

# THE ADVOCATE

A BI-Monthly Newsletter for Military

## Defense Counsel

Defense Appellate Division

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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. 1-21f, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and officers therein, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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## Editors Note

It should be noted for the record that beginning with this issue, The Advocate will no longer bear the signature of Colonel Arnold I. Melnick. Colonel Melnick has departed the Defense Appellate Division to assume the position as Deputy Judge Advocate, USAREUR and Seventh Army. The Editors would like to thank Colonel Melnick for his guidance, support, and suggestions in continuing to make this publication possible.

Future issues will be published over the signature of Colonel Victor A. De Fiori, Chief, Defense Appellate Division. Colonel De Fiori was formerly Director for Legislation and Selected Policies in the Office of The Assistant Secretary of Defense (Manpower and Reserve Affairs). It is anticipated the editorial policy will remain substantially the same, and every effort will be expended to make The Advocate useful to Defense Counsel.

A special note of appreciation is extended to Captain John T. Willis, past Editor-in-Chief of The Advocate. It was through the persistent and resourceful efforts of Captain Willis that this publication has remained viable during the past year. The editors extend their best wishes to Captain Willis in his new job in The Legal Assistance Office, Aberdeen Proving Grounds, Maryland.

The Threat of Charging Desertion -  
A Strong Defense Bargaining Position

While the incidence of convictions under Article 85, Uniform Code of Military Justice, is relatively infrequent, the possibility always exists that any lengthy absence, especially one terminated by apprehension, will be charged as desertion. Also, the threat of charging an accused with desertion may be used to induce a plea of guilty to the lesser included offense of absence without leave and/or to obtain a pretrial agreement more favorable to the government. Thus, trial defense counsel should be aware of exactly how difficult it is to sustain a desertion conviction at the appellate level and of the correspondingly strong bargaining position of an accused facing the threat of a desertion charge.

To support a finding of guilty of desertion, there must exist evidence of record to prove beyond a reasonable doubt, not only the unauthorized absence, but also the intent to desert, usually to remain away permanently. This intent to desert, in the absence of a confession, normally can only be proven by circumstantial evidence. As a starting point, the Manual for Courts-Martial, United States, 1969 (Revised edition), lists a number of factors to be used to prove an intent to desert:

...that the period of absence was of a prolonged duration; that the accused attempted to dispose of his uniform or other military property; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that while absent he was in the neighborhood of military posts or stations and did not surrender to the military authorities; that he was dissatisfied in his company or on his ship or with the military service; that he had made remarks indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; that just before absenting

himself he stole money, civilian clothes, or other property that would assist him in getting away; or that without being regularly separated from an armed force he enlisted or accepted an appointment in the same or another armed force without fully disclosing the fact that he had not been regularly separated or entered any foreign armed service without being authorized by the United States.... (Paragraph 164b, Manual for Courts-Martial, United States, 1969 (Revised edition)).

In the usual AWOL/desertion case, few of these factors will be present, and the absence of any of them should be emphasized by trial defense counsel, whether before a court or in informal discussion or negotiations with trial counsel. Further, the presence of any one or two of these criteria does not raise a conclusive or even a rebuttable presumption of an intent to remain away permanently. Rather, the Manual provides that these factors, if present, raise only an inference of an intent to desert. (Paragraph 164a)

Case law is consistent with the Manual provision, allowing only an inference of an intent to desert from the above factors. Illustrative of this judicial policy is the weight given to the most common factor, namely duration of the absence. The Court of Military Appeals has held:

While length of absence is a factor to be considered with all of the other evidence in the determination of intent to desert, it is not a substitute therefor . . . United States v. Wiedemann, 16 USCMA 365, 367, 36 CMR 521, 523 (1966).

The court-martial must consider the specific intent of the accused and not some substituted "established fact" of a justifiable inference. United States v. Cothorn, 8 USCMA 158, 160, 23 CMR 382, 384 (1957). See also United States v. Swain, 8 USCMA 387, 24 CMR 197 (1957).

By far, the most crucial factor in determining whether or not an intent to remain away permanently is present, is

whether the accused surrendered voluntarily or was apprehended. Where trial defense counsel can show a voluntary surrender, appellate reversal of a desertion conviction is much more likely, except under the most extraordinary circumstances. An analysis of all of the published cases where an intent to desert was found by the Court, demonstrates that in approximately 90% of these cases the absence was terminated by apprehension. [See Appendix ] The reasoning behind the importance placed by the Courts upon the surrender/apprehension comparison is apparent. The Courts have reasoned that it is entirely logical to indulge in the inference that an accused who was apprehended did not intend to return voluntarily to military control and that one who surrendered of his own free will did intend to return voluntarily. Consistent with this rationale, in the vast majority of the cases where an intent to desert was found, the accused had been apprehended.

In those few cases where an intent to remain away permanently was found by the appellate courts and there was no apprehension, the absence is invariably not "satisfactorily explained." [See Appendix] In most cases, the accused never testified and the defense presented no evidence whatsoever. By "satisfactory explanation" the Courts have not required that the defense justify the absence, but only that sufficient reasons be presented to provide a motive for the absence other than to remain away permanently. Examples of "satisfactory explanations" have been the need to help an alcoholic mother (United States v. Kazmarck, 12 CMR 603 (ABR 1953)), to care for a sick aunt (United States v. Wilson, 8 CMR 194 (ABR 1953)), to attend to a family illness (United States v. Uhlund, 10 CMR 620 (AFBR 1953)) and to search for a wife and child (United States v. Johns, 28 CMR 639 (NBR 1959)). Thus, with only minimal defense explanation, trial defense counsel has an extremely strong bargaining position for a pretrial agreement, lesser included offense, etc., assuming he can establish the accused's voluntary surrender.

Trial defense counsel should be aware of three appellate decisions in particular, all dealing with relatively lengthy absences. In United States v. Anderson, 38 CMR 582 (ABR 1967), the accused surrendered after a 2 year 3 1/2 month absence. Anderson testified that he had marital and family problems, that he kept his uniform, that he lived at home and worked in his home town and that he always intended to return to the Army. In Anderson the Army Board of Review

held that there was no intent to desert. In United States v. Simmons, 42 CMR 543 (ACMR 1970), the accused presented no explanation at all to explain his nearly two year absence. Yet the Army Court of Military Review found no intent to desert, considering the accused's voluntary surrender. The most recent case is United States v. Stokes, CM 430516 (ACMR 17 June 1974). The accused was absent for 3 years, 7 1/2 months and departed from a combat zone in Vietnam. The prosecution also presented the testimony of the accused's employer who testified that the accused stated that he intended to remain permanently with the corporation he was working for (while absent). Nevertheless, the Army Court of Military Review held that an intent to desert was not proven beyond a reasonable doubt, in light of the accused's voluntary surrender and satisfactory explanation for the absence.

