

MAR 16 1981

A Journal For Military Defense Counsel

THE ADVOCATE

United States Army
Defense Appellate Division

Vol. 13, No. 1

January — February 1981

Contents

2

NEW TRIAL PETITIONS UNDER ARTICLE 73, UCMJ
Captain Gunther Carrle

24

BURDENS OF PROOF, PERSUASION AND PRODUCTION:
A THUMB ON THE SCALES OF JUSTICE?
Captains Charles Trant and R. T. Harders

43

SEARCH and SEIZURE: A PRIMER
PART TWO - Border and Overseas Gate Searches



50

SIDE BAR

55

USCMA WATCH

62

CASE NOTES

71

ON THE RECORD

NOT TO BE REMOVED
FROM TJAGSA LIBRARY

CHIEF, DEFENSE APPELLATE DIVISION

COL Edward S. Adamkewicz, Jr.

EDITORIAL BOARD

Editor-in-Chief:	CPT Edwin S. Castle
Managing Editor:	CPT Alan W. Schon
Articles Editor:	CPT Edward J. Walinsky
Case Notes Editor:	MAJ Robert D. Ganstine
Trial Tactics Editor:	CPT Courtney B. Wheeler
USATDS Representative:	MAJ John R. Howell

STAFF AND CONTRIBUTORS

Associate Editors

MAJ Grifton E. Carden
CPT Robert L. Galloway
CPT Charles E. Trant
CPT Joseph A. Russelburg

Contributors

CPT Richard W. Vitaris
CPT Chuck R. Pardue
CPT David M. England

ADMINISTRATIVE ASSISTANTS

Ms. Maureen Fountain
Mr. James M. Brown
Ms. Jean Murray

THE ADVOCATE (USPS 435370) is published under the provisions of AR 360-81 as an informational media for the defense members of the U.S. Army JAGC and the military legal community. It is a bimonthly publication of The Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, VA 22041. Articles represent the opinions of the authors or the Editorial Board and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Controlled circulation postage paid at Falls Church, VA. SUBSCRIPTIONS are available from the Superintendent of Documents, U.S. Government Printing Office, ATIN: Order Editing Section/SSOM, Washington, D.C. 20402. POSTMASTER/PRIVATE SUBSCRIBERS: Send address corrections to Superintendent of Documents, U.S. Government Printing Office, ATIN: Change of Address Unit/SSOM, Washington, D.C. 20402. The yearly subscriptions prices are \$8.00 (domestic) and \$10.00 (foreign). The single issue prices are \$2.00 (domestic) and \$2.25 (foreign).

OPENING STATEMENTS

Introduction to Volume 13

During the twelve years since its inception, The Advocate has evolved from a 7-page monthly newsletter into a professional legal journal with a full complement of editors, staff members, administrative assistants and contributors, a circulation of nearly 3000, and an independent distribution network which embraces military installations throughout the world, private subscribers, various Department of Defense libraries, the Superintendent of Documents, the United States Army Legal Services Agency, and The Judge Advocate General's School. The introductory comments in the first issue of The Advocate expressed the hope that the publication would "foster a spirit of cohesiveness among the defense bar." We begin Volume 13 of the journal by reaffirming our resolve to further that objective.

Overview of Contents

The lead article in this edition pertains to new trial petitions filed under Article 73 of the Uniform Code of Military Justice. The author outlines the procedural rules applicable to the petitions, defines the standards courts employ in assessing them, and presents, in an appendix, a suggested petition form prepared by the Defense Appellate Division. The second article addresses the timely issue of whether regulatory exceptions are elements of the offense or affirmative defenses, and the attendant problem of allocating burdens of proof, production, and persuasion in criminal cases. Finally, in the second installment of "Search and Seizure: A Primer," The Advocate staff capsulates decisional law regarding border and overseas gate searches.

Solicitation

We encourage readers of The Advocate to submit articles pertaining to legal issues which are of particular importance to trial defense counsel and warrant examination in the pages of this journal; your contributions, comments, and suggestions can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.

NEW TRIAL PETITIONS UNDER ARTICLE 73, UCMJ
by Captain Gunther O. Carrle*

In the military setting, the petition for a new trial provides reviewing courts and The Judge Advocate General with a procedure for setting aside findings and sentences in the interest of justice, based principally on matters outside the record.¹ A new trial is an available remedy even if the accused is separated from active military service,² and either he or his representative may file the petition.³ Its approval is a matter solely within the discretion of the authority to whom the petition is addressed.⁴ The petition is authorized by Article 73 of the Uniform Code of Military Justice, which provides:⁵

At any time within two years⁶ after approval by the convening authority of a court-martial sentence, the accused may petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending

* Captain Carrle received his B.S. and M.Engr. from Rensselaer Polytechnic Institute and his J.D. from the University of Pennsylvania. He is currently serving as an action attorney at the Defense Appellate Division.

1. See United States v. Owens, 6 USCMA 466, 20 CMR 182 (1955); United States v. McCarthy, 43 CMR 447 (ACMR 1970).

2. See para. 109b, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

3. Id. A suggested petition form is included as an appendix to this article.

4. See para. 109d(1), MCM, 1969.

5. Article 73, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. §873 (1976).

6. At least with regard to post-trial disabilities, courts generally suspend the time period and allow the accused a reasonable period within which to file his petition. See United States v. Bell, 6 USCMA 392, 20 CMR 108 (1955); United States v. Washington, 6 USCMA 114, 19 CMR 240 (1955).

before a Court of Military Review or before the Court of Military Appeals, The Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise The Judge Advocate General shall act upon the petition [footnote not in original].

Although the accused must initially submit the petition to The Judge Advocate General, it will be forwarded to the appellate court before which his case is pending.⁷ If The Judge Advocate General refuses to forward the petition, the accused may seek a writ of mandamus to compel him to take that action.⁸ Only if all appeals have been exhausted may The Judge Advocate General rule on the petition.⁹ Furthermore, although the Court of Military Appeals may review the Court of Military Review's decision on a new trial petition, it may not order a hearing de novo and it extends relief only when the lower tribunal abuses its discretion.¹⁰ Neither court may review a decision by The Judge Advocate General rendered after the conviction is final under Article 76, UCMJ.¹¹ Apparently there are no constraints on the type of information the accused may present in support of his petition. Thus the authority may consider, inter alia, the petition, the record of trial, and affidavits of new witnesses.¹² Moreover, both military appellate courts may direct an investigation into appropriate

7. Para. 109c, MCM, 1969. Accordingly, counsel should be familiar with the applicable appellate court rules. See USCMA R. Pract. and Proc. 27; CMR R. Pract. and Proc. 22.

8. Holodinski v. McDowell, 7 M.J. 921 (NCMR 1979).

9. This petition is independent of an "appeal" to The Judge Advocate General under Article 69, UCMJ. See Glidden, Article 69 "Appeals" - The Little Understood Remedy, 10 The Advocate 170 (1978).

10. United States v. Thomas, 3 USCMA 161, 11 CMR 161 (1953).

11. Platt v. United States, 21 USCMA 496, 45 CMR 270 (1972); Article 76, UCMