page 1; Deportation Following General Court-Martial Conviction, THE ADVOCATE, March 1970, page 14; Due Process during Post-trial Review Proceedings, THE ADVOCATE, April 1970, page 16; Excess Leave without Pay, THE ADVOCATE, April 1970, page 8; Extenuation, Mitigation and Punishment in Marijuana Cases, THE ADVOCATE, May 1969, page 6; Matters in Extenuation and Mitigation, March 1970, page 16; Objecting to Final Arguments, THE ADVOCATE, August 1969, page 10; Post-trial Communication with Court Members, THE ADVOCATE, May 1970, page 5; Post-trial Duties of the Defense Counsel, THE ADVOCATE, March 1969, page 4; Preparation for the Post-trial Interview, THE ADVOCATE, December 1969, page 5; Pretrial Confinement in Violation of Article 13--A Proposed Instruction; THE ADVOCATE, January-February 1970, page 4; Recommendation for Retention: Lost Opportunity, THE ADVOCATE, November 1970, page 13; The Request for Appellate Defense Counsel, THE ADVOCATE, March 1970, page 11; Sentence and Punishment--May the Defense Counsel Affirmatively Argue for a Discharge, THE ADVOCATE, March 1969, page 1; Tailoring the Sentence Worksheet to Credit Pretrial Confinement, THE ADVOCATE, April 1969, page 7; Transfers of Convicted Servicemen, THE ADVOCATE, September 1970, page 10; Unjust Conviction, THE ADVOCATE, September 1970, page 11.

THE PRESENTENCING PHASE OF TRIAL

1. Consider delaying the sentencing aspects of the voir dire examination until after findings.

2. In cases where a jury is tactically desirable on findings but not on sentence, interpose a request to be sentenced by military judge at this point.

3. Object to inadmissible evidence in aggravation offered by the prosecution. Rebut adverse matter, if possible, of a prior conviction or nonjudicial punishment. If necessary, try to relitigate the defenses to such prior charges.

4. Introduce all available evidence in extenuation and mitigation on behalf of the accused. Seek expert testimony on the psychological aspects of the criminal behavior involved in the charges. Assist the accused in deciding if he should testify, if it should be under oath, or if you should submit a statement on his behalf. Alert the not guilty pleading accused to the dangers of judicial admissions should he testify. Call or subpoena any witness (spouse, parent, relative, clergyman, employer, military superior, teacher, friend, or otherwise) who can testify for your client. A military superior who will go out on a limb for your client is worth his weight in gold, and stockade personnel are often an accused's last best hope. Go behind awards and decorations for eye-witness evidence of valorous or meritorious achievement or service. While conceding as little as possible, present a sentencing program of your own which will satisfy the punitive, deterrent, and rehabilitative aspects of the criminal law as far as your client is concerned. Use hard evidence like a drug rehabilitation program which would accept your client now, or an employer who has a job waiting for the accused.

5. Propose instructions based on the evidence presented at sentencing. Request an instruction on crediting time spent in pretrial confinement, and seek to tailor the sentencing worksheet accordingly. Request an instruction on the court-martial's ability to recommend suspension of sentence. Examine the multipliciousness of charges, especially in judge-alone cases where the issue might not otherwise arise. When necessary, enter formal objections to proposed instructions offered by the military judge or the prosecution.

6. Make a strong argument on behalf of your client. Never assume that even the toughest military jury or the hardest military judge would be unmoved by your argument.

7. Upon rendition of the sentence, be prepared to move immediately for a mistrial in the event of an improper, inconsistent, or self-impeaching sentence.

POST-TRIAL DEFENSE SERVICES--REPRESENTATION BEFORE THE CONVENING AUTHORITY ACTS

1. Immediately seek deferment of a sentence to confinement pending appeal, and seek appropriate review from an unlawful denial thereof. Article 57(d), Uniform Code of Military Justice, AR 27-10. Stress the appellate issues in the case, as well as financial, medical, or other reasons against confinement. Emphasize the lengthy duration of appellate review, as well as the concern of the Commander in Chief in this matter in United States v. Calley.