While there is little question that trial defense counsel's bargaining position (and defense if the case ultimately goes to trial) is improved immeasurably if the accused has surrendered to military control an absence terminated by apprehension is not a presumption of an intent to desert. In Kazmarck, Wilson, Uhland, and Johns, all supra, each absence, although relatively short, was terminated by apprehension. However, in view of the explanations presented, no intent to desert was found by the appellate courts.

Thus, where trial defense counsel must prepare to defend an accused charged with desertion terminated by apprehension, a critical factor will be the quality and quantity of the extenuating and mitigating evidence tending to explain the absence and to rebut an inference of intent to desert, if any is established. The single most important element will be the accused's testimony that he always intended to return to the Army and never at any time, entertained the thought of permanent separation. Secondly, adequate reasons for the absence, e.g., family illness, financial problems, etc. (whether from the accused or corroborating witnesses) will be needed to support the accused's testimony that he never intended to desert. Thirdly, testimony and documentary evidence should be presented to establish the accused's readiness, and therefore his intention, to return to his unit. Some examples would be retention of his uniform, medals, ribbons, I.D. card, and military driver's license, and evidence of previous excellent and long service.

Finally, evidence should be introduced (or brought to the convening authority's attention when negotiating a pretrial agreement), showing that the accused never made an effort to conceal himself or his identity from military or civilian authorities. Evidence that the accused lived and worked in his home town, that he always used his true name and social security number, that he paid taxes etc., effectively tend to rebut any inference of an intent to desert. See Stokes, supra.

Accordingly, trial defense counsel will be justified in adopting a strong and confident bargaining attitude in response to the threat of a charge of desertion for a lengthy unauthorized absence and should be assured of an equally strong position if the accused is tried under Article 85, Uniform Code of Military Justice. In either case, it is essential that trial defense counsel bring to the attention of the convening authority or the Court, the inherent weakness of proving an intent to desert beyond a reasonable doubt and the relevant Manual provisions and case law. In the future, it is anticipated that the Army Court of Military Review will continue to apply its strict standard to determine an intent to desert.\*/ As one member of the Court of Review stated during oral argument in United States v. Stokes, supra, There was a time when we would cut off a man's arm to punish him for an offense. Hopefully, we have progressed since then. The Army's attitudes toward desertion expressed in the 1950's cases are as outdated as trial by fire and water. An intent to desert cannot be presumed or inferred, it must be proven.

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\*/See United States v. Donaldson, CM 431133, 17 September 1974, where the Court of Military Review found no intent to desert despite appellant's apprehension at his home, a place far removed from his place of duty, by two FBI agents, and his record of three prior unauthorized absences; and United States v. Vanier, CM 431559, 25 October 1974, in which the Court found no intent to desert even though the appellant's eight year absence was terminated by apprehension.

#### Appendix

The following are cases where the appellate court found an intent to desert and therefore are the cases most likely to be relied upon by trial counsel, whether in argument before the Court or in negotiations with trial defense counsel. Cases are listed in chronological order and are followed by the

factors that would distinguish them from a case of an absence terminated by surrender.

Dreschnack, 1 CMR 193 (no defense evidence).

McConnell, 1 CMR 320 (apprehension).

Faraca, 1 CMR 356 (apprehension).

Jackson, 1 CMR 764 (apprehension).

McCrary, 1 CMR 781 (no defense evidence)

Percy, 1 CMR 786 (apprehension).

Shepard, 2 CMR 202 (apprehension).

Anderson, 2 CMR 238 (accused under extremely serious charges when going AWOL).

Urban, 2 CMR 246 (ABR 1951) (prior AWOLs and "unexplained extended absence.")

Miller, 2 CMR 395 (appellant remains silent).

White, 2 CMR 511 ("unsatisfactorily explained").

O'Brien, 2 CMR 531 (absence unexplained and appellant under serious charges of AWOL).

Ferretti, 3 CMR 57 (apprehension).

Hopper, 3 CMR 261 (apprehension).

Brussow, 3 CMR 290 (apprehension).

Swisher, 3 CMR 367 (apprehension).

Pascal, 3 CMR 379 (two "battlefield desertions," without explanation, manner of return not known).

Watson, 3 CMR 461 (unexplained).

Curtis, 3 CMR 735 (unexplained).

Runner, 3 CMR 742 (apprehension; no explanation).

Cirelli, 4 CMR 160 (apprehension and no satisfactory explanation).

Ziglinski, 4 CMR 209 (ABR 1952) ("intent can be inferred from (1) prolonged absence, (2) war zone, (3) apprehension, and (4) previously eluding arrest by falsely asserting his assignment to another organization."

Stellman, 4 CMR 233 (apprehension).

Taylor, 4 CMR 450 (facts contradicted appellant's explanation).

West, 5 CMR 19 (apprehension simultaneous offense and anticipated court-martial).

Dailey, 5 CMR 469 (apprehension).

Knoph, 6 CMR 108 (apprehension).

Huffman, 6 CMR 244 (apprehension).

Linacre, 6 CMR 417 (apprehension).

Wright, 6 CMR 491 (apprehension, civilian clothes, assumed name).

Coover, 7 CMR 349 (apprehension and previous AWOL convictions).

Cochran, 7 CMR 490 (apprehension).

Martin, 7 CMR 542 (actions to avoid apprehension; serious offense of AWOL).

Williams, 7 CMR 726 (apprehension).

Ostrander, 8 CMR 560 (no satisfactory explanation; "aimless waiting around" - not logical).

Stuckey, 8 CMR 583 (apprehension).

Palmer, 8 CMR 633 (apprehension).

Barnett, 8 CMR 653 (intent to shirk important service).

McNeill, 9 CMR 13 (apprehension).  
Cliette, 9 CMR 289 (apprehension).  
Toewen, 9 CMR 312 (apprehension).  
Keeton, 9 CMR 447 (apprehension).  
Shuler, 10 CMR 109 (apprehension).  
Rushlow, 10 CMR 139 (apprehension).  
Privitt, 10 CMR 502 (apprehension).  
Linerode, 11 CMR 262 (5 month absence and surrender 2000 miles away = intent when appellant's "financial and domestic reasons" explanation held not satisfactory. Financial problems were a satisfactory explanation up to Feb 1, but not sufficient after Feb 1 when business was sold. 11 CMR at 272.)  
Savoy, 11 CMR 397 (apprehension).  
Duchard, 11 CMR 640 (apprehension).  
Kelley, 11 CMR 721 (AFBR) (no sufficient explanation, writing worthless checks during absence, and "accused returned to military control").  
McLean, 11 CMR 755 (apprehension).  
Johnsey, 11 CMR 798 (apprehension).  
Barrett, 12 CMR 51 (apprehension).  
Fout, 13 CMR 121 (contradictory explanation).  
Thompson, 13 CMR 648 (apprehension, admissions).  
Prather, 13 CMR 740 (apprehension).  
Reed, 13 CMR 925 (apprehension).  
Frazier, 14 CMR 495 (admission not to return to duty station).  
Muench, 14 CMR 857 (apprehension).

Bonds, 19 CMR 361 CMA (apprehension 500 miles away and  
8 1/2 year absence).

Davis, 19 CMR 930 (apprehension).

Jewel, 20 CMR 707 (apprehension).

Kidd, 20 CMR 713 (apprehension).

Spruill, 23 CMR 485 (apprehension).

Herring, 23 CMR 489 (apprehension and distant place).

Olson, 28 CMR 766, (previous offenses before AWOL).

Rathman, 30 CMR 872 (previous offense before AWOL).

Fields, 32 CMR 193 (apprehension).

Morgan, 32 CMR 576 (would return but not to same unit).

McPherson, 33 CMR 543 (previous AWOL of 3 years which occurred  
2 weeks before current offense; apprehension).

Miller, 33 CMR 563 (apprehension).

Wagner, 33 CMR 853 (apprehension).

Montoya, 35 CMR 182 (only issue raised on appeal; whether  
AWOL ended by apprehension).

Webb, 35 CMR 593 (appellant "would leave again"; apprehension).

Turner, 37 CMR 508 (escape from confinement and apprehension).

Care, 40 CMR 247 CMA (apprehension and 3000 miles away).

Herrin, 40 CMR 961 (religious beliefs inconsistent with the  
military).

Wallace, 41 CMR 147 (prior absences - course of conduct).

Wilson, 42 CMR 263 (apprehension).

Moss, 44 CMR 298 (absence upon orders to Viet Nam).

Nelson, 45 CMR 631 (prior AWOLs and other misconduct).

Mackey, 46 CMR 754 (apprehension).

Note: The only cases dealing with desertion in 47 CMR are guilty pleas.

## The Continuing Saga of Non-Punitive Regulations

The most recent case to be decided by the Court of Military Appeals on the non-punitive regulation issue is United States v. Scott, 22 USCMA 25, 46 CMR 25 (1972). The Courts of Military Review have disposed of the issue favorably in several cases (see Article 92(1) -- The Possibility of Attack on Nonpunitive, Vagueness and Knowledge Grounds, Vol. 6 No. 1 The Advocate). But by no means is this area settled. If there is one thing that defense counsel can glean from reading the COMA cases on the issue, there is no single characteristic which will cause the Court to determine categorically that the regulation is, indeed, punitive. The Court has disapproved regulations because they combined advisory instructions with punitive regulations (Hogsett, 8 USCMA 861, 25 CMR 185 (1958)); because the regulation required implementation (Tassos, 18 USCMA 12, 39 CMR 12 (1968) and Woodrum, 20 USCMA 529, 43 CMR 369 (1971)); because the regulation was predominantly instructional (Nardell, USCMA 327, 45 CMR 101 (1972)); and because it was not clear that the regulation was punitive (Scott, supra).

The only cases which produced dissents in the Court were Hogsett, and Woodrum. Judge Latimer dissented in Hogsett, as to three issues. He stated that the regulation in question was (1) a lawful military regulation of general application, (2) a positive command and (3) not defective simply because it did not contain a specific penalty.

The latest dissent was in Woodrum, in which Judge Darden picked up the thread of Judge Latimer's first contention. The regulation in Woodrum was the successor regulation to the one complained of in Tassos. It was acceptable because of an added section that made it applicable to individuals. Judge Darden's contention was that since it was now applicable to individuals it fit the definition of a lawful general order.

It is of course impossible to predict the attitude of the Court of Military Appeals due to its recomposition. However, using case law and dissents as guidelines, there are some general points that defense counsel should look out for in dealing with a regulation.

- (1) What is the purpose of the regulation?
- (2) Is there a statement that violations of the regulations will form a basis for prosecution under the Uniform Code of Military Justice?
- (3) To whom does the regulation apply or to whom is it directed?
- (4) Does it seek to establish a code of conduct or is it merely a guide for the conduct of military functions?
- (5) Does it require implementation by subordinate commanders?
- (6) Does the regulation touch on a variety of topics or does it specifically concentrate on one area?
- (7) Does the specification cite the regulation in question and the correct paragraph?
- (8) Has the trial counsel introduced the regulation into evidence and/or had it judicially noted?
- (9) Does the regulation as a whole seem to be punitive? How many sections carry penalties?

It is strongly suggested that defense counsel not rely on any one of these issues. Attack the regulation on as many bases as you possibly can and don't forget that the regulation must be strictly construed to be used as a punitive regulation.

#### Use of Dogs for Barracks and On-Post Drug Searches

An area which appears ripe for abuse is the use of "marijuana dogs" in searches of soldier's lockers and barracks areas. The apparent feeling of many officers in the field is that the case of United States v. Unrue, 22 USCMA 466, 47 CMR 556 (1973) gives a free hand to utilize dogs to search for drugs with impunity, without regard to the need for probable cause or reliance upon inspection requirements. The Unrue decision rests on two key factors not present in the random barracks search situations: (1) a finding of

military necessity due to the "epidemic" drug problem coupled with what Judge Quinn perceived to be a carefully regulated inspection system and (2) the presence of the "amnesty barrel" which was somehow equated to a situation of no expectation of privacy under United States v. Poundstone, 22 USCMA 297, 46 CMR 277 (1973); United States v. Simmons, 22 USCMA 288, 46 CMR 288 (1973) and United States v. Weshenfelder, 20 USCMA 416, 43 CMR 256 (1971). Further, Unrue brings into play the special concepts of border-gate searches (see generally Alemedia-Sanchez v. United States, 413 U.S. 266 (1973)) relying on the relaxed standards encompassed in the doctrines of border inspections and the mobility doctrine not present in barracks areas. Under United States v. Neloms, 48 CMR 702 (ACMR 1973), absent exigent circumstances, the use of dogs in "walkthroughs" or in random stops at gates is invalid. These stop-type searches do not equate to implied consent nor can they be sustained as valid under either the plain view concept or as pursuant to apprehension under either Robinson, 414 U.S. 218 (1973) or Gustafason, 414 U.S. 260 (1973). A nexus between the stop and the search must be established. Warden v. Hayden, 387 U.S. 294 (1967). Note also the recent decision of United States v. Carson, 22 USCMA 203, 46 CMR 203 (1973) condemning the use of dogs to make general searches at airport terminals of soldiers returning to the States, based on suspicion, as illegal on the grounds of being general and exploratory.