2. Where appropriate, canvas the prosecution, the military jury, and the military judge with a petition for clemency. Include therein any subsequently discovered evidence relevant to clemency, thus insuring that such evidence becomes part of the record of trial.

3. Prepare your client for the post-trial interview. Although many convicted soldiers want to be discharged, they should be advised against making such an admission at the post-trial interview or elsewhere, because reviewing authorities at all levels generally are not disposed to reverse convictions or grant other relief when their action sends unwilling soldiers back to duty. A convicted soldier should also be made aware that damaging admissions can be made at the post-trial interview regarding present charges or other crimes, or about the appropriateness of the adjudged sentence. Such admissions may prejudice subsequent favorable action on a case (by appellate courts or others) by waiving errors which could be raised in appropriate cases on appeal. Unless a client can be trusted to field such matters on his own, a post-trial interview should not be undertaken in the absence of counsel.

4. Exercise the accused's right to rebut adverse matters first appearing in the post-trial review. Seek access to the post-trial review prior to the time it is forwarded for the

convening authority's action. With or without seeing the post-trial review, consider preparing a brief of trial defense counsel pursuant to Article 38c, Uniform Code of Military Justice. Use it to re-argue the factual and legal theories of the defense and to introduce into the record evidence discovered after trial or ruled inadmissible at trial. Counsel should also consider using the Article 38c brief to enter formal objections which were overlooked at trial. In guilty plea cases it is at least debatable that Article 38c can be used to raise issues normally waived by a plea of guilty. In short, because the Article 38c brief allows material to become "part of the record," it should be used to raise matters which are best not raised elsewhere (e.g., the facial expressions and voice inflections of a military judge which may have harmed the accused). Where appropriate, request a personal hearing, or at least an interview, before the convening authority.

5. Advise the accused of the meaning and effect of the findings and sentence in his case. Explain in detail the consequences of a punitive discharge. Notify the accused of his appellate rights and assist him in securing the appointment of appellate defense counsel. If forms are provided for this purpose, insure that they do not limit the authority of appellate counsel in any way, and that they specifically authorize the appellate defense counsel to petition the Court of Military Review for a grant of review, if the case is then eligible for such review, and to institute any other legal or administrative procedures available to ameliorate the conviction or sentence of the accused. Give both the accused and appellate defense counsel your best evaluation of the grounds for appeal and your realistic estimate of the likelihood of success. Familiarize the accused with the Army clemency and parole system.

6. Maintain, as much as possible a continuing interest in the case in hopes of discovering new evidence of innocence or of fraud on the court such as would warrant petitioning for a new trial.

THE MISCELLANEOUS DOCKET

The Court of Military Appeals has rendered its decision in Petty v. Moriarty, COMA Misc. Docket No. 71-3 reported upon in the Miscellaneous Docket section of the February 1971 issue of THE ADVOCATE. The Court concluded (Darden, J.,

dissenting) that the respondent had not shown good cause why the petitioner's request for a Writ of Prohibition enjoining the respondent from proceeding with the Article 32 investigation which he ordered in connection with charges lodged against the petitioner should not be granted. The charges against the petitioner had been referred to a special court-martial empowered to adjudge a bad conduct discharge. Trial was scheduled for 8 January 1971 but at the request of defense counsel, concurred in by government counsel, the military judge, assigned to the special court, granted a continuance or postponement. On 14 January, defense counsel submitted a request for four named witnesses, none of whom were then at the trial command. The following day, the respondent withdrew the case from the special court-martial and ordered an investigation pursuant to Article 32, Uniform Code of Military Justice. The petitioner averred that the charges, which had been originally referred to a special court-martial, were withdrawn as a preliminary to subsequent referral to a general court-martial, solely because defense counsel requested the presence of witnesses whose expected testimony was shown to be material, relevant, and necessary. The respondent denied these allegations in his affidavit and asserted that the case was withdrawn and an Article 32 investigation ordered for the purpose of looking into the entire course of events surrounding the charges against petitioner, in light of petitioner's disclosure that he had been mistreated by custodial personnel and was acting in self-defense. Respondent, after learning of the request for the witnesses and their identity (all former prisoners in the base correctional facility, having been convicted of sodomy and conspiracy to commit sodomy) and personally inspecting the area of the correctional facility where the offenses allegedly occurred, believed that the allegations of petitioner that he had been assaulted were not well-founded. In his opinion, an Article 32 investigation was the appropriate vehicle to uncover the truth of the matter.