Following the position articulated in Carson and then further advanced and articulated in Neloms, it would seem that the only tenable position for the government will be to attempt to sustain all such intrusions under some theory of military necessity under Unrue or Poundstone or no expectation of privacy under Simmons, or Weshenfelder. Neither argument seems likely to succeed in the typical barracks or on-post stop situation especially in light of recent cases stressing the need and right of privacy of the individual soldier in his locker area like United States v. Whitler, 23 USCMA 121, 48 CMR 682 (1974), and United States v. Salatino, 22 USCMA 531, 48 CMR 16 (1973). As such, these searches should be attacked as general and exploratory under United States v. Martinez, 16 USCMA 40, 36 CMR 196 (1965) and United States v. Battista, 14 USCMA 70, 33 CMR 282 (1963). Clearly under Carson and Neloms dogs cannot be used to circumvent the protections of the Fourth Amendment or ignore the standards concerning inspections as set forth in United States v. Lange, 15 USCMA 486, 35 CMR 458 (1965), and United States v. Grace, 18 USCMA 409, 42 CMR 11 (1970). Unrue cannot be read to give free license for unfettered use of dogs without a showing of probable cause or a permissible regulatory scheme; a marijuana dog does not excuse an otherwise unlawful intrusion.

## Waiver: A Trap for the Unwary

The issue of waiver is appearing with increasing frequency in cases before the Army Court of Military Review. The following represents a brief discussion of the most common problem areas and is not intended to be all inclusive. It is hoped that the end result will be immediate relief at trial, or at least the development of sufficient facts on the record to enable relief to be granted at the appellate level.

I. Certain issues cannot be waived whether they are litigated at the trial level or not.

A. Insanity or mental capacity.

B. Jurisdiction.

CAVEAT: If trial defense counsel does not raise the issue, successful litigation on appeal is improbable due to lack of sufficient factual basis to develop the pleadings.

II. Certain issues must be raised to be preserved for appeal but will not be deemed waived by a subsequent plea of guilty.

A. Speedy trial.

CAVEAT: This is not limited only to the situations of confinement in excess of 90 days. In the recent case of United States v. Johnson, 49 CMR 13 (ACMR 1974) the Army Court of Military Review dismissed all charges on the basis of category 2 Burton -- demand for trial situations. Speedy trial can also arise in the deprivation of due process situation (Articles 10 & 33) and should be raised, especially to assist in clemency matters.

B. Multiplicity - both as to sentencing and to dismissal of the multiplicitious charge.

- C. Statute of Limitations.
  - D. Prior Convictions - improperly prepared.
  - E. Misjoinder of major and minor offenses.
  - F. Challenge to military judge or trial counsel for improper remarks or comments on the evidence etc. See especially United States v. Pickney and United States v. Saint-John.
  - G. Former jeopardy.
  - H. Failure to state an offense in the specification.
- III. The following are waived by a plea of guilty regardless of whether or not they were litigated during the course of the trial.
- A. Search and seizure.
  - B. Imperfections in the Article 32 hearing and investigation.
  - C. Voluntariness of the confession.
  - D. Vagueness as to time or place of specification.
  - E. Referral to trial on unsworn charges.
  - F. Affirmative defenses.

As a general rule, any and all defects which are non-jurisdictional are waived unless a specific and timely objection is made at trial. The trend, if any, in the military appellate tribunals is to expand the doctrine of waiver, and it therefore is increasingly imperative to the individual accused's interests that the appropriate objections and motions be timely and properly made. If the issue is not sufficiently developed at the trial, successful litigation at the appellate level in virtually all cases is severely restricted if not precluded. See United States v. Warren, 49 CMR \_\_\_ (ACMR 1974), an en banc decision. The only possible exceptions are plain error or manifest injustice which are not clearly defined or determined at the present time.

Recent Court of Military Review Cases.

6 August 1974.

United States v. Milliken, CM 429969 Per Curiam --- Convening authority's grant of immunity from prosecution in exchange for the witness' testimony disqualifies him from reviewing and taking action in the cases in which the witness testifies. Note also the attempt by trial counsel to impeach appellant through use of pretrial confession given without Art. 31 warnings. COMR found that appellant had waived Art. 31 warnings.

7 August 1974.

United States v. Rosario, CM 431039 - Failure to establish a factual basis for a guilty plea and the resolution of inconsistencies in appellant's testimony will render the plea improvident. A mere listing of the elements and the appellant's acknowledgement of those elements will not establish the providency of the plea.

United States v. Wright, SPCM 9080 - (Action on petition for new trial.) Appellant was convicted of possession of marijuana in violation of Art. 92. Because of the following three problems the Court set aside the findings and sentence and dismissed the charges. (1) The circumstances surrounding the controlled purchases (by the CID) were atypical. (2) There was an unexplained gap in the chain of custody. (3) The phone calls from the informant with regard to the second purchase were made under questionable circumstances. None of the three matters individually would raise a reasonable doubt; considered together, reasonable doubt was raised.

8 August 1974.

United States v. Henderson, SPCM 9212 - Self-defense. A person may use that degree of force which he believes on reasonable grounds necessary to prevent the perceived impending injury. Military judge did not err in instructing that the accused must have believed that the force he used was necessary for protection against death or bodily harm.

15 August 1974.

United States v. Pushee, CM 430457 - Appellant was charged with lengthy AWOL. His defense was that he was waiting at his home pursuant to instructions. He was unable to

clarify his situation after several attempts which he duly noted. The Court held that since the military judge had accepted appellant's claim, the burden was upon the Army to issue new orders, not upon the appellant, and dismiss the charge citing United States v. Davis, 22 USCMA 241, 46 CMR 241 (1973).

United States v. Talamantes-Chavez, CM 430233 - Several defects in the post-trial review required a new review and action by a different staff judge advocate and convening authority. (1) The incorrect statement that there was a plea of guilty to the lesser included offense of AWOL to the desertion charge (Court found this to be the most serious). (2) Failure to meet review standards for a not guilty plea. (3) Officer who signed the review had acted as an interpreter in the case. (4) Failure to inform convening authority that the Article 32 officer did not recommend a general court-martial.

15 August 1974.

United States v. Gourley, CM 431071 - Improper introduction three prior Art. 15's during sentencing. The Art. 15's were imposed in the time period covered by an AR which provided for the destruction of those records two years after imposition (or one year after transfer from unit). These Art. 15's were almost 4 years old. See United States v. Tafoya, 48 CMR 969 (ACMR 1974). AR 27-10, 26 Nov. 1968 (effective 1 Jan 1969).

23 August 1974.

United States v. Zuis, CM 429814 - Appellant pleaded guilty to various offenses pursuant to advice of civilian counsel. He attacked the adequacy of his counsel on appeal alleging essentially that he was coerced into pleading guilty. Affidavits were submitted by appellant and others which attested to the "production line" defense counselling. The Court ordered hearing as to the issue of adequacy of counsel, refusing to decide the case on the basis of ex parte affidavits. Note concurring opinion which states that the true issue is coercion of the plea.

29 August 1974.

United States v. Leach, SPCM 7969. The Court held that a "cubicle", one of twenty in a large squad room in a barracks, can be the subject of housebreaking, Art. 130 UCMJ. "The occupants had an expectation of privacy in the area and it was sufficiently defined that others could not intrude by mistake."

United States v. Burt, SPCM 9522. Delay of 141 days from trial to action of convening authority. Clear prejudice, the remedy for which is the disapproval of the punitive discharge. Note: this was decided on pre-Dunlap grounds.

United States v. Berry, SPCM 9476. A coffee cup was used to deliver a blow which required in excess of 35 sutures to close. The Court held that this was insufficient to show grievous bodily harm. It reduced the specification to one of assault but reassessed and affirmed the sentence.

#### RECENT FEDERAL CASES OF INTEREST TO DEFENSE COUNSEL

Search and Seizure: Reasonable expectation of privacy. Fixel v. Wainwright, (CA 5 4/10/74) 15 C.L.R. 2122.

Occupant of one apartment in a four-unit building enjoys a reasonable expectation of privacy with respect to a common back yard. The majority of the court pointed out that contemporary living quarters and arrangements such as those found in multi-unit dwellings must not be allowed to dilute the individual's right to privacy any more than absolutely necessary.

Search and seizure: Informer's affidavit. United States v. Pamitz, (CA 9, 4/8/74) 15 C.L.R. 2121.

An informer's knowing and material misrepresentation in an affidavit that agents had him swear to was not fatal to warrant the agents obtained, because portions of the affidavit which were true were sufficient to show probable cause. However, court indicates that it is significant that the agents had no knowledge of the informer's prevarications

Evidence: Co-conspirator's hearsay testimony. Park v. Huff (CA 5 5/6/74) 15 C.L.R. 2221.

Co-conspirator's hearsay testimony admitted under a state exception to hearsay rule was crucial but unreliable evidence that violates the defendant's Sixth Amendment right of confrontation. The failure of the state to show the unavailability of the co-conspirators, coupled with the crucial but inherently unreliable nature of the statements convinces the majority of the Court that the admission was improper under the testimony guidelines from Dutton v. Evans, 400 U.S. 89.

evidence - Voiceprints: United States v. Addison (CA DC 6/674) 15 C.L.R. 2249.

Techniques of speaker identification by spectrogram comparisons ("voiceprints") have not attained the general acceptance of the scientific community to justify admission.

Entrapment: Government supplied contraband. United States v. Mosley (CA 5 7/5/74) 15. C.L.R. 2341.

When the government supplies the contraband so that accused could commit the crime, this constitutes entrapment notwithstanding the defendant's predisposition. See United States v. Bueno, 447 F.2d 903 (5 CA 1971); United States v. Russell, 411 U.S. 423 (1973) (distinguished).

The Defense Appellate Division recently developed a "Reference Outline" on various legal issues.

Beginning with this issue, the outlines will be distributed as part of the Advocate. It is suggested they be detached from this publication and placed in a separate binder for use by Defense Counsel as a desk-top, ready-reference booklet.

## Jurisdiction

### I. Jurisdiction over the Offense

To be subject to military jurisdiction, crimes in the United States must be "service connected." O'Callahan v. Parker, 395 U.S. 258 (1969). When the offense is committed on a military reservation, the Army has jurisdiction over the offense. Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971).\*/ Sale of drugs to a civilian off-post is not "service connected." United States v. Morley, 20 USCMA 179, 43 CMR 19 (1970). Off- post drug sale to a CID agent may not be "service connected." United States v. Blancuzzi, 46 CMR 922 (1972); but see United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974). The issue of off- post sale of drugs is currently before the Supreme Court in Councilmen 481 F.2d (10th Cir. 1973); cert. granted 414 U.S. 1111 (1973). Thus, the issue should be raised even though the military courts may not grant relief at this time. Crimes against other servicemen wherever located are generally service connected. United States v. Rego, 19 USCMA 9, 41 CMR 9 (1969).

### II. Jurisdiction over the Person

Jurisdiction over the person is statutory. Article 2, Uniform Code of Military Justice. Generally, the accused must be subject to the Code both at the time of the offense and at the time of trial.

A. Illegal enlistments. Enlistment by those under 17 is void. "Go to jail or join the Army" enlistments may be void. United States v. Catlow, 23 USCMA 142, 48 CMR 758 (1974). Any enlistment contrary to regulation is illegal and jurisdiction may be lacking. If the Army is on timely notice that an enlistment is invalid it is estopped from raising

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\*/If the accused is stationed in and commits an offense off-post in a foreign country, the military has jurisdiction. United States v. Newvine, 23 USCMA 208, 48 CMR 960 (1974).

constructive enlistment to establish jurisdiction. United States v. Brown, 23 USCMA 162, 48 CMR 778 (1974). Concealment by enlistee and recruiter of prior felony convictions creates a void enlistment which cannot be saved by constructive enlistment. United States v. Bunnell, SPCM 9150 (ACMR 25 July 1974).

B. Reservists. The Army lacks jurisdiction to try a "lazy" reservist ordered to active duty for missing drills unless the provisions of AR 135-91 are followed. Such regulations are for the benefit of the reservist not just the Army. United States v. Kilbreth, 22 USCMA 390, 47 CMR 327 (1973); United States v. Burke, No. 429541 (ACMR 31 October 1973).

C. Termination. Generally jurisdiction ceases upon discharge. United States v. Scott, 11 USCMA 646, 29 CMR 462 (1960). This is true even if the accused has subsequently reenlisted. United States v. Ginyard, 16 USCMA 512, 37 CMR 132 (1967); but see Article 3(a) Uniform Code of Military Justice. Another exception is the so-called "continuing offense." See United States v. Watson, No. 428479 (ACMR 19 March 1973).

### III. Record of Trial Errors

A. Nonverbatim records. A verbatim record is a jurisdictional requirement for any court adjudging a punitive discharge, or forfeitures or confinement at hard labor in excess of 6 months. Paragraphs 82b, 83a, Manual. A reconstructed or nonverbatim record deprives a court of the power to impose such sentences. United States v. Randall, 22 USCMA 591, 48 CMR 215 (1974); United States v. Thompson, 22 USCMA 448, 47 CMR 489 (1973); United States v. Boxdale, 22 USCMA 414, 47 CMR 352 (1973). This jurisdictional defect may be cured, however, by reducing the sentence to that of a special court-martial.

B. Authentication of Record. The record of trial must be authenticated and dated by the military judge before the date of the convening authority's action. Otherwise the convening authority lacks jurisdiction to take his action as the status of the record is unknown. Paragraphs 82e,f, Manual; United States v. Minchew, 40 CMR 667 (ABR 1969); United States v. King, 44 CMR 680 (ACMR 1971).

C. Request for Trial by Military Judge Alone. Since the request creates a Court which does not otherwise exist, it is a jurisdictional requirement that the request must be in writing, personally signed by the accused and must request by name the specific military judge who sits at trial. If a new judge is detailed, a new request must be completed. Article 16, UCMJ. United States v. Rountree, 21 USCMA 62, 44 CMR 116 (1971). If a proper form exists at the time of trial but it is subsequently lost, there is no jurisdictional defect. United States v. Colonna, 46 CMR 687 (ACMR 1972).