The Court of Military Appeals noted that the appropriate basis for directing an investigation under Article 32 is the seriousness of the offenses. Paragraph 33e, Manual for Courts-Martial, United States, 1969 (Revised edition). No new matter regarding the seriousness of the charges against

the petitioner was brought to the attention of the respondent; to the contrary, the allegations of misconduct on the part of confinement personnel detracted rather than enhanced the magnitude of the charges insofar as the petitioner was concerned and the forum for determining the petitioner's responsibility had already been selected. The Court noted certain other irregularities in the proceedings to include improper processing of the petitioner's request for witnesses. The Court also observed in passing that if the military judge had granted a formal continuance (Para. 58e, Manual, supra) during an Article 39(a) session, as opposed to a postponement prior to trial, the action of the respondent in removing the case from the consideration of the military judge would have constituted an illegal interference with the exercise of his judicial function. The record did not disclose whether a continuance or a postponement was involved.

In dissent, Judge Darden was of the opinion that the Court's action in ordering the government to show cause was improvident and that any harm the accused suffered should be reviewed in the normal course of the appellate process.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

AWOL -- DEFECTIVE EXTRACT OF MORNING REPORT -- Appellant was convicted contrary to his plea of absence without leave. Trial defense counsel objected to the admission into evidence of a morning report extract (DA Form 188) which did not contain the name of the reporting unit in Item 4. The specifications in question alleged that appellant was absent from "United States Army Overseas Replacement Station, located at Oakland California." The extract admitted at trial (DA Form 188) was devoid of any entry in Block 4, and it contained in Block 5 the notation "USA OS REPL STA (6A)". The Army Court of Military Review noted that there was more than one "USA OS REPL STA (6A)" and that the regulation in effect at the time the morning report and the extract were prepared sought to alleviate this problem by directing that both the reporting unit and the parent unit be identified by completion of Blocks 4 and 5 on both documents, unless the organization is a separate or parent unit (Paragraphs 1-19, 1-20, AR 335-60 dated 25 June 1969). The Court further noted that the U.S. Army Replacement Station, Oakland, California was neither a parent unit nor a separate unit.

In discussing the relevance of the omission in Item 4 the majority of the Court observed that:

1. An omission on the DA Form 188 must be considered as an omission on the actual morning report (DA Form 1).

2. The "Certification and Authentication of Extract" section of DA Form 188 is hearsay information and is made for the purpose of prosecution; the information contained in that section cannot be used to remedy omissions in Section II of the extract.

Emphasizing the objection of trial defense counsel to the morning report extracts, the Court set aside the conviction affected by the extracts in question on the grounds that the evidence failed to establish the organization from which appellant absented himself. United States v. Bowman, No. 423901, __CMR__ (ACMR 1971). This case has been certified by TJAG.

INSANITY -- NORCOANALYSIS, INSTRUCTIONS -- The Army Court of Military Review recently held that a military judge erred in limiting a psychiatrist's testimony to conclusions as to mental responsibility arrived at absent reference to the psychiatrist's diagnostic use of narcoanalysis (a sodium pentothal interview). As a result of the limitation placed upon the psychaitrist by the military judge, the psychiatrist was not able to render an opinion as to appellant's mental responsibility at the time of the acts charged (murder, assault with intent to murder). The psychiatrist had concluded by reference to the narcoanalysis that appellant was not mentally responsible at the time of the acts charged. The Court interpreted the following language in the Manual and concluded that it did not support the ruling of the military judge.