D. Request for Enlisted Court Members. Likewise in a request for enlisted persons on the court, the accused must personally request this type of court in writing. United States v. White, 21 USCMA 583, 45 CMR 357 (1972).

E. Oaths. The court lacks jurisdiction if the military judge and the court members are not sworn. United States v. Kendall, 17 USCMA 561, 38 CMR 359 (1968). The court reporter must also be sworn. Paragraph 112b, Manual. However, it is not jurisdictional error if the trial counsel is not sworn. United States v. Walsh, 22 USCMA 509, 47 CMR 926 (1973).

#### IV. Composition of Courts-Martial

The court members and military judge must be detailed by the convening authority. Articles 25, 26, Uniform Code of Military Justice. After assembly only the convening authority may excuse or add court members and only for good cause. Paragraph 37a, Manual. The record must contain a detailed explanation for removal. United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953). The trial court lacks jurisdiction without a quorum. Article 29, Uniform Code of Military Justice. A new military judge may be detailed for good cause. Article 29(d), UCMJ. But if tried by judge alone, a new request must be executed. United States v. Rountree, supra.

#### V. Statute of Limitations

While not jurisdictional per se, the statute of limitations will bar trial unless the accused knowingly waives it. Paragraph 68c, Manual. The military judge has an affirmative duty to so advise accused. Id. There is no limitation barring trial for wartime AWOL or desertion. The Court of Military Review has held that the Vietnam War ended on 27 January

1973. United States v. Reyes, 48 CMR 832 (ACMR 1974). Generally the period is three years for serious offenses, two years for less serious offenses. Article 43, UCMJ. The statute begins running on the date of commission of the offense. Paragraph 68c, Manual. For AWOL and desertion, it commences on the inception date. United States v. Lynch, 22 USCMA 457, 47 CMR 498 (1973). The statute is suspended when the accused is absent from the country or when in civilian confinement. Article 43(d), UCMJ. The statute stops running when the summary court-martial authority receives sworn charges. Article 43(d), UCMJ.

## VI. Former Jeopardy

No person, once final review is completed, may be tried again for the same offense. Article 44, UCMJ. If a convening authority disapproves the findings and sentence for any reason except sufficiency he may generally order a rehearing. Article 63, UCMJ. However, an accused may not be tried again for any offense for which he was acquitted and he may not receive a greater sentence. Id. Punishment under Article 15 bars subsequent trial for a minor (punishment less than DD or one year authorized) offense. Paragraph 215c, Manual. Retrial for AWOL from a different place for a period included in the initial charge is barred. It does not matter whether the first charge was dismissed or resulted in acquittal. United States v. Pounds, 23 USCMA 153, 48 CMR 769 (1974).

## EVIDENTIARY PROBLEMS

### I Elements of offense

- A Should conform to sample specification in MCM but that does not preclude analysis for sufficiency.
- B Article 90 must allege that victim is "his" superior commissioned officer. U.S. v Showers, 48 CMR 837 (ACMR 1974).
- C Article 134 (1) and (2) must include allegation of criminality, i.e., "wrongful". U.S. v Bryce, 17/336, 38/134 (1967).
- D Article 134 (3)-Assimilative Crimes Act
  - 1. Must incorporate relevant words of criminality from whatever local statute is being incorporated. U.S. v Almendarez, 46/814 (ACMR 1972).
  - 2. Must allege absence of exceptions to conduct set forth in the statute which makes it lawful. If the exceptions are not part of offense but only remove taint of criminality from otherwise lawful act, the burden rests on accused to bring himself within exception. U.S. v Rose, 19/3, 41/3 (1969); U.S. v Blau, 5/232, 17/232 (1954).
- E Article 92-Lawful general regulation
  - 1. Must be punitive. U.S. v Alexander, 22/485, 47/786 (1973).
  - 2. Must apply to accused.
    - a. A.F. reg held applicable only to pilots, not plane thieves. U.S. v Webber, 13/536, 33/68 (1963).
    - b. USAREUR reg held applicable only to POV owners, not car thieves. U.S. v Strickland, 42/888 (ACMR 1970).
  - 3. Must prohibit specific conduct committed by accused. MACV directive held only to prohibit purchases at post office, not at other places. U.S. v Baker, 18/504, 40/216 (1969).
  - 4. Must recite correct paragraph violated. U.S. v Wright, 48/319 (1974), but see U.S. v Grublack, 47/371, (ACMR 1973) pet.dn. 2 Nov. 1973 holding that it does not matter which regulation is alleged as long as conduct is prohibited by any regulation in existence.

### II Sufficiency

- A ACMR can reverse cases with no legal errors just because they are not convinced beyond a reasonable doubt or for any other reason. U.S. v Cheatham, 48 CMR 819 (ACMR 1974) (did not believe accomplice); U.S. v Samuels, 48 CMR 972 (ACMR 1974) (did not believe victim).
- B Confession is inadmissible unless corroborated as to all of its essential facts, (note: "corpus delicti")

rule not followed in military). U.S. v. Seigle, 22/403 47/340 (1973); U.S. v Johnson, 43/783 (ACMR 1971).

C Accomplice testimony (if vague, self-contradictory, or uncertain) must be corroborated. U.S. v West, 36/564 (ABR 1965); U.S. v Enlow, 46/518 (NCMR 1972).

D Drug sales-One who is an agent for the buyer is not guilty of sale. U.S. v Fruscella, 21/26,44/80 (1971).

E Larceny-Not provable by evidence of possession of recently stolen property. U.S. v Boultinghouse, 11/721, 29/537 (1960).

### III Testimonial evidence

A Hearsay is incompetent evidence and failure to object does not preclude litigation of error on appeal.

B A doctor can not testify as to collective opinions of other members of a sanity board. U.S. v Parmes 42/1010 (AFCMR 1970 en banc).

C Same rules discussed in part IV below also apply to limit trial counsel's cross-examination of accused as to-

1. Confessions or admissions. U.S. v Lincoln, 17/330 38/128 (1967); U.S. v Jordan, 20/614, 44/44 (1971).

2. Prior convictions. U.S. v Sisk, 45/735 (ACMR 1972).

3. Accused's prior reliance on Article 31 right to remain silent.

a. Error to cross-examine accused by asking him why he refused to talk to the CID. U.S. v Stegar, 16/569, 37/189 (1967).

b. ...or had refused to take a polygraph. U.S. v Cloyd, 25/908 (AFBR 1958).

c. But, it is permissible to cross-examine accused on the recency of the story he is telling at trial and that he has not told it before, as long as it does not involve prior invocation of his rights. U.S. v Cloyd, 21/795 (AFBR 1956) (no relation to prior Cloyd).

### IV Documentary evidence

#### A Official records

1. Must be prepared in accordance with regulations.

a. Failure to include synopsis of specification and inconsistency between other specification and Article allegedly violated, indicate prior conviction was erroneously admitted. U.S. v Weathersby, 42/791 (ACMR 1970).

b. Entry prepared by E-4 inadmissible if regulations call for E-7 or higher to do it. U.S. v Hammond, 43/994 (AFCMR 1971).

c. Typographical error "DER" instead of "DFR" entry morning report inadmissible since entry could in no way consistent with logic have been made in accordance with regulations. U.S. v Porter, No 4305 (ACMR 14 May 1974) (reconsidered 31 July 1974)

- d. Must reflect final supervisory review. U.S. v Perkins, 48 CMR 975 (ACMR 1974) (see portion of this outline on (previous convictions).)
2. Must be certified.
  - a. Must bear rank of custodian, to establish that entry was made by proper person. U.S. v Turner, 13/820 (AFBR 1953).
  - b. Blanks on form must be filled in with whatever information is called for, i.e., name, rank, & organization of custodian. U.S. v Cathey, 6/824 (AFBR 1952).
  - c. Document must reflect custodian's signature.
    - (1) Morning report with neither signature block nor signature of custodian below entry is not admissible. U.S. v Parlier, 1/433, 4/25 (1952).
    - (2) Signature block unaccompanied by a signature is not admissible if the form (DD 493) calls for such a signature. U.S. v Anderson, 43/960 (AFCMR 1971).
    - (3) Extract bearing /s/ but then blank affirmatively establishes that original has no signature. U.S. v Beyers, 31/669 (AFBR 1961).
    - (4) Extract (DD 493) with diagonal line through certification block affirmatively establishes that original is not certified. U.S. v Benton, 20/428 (AFBR 1955).
    - (5) Inner pages of multipage document need not be signed if governing regulation does not require it, but their connection to the certified first page must be established. U.S. v Fowler, No. 430031 (ACMR 31 Oct. 1973).
  - d. Certification defects are not waived by a failure to object since they indicate that the entry not having been made in accordance with applicable regulations, does not fall within official records exception and is thus incompetent hearsay. U.S. v Adams, 5/569 (AFBR 1952).
3. Must be authenticated.
  - a. Illegible signature held improper authentication. U.S. v Lawson, 42/847 (ACMR 1970).
  - b. Authentication of a morning report dated on the day covered by the entry and which therefore was not made until 2400 hours of that day was a physical impossibility. U.S. v Jewell, 46/557 (ACMR 1972).
  - c. Authentication block does not fall within official records exception to the hearsay rule, so information there cannot be used to bootstrap admissibility of document by filling in gaps in actual entry. U.S. v Bowman, 44/285 (ACMR 1971) reversed on other grounds 21/48,

44/102 (1971).

d. Lack of authentication can be waived by failure to object. Para. 143 b, MCM.

4. Must not be made solely for the purposes of prosecution. U.S. v. Jewell, supra.

B. Business entries

1. TC who fails to prove document as an official record may try to establish that it is kept in the ordinary course of the Army's business and offer it as a business entry.
2. Lab Report was upheld on this theory, though with the caveat that if DC wanted witness (chemist who prepared report) he was entitled to him. U.S. v. Evans, 21 /579, 45/353 (1972).
3. Business entries must also be authenticated. Beware of TC's who try to avoid calling anyone from the lab by attempting to authenticate lab report by local CID evidence custodian, judicial notice of the function of a crime lab (as COMA did in Evans), and inference of authenticity of responses through regular mail channels. Para. 143 b, MCM. This area is still unsettled.

C Confessions

1. Confession or admission must be predicated on government's showing of voluntariness, i.e., Article 31 and Miranda-Tempia warnings. U.S. v. Tempia, 16/629, 37 /249 (1967); U.S. v. Smith, 15/416, 35/388 (1965).
  - a. Warning requirement applies to police apprehending a deserter. U.S. v. Kaiser, 19/104, 41/104 (1969).
  - b. Whenever lawyer is requested, interrogation must cease immediately. U.S. v Rogers, 40/861 (ACMR 1974).
  - c. Warnings vitiated if their meaning is qualified in any way by CID, i.e., advising suspect that if he is really innocent, he could get in trouble for withholding information U.S. v Hundley, 21/320, 45/94 (1972); U.S. v Allen, 48/474 (ACMR 1974).
2. Only exception to requirement to establish voluntariness is if statement is admitted at trial with express consent of accused. U.S. v Shell, 18/410, 40/122 (1969); U.S. v Gustafson, 17/150, 37/14 (1967).
  - a. Consent must be established by more than a mere failure to object. U.S. v Derrick, 42/835 (ACMR 1970).
  - b. Record must show that prior statement by accused actually contributed in some way to defense theory of case and was relied on by DC in some way (i.e., examination of witnesses or closing argument) as

part of his strategy. U.S. v Gilliard, 20/534, 43/374 (1971); U.S. v Masemer, 19/366, 41/366 (1970).

3. COMA does not search for prejudice in this area. Use of an inadmissible confession against an accused is prejudicial per se. U.S. v Reynolds, 16/403, 37/23 (1966); U.S. v Tanner, 14 /447, 34/227 (1964); but see U.S. v Clayborne, No. 426210 (ACMR 10 Nov. 1972) aff. 22/387, 47/239 (1973) where ACMR tried to chip away at COMA's rejection of the harmless error rule.
4. Above rules apply equally to admissions as well as confessions. U.S. v Lincoln, 17/330, 38/128 (1967).

V

#### Real Evidence

- A Relevance-Trial counsels habitually introduce such evidence just because CID secured it, or it was in the file without establishing relevance to any element of proof.
- B Inflammatory-Pictures of the bloody body should not always be objected to and litigated. U.S. v Coleman, 36/574 (ABR 1965).
- C Chain of custody-Document itself is seldom admissible, as proper foundation is seldom laid. One or two breaks in the chain may not be enough to defeat foundation, but if any time gaps occur in chain for drugs or other real evidence tied to testimony by expert analysing same, error should be assigned. U.S. v Spencer, 21/504 (1956).

## INSTRUCTIONS

### A. Failure to Instruct on a Theory of the Defense.

1. Amie, 7 USCMA 514, 22 CMR 304 (1957)

AWOL case; the court said it could not conclude as a matter of law that the defense of physical incapacity was not raised. Where raised by the evidence, military judge is required sua sponte to give the instruction.

2. Tucker, 17 USCMA 551, 38 CMR 349 (1968)

Although contradicted by the testimony of other witnesses, the testimony of the accused alone was sufficient to raise a factual issue requiring instructions on the defense of accident. It does not matter that the accused is the sole source of his contention.