> "The conclusions based upon or graphically represented by a polygraph test and the conclusions based upon, and the statements of the person interviewed made during, a drug-induced or hypnosis-induced interview are inadmissible in evidence in a trial by court-martial." Paragraph 142e, Manual for Courts-Martial, United States, 1969 (Revised edition).

The Court reasoned that the above Manual rule of hearsay exclusion was not directed to narcoanalysis used as a diagnostic technique. The Court reviewed the medical literature and the case law involving use of narcoanalysis and concluded that military law should not preclude the physicians' use of a medically accepted diagnostic technique. United States v. Smith, No. 423144, ___CMR ___(ACMR 1971).

ARREST -- SEARCH AND SEIZURE -- The accused and another were arrested for hitch-hiking in Vietnam. A search of the accused revealed marihuana. The arrest was predicated upon a 101st Division written order prohibiting hitch-hiking. The Army Court of Military Review held the arrest invalid as: (1) the evidence of record did not establish that hitch-hiking occurred; (2) even if that offense were shown, the evidence did not show whether appellant or the individual with him solicited a ride; (3) the order prohibiting hitch-hiking was not shown to be official; (4) the record failed to demonstrate that the arrest was not effected solely because of a policy of the military police, not shown to be official, that appeared to have extended the no hitch-hiking prohibition of the Division by considering all soldiers, regardless of their pass status, as being off-limits when walking along the road. Because the government failed to meet its burden of establishing that the arrest upon which the search and seizure was predicated was lawful the accused's conviction for possession of marihuana was set aside. United States v. Daily, No. 423611 ___CMR ___ (ACMR 1971).

SEARCH AND SEIZURE -- PROBABLE CAUSE -- The Army Court of Military Review held that a lawful seizure of drugs from an accused's person in a bunker in the Republic of Vietnam does not, without more, give rise to probable cause to search his quarters ("located at an undisclosed but apparently different place from the bunker"). Citing United States v. Clifford, 19 USCMA 391, 41 CMR 391 (1970); United States v. Racz, SPCM 5960 ___CMR ___(ACMR 1971).

CHARGES AND SPECIFICATIONS -- LESSER INCLUDED OFFENSES -- The Army Court of Military Review held, citing United States v. Ross, 40 CMR 718 (ABR 1969), that disrespect towards a superior officer is not a lesser included offense of communicating a threat where the phrase "his superior officer" is not included in the specification as pleaded. United States v. Massey, SPCM 6456 (ACMR 16 March 1971).

CHARGES AND SPECIFICATIONS -- FAILURE TO STATE AN OFFENSE -- The accused in the applicable specification was charged with "having knowledge of a lawful order . . . which states, magazines will not be inserted in weapons in a base camp area unless engaged in action with the enemy or on order of competent authority . . . did . . . fail to obey the same, by having a magazine with ammunition inserted." Because the specification did not allege the particular circumstances under which it was unlawful to insert ammunition, the United States Army Court of Military Review held that the specification fell short of satisfying the test of legal sufficiency. United States v. Clayton, SPCM 5949 (ACMR 26 March 1971).

EVIDENCE -- SUFFICIENCY -- DRUG OFFENSES -- The Army Court of Military Review recently considered the sufficiency of the evidence to establish that the accused sold and possessed a "hallucinogenic drug, to wit: Lysergic Acid Diethylamide (LSD)." The expert testimony at trial concerning the identification of the substance in question revealed that the tests performed by the prosecution expert would not distinguish dextrolysergic acid diethylamide (d-LSD) from levolysergic acid diethylamide (l-LSD) as a result of the absence of a test involving use of a polarimeter [see the June 1970 issue of THE ADVOCATE]. The Court of Military Review after reviewing the professional literature and legislation (federal and military) concerning hallucinogenic drugs concludes that levolysergic acid diethylamide (l-LSD) is not a hallucinogenic drug and that only the hallucinogenic forms of LSD fall within the purview of the statutory and regulatory prohibitions. The Court's task was then to determine whether the evidence was sufficient to establish that the appellant possessed and sold d-LSD. In concluding that the evidence was sufficient to sustain the conviction the Court states:

> "Lysergic acid is the starting material in the synthesis of LSD, with d-LSD being made from d-lysergic acid and l-LSD being produced from l-lysergic acid. Whereas d-lysergic acid exists in a natural state, the production of l-LSD requires a difficult fifteen-step synthesis in a laboratory. Thus, the availability of l-LSD is so highly limited that the chance of an average person obtaining any is virtually nil. Certainly, no illegal seller of LSD could reasonably be expected to dispense a

> product so difficult to obtain and which does not produce the hallucinogenic effect desired by his customers. Further, if this appellant had sold l-LSD capsules, it is not likely that he would have been selling them for $5.00 each, the highest price charged in any of the transactions. For the foregoing reasons, it was not incumbent on the prosecution to come forward with evidence that the capsules were not l-LSD. Cf. United States v. Rose, 19 USCMA 3, 41 CMR 3 (1969), and the cases cited therein. In the absence of any affirmative evidence to show that l-LSD was involved in the instant offenses, we are convinced beyond a reasonable doubt of the appellant's guilt and find that the evidence is sufficient to support the findings of guilty." [Footnotes omitted] United States v. Crawford, SPCM 5862 ___CMR ___(ACMR 1971).

CHARGES AND SPECIFICATIONS -- SUFFICIENCY -- The United States Army Court of Military Review holds that the rationale of United States v. Crawford, SPCM 5862 ___CMR___(ACMR 1971), which requires that the prosecution need only prove that the substance is LSD, as opposed to proving it it is not l-LSD, precludes successful appellate attack upon the sufficiency of a specification to state an offense that alleged only possession and transfer of "Lysergic Acid Diethylamide, commonly known as LSD." United States v. Lynxwiler, No. 424088, ___CMR ___ (ACMR 1971).

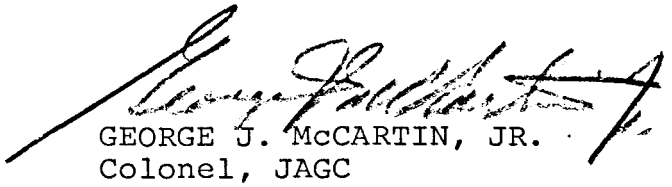
PROCEDURE -- DENIAL OF COMPULSORY PROCESS OF WITNESSES -- Under Fed. R. Crim. P. 17(b), compulsory process at government expense is available to an indigent defendant merely on a showing that he cannot pay the witness's expenses and that the witness is necessary to an adequate defense. The fifth circuit recently held that a district judge abused his discretion by refusing to order the production of a convicted codefendant unless the defense "guaranteed" that the witness would be called to the stand.

> "The requirement that defense counsel bind himself in advance to put [the witness] on the stand regardless of trial developments

> and the necessity counsel recognized to preserve options as to tactical trial decisions was doubtlessly motivated by a desire to save money for the government. It was nonetheless, in our judgment, the imposition of unreasonable conditions upon the right to compulsory process and an almost classic example of abuse of judicial discretion." Hathcock v. United States, 9 Crim. L. Rep. 2035.

Military defense counsel might well consider whether the rationale of this case undercuts the more restrictive language of Paragraph 115, Manual for Courts-Martial, United States, 1969 (Revised edition). The Hathcock case implies that the witness has to be made available long before the defense must decide during trial whether his in-court testimony is advantageous to the defense, in a tactical sense.

RAPE -- CONVICTION REVERSED ON FINDING CONSENT -- People v. Taylor, ___ N.W. ___ (Ill. Sup. Ct. March 15, 1971) is a recent rape case won by the defense on the theory of consent. Even though the complainant testified she was threatened with what she thought was a gun, consent was found under all the other circumstances of the case, including, inter alia, the two or more hours she was with the accused, her extensive conversations with him, her failure to resist in any way, her opportunity to get out of the car several times when it was stopped in traffic, her half-hearted attempt to flee at the scene of the crime, her voluntary undressing, the lack of bruises on her or damage to her clothing, and, finally, her goodbye kiss as she left his presence.



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