3. Smith, 13 USCMA 471, 33 CMR 3 (1963)

Instructions should be tailored to the circumstances of the case, the affirmative submission of the respective theories of the government and the accused, with lucid guideposts, so the court may knowledgeably apply the law. Self-defense instruction using the language that one can lawfully "meet force with a like degree of force" should be eliminated from self-defense instruction.

4. Sitren, 16 USCMA 321, 36 CMR 477 (1966)

Entitled to have instructions relating to any defense theory for which there is evidence in the record. A court is insufficiently informed as to the law of the case without legal explanation of affirmative defenses. Assault and battery, failure to instruct on the issue of self-defense raised by evidence was error, even though defense counsel did not object to the instructions given or request additional instructions.

5. Sheeks, 16 USCMA 430, 37 CMR 50 (1966)

Forgery of wife's name on a check. Forgery involves intent to defraud. Instructions by the military judge were requested by the defense counsel that accused only intended to deceive by writing the checks, and thus was not guilty. Held: Appellant was entitled to have his theory of the case submitted to the jury. Sufficiency of the evidence is not the basis upon which an instructional request will be judged. The Court found a substantial basis from the evidence to support appellant's theory, and ordered a rehearing.

6. Hendy, 23 USCMA 70, 48 CMR 451 (1974)

Judge erred in failing to instruct the jury that appellant could not be convicted of selling durgs if they believed that he undertook to obtain the drugs as an agent for the purchaser. The evidence was sufficient to support the theory that appellant was gratuitously acting only as an agent for said purchaser.

B. Failure to Instruct on any Lesser Included Offenses Raised by the Evidence

1. Clark, 22 USCMA 576, 48 CMR 83 (1973)

Judge is required to instruct sua sponte on any and all lesser included offenses for which there is in the record some evidence reasonably placing these offenses in issue. Although the trial judge's determination that a lesser included offense is or is not in issue should not be lightly disregarded, an appellate tribunal must independently evaluate the evidence to determine if appellant's right to have court consider all reasonable alternatives of guilt had been deprived. Held: defense theory of self-defense was not inconsistent with theory of voluntary manslaughter which should have been instructed upon.

2. Bellamy, 15 USCMA 617, 36 CMR 115 (1966)

Convicted of unpremeditated murder, the court erred in refusing to give a requested instruction on manslaughter. If there is any evidence which tended to show such a state of facts as might bring the crime within manslaughter, then it became a proper jury question that should be instructed upon.

3. Bairos, 18 USCMA 15, 39 CMR 15 (1968)

Every offense reasonably raised by the evidence must be the subject of proper instructions; and any doubt as to the sufficiency of the evidence to require instructions should be resolved in the accused's favor. Judge's instructions must include every issue as to which there is competent evidence in the record.

C. Failure to Object

1. Stephen, 15 USCMA 314, 35 CMR 286 (1965)

Generally the absence of a request for special instructions precludes consideration on appeal. But if the instructions fail to furnish the court with the "lucid guideposts" or result in plain error (since a fair trial requires that the jury be properly instructed) appellate notice of such deficiencies will not be precluded even though no objection was made.

D. Accomplice Testimony

1. Gilliam, 23 USCMA 4, 48 CMR 260 (1973)

Judge must instruct sua sponte on the effect of accomplice testimony when such testimony is of pivotal importance to the government's case. But compelling evidence of guilt will render the failure to give such an instruction nonprejudicial.

2. Diaz, 22 USCMA 52, 46 CMR 52 (1972)

The requirement that an instruction on uncorroborated accomplice testimony be requested is a mandatory requirement for review of such issue. However, Court of Military Appeals will review those instances where the absence of an instruction on the necessity of corroboration of an accomplice's testimony has resulted in plain error or a miscarriage of justice.

3. Garcia, 22 USCMA 8, 46 CMR 8 (1972)

Whether a witness is an accomplice so as to require the instruction on accomplice testimony is measured by whether the evidence established that the witness was subject to criminal liability for the same crime as the accused.

#### E. Sentencing Instructions

1. Keith, 22 USCMA 59, 46 CMR 59 (1972)

The military judge erred in failing to inform the court of the conditions under which they could, after announcement of sentence, recommend an administrative discharge, disapproval of the adjudged punitive discharge or suspension of the latter. Although a court on rehearing is limited to the sentence originally imposed and that sentence included no forfeitures, where the court on rehearing indicated some concern in finding an alternative to a punitive discharge, the judge also erred in not advising the court of its right to substitute forfeitures in lieu of punitive discharge.

2. Thornton, 19 USCMA 140, 41 CMR 140 (1969)

Prejudicial error as to sentence resulted from the failure to instruct the court that in voting on proposed sentences, it should begin with the lightest proposal first.

## Arguments

### A. Trial Counsel

1. Allen, 20 USCMA 317, 43 CMR 157 (1971)

Trial counsel erred in his argument on sentence when he attempted to read to the court a Secretary of the Navy policy directive concerning drug abuse, a form of command influence to which the doctrine of general prejudice is applicable.

2. Long, 17 USCMA 323, 38 CMR 121 (1967)

Prosecutor's argument appealing to passion or prejudice is wholly improper. It is also improper to associate an accused with other offensive conduct or persons, without justification of evidence in the record. Held that prosecutor's statements exceeded fair comment on evidence but found no prejudice where judge gave corrective instruction.

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

Improper argument by the prosecutor does not necessarily require corrective action. In assessing prejudice the Court questions whether there is a fair risk that the argument had any affect on the court members. Court held that the prosecutor's comments were significant and persuasive. The sentence was ordered reassessed because of prosecutor's statement.

### B. Defense Counsel

1. McDonald, 21 USCMA 84, 44 CMR 138 (1971)

Court ordered a rehearing on sentence where defense counsel, during his closing argument on sentence, stated that he himself had quite a few misgivings about the accused which prevented him from presenting evidence that accused was a good marine. Such comments were so contrary to the best interests of the accused as to require a rehearing.

2. Weatherford, 19 USCMA 424, 42 CMR 26 (1970)

Defense counsel cannot ask the court to impose a punitive discharge when the express or implied desire of the accused is to the contrary. Only in certain instances can a defense counsel properly argue for imposition of a discharge to the exclusion of other forms of probable punishment.

3. Richard, 21 USCMA 227, 44 CMR 281 (1972)

Defense counsel's argument for a bad conduct discharge but no confinement was held not to be improper and in the best interests of the client in light of the circumstances of the case and the expressed desires of the accused.

4. Wood, 18 USCMA 291, 40 CMR 3 (1969)

Defense counsel has some obligation to object to the arguments of the trial counsel. Timely objection can result in timely correction. The absence of objection tends to indicate that the defense did not regard the argument as improper and is persuasive inducement to the appellate court to evaluate the prosecutor's argument in the same light. The Court found error in prosecutor's argument asking the court members to place selves in the position of a near relative wronged by the accused (appellant convicted of taking indecent liberties with children), but provided no relief in light of the overwhelming evidence against appellant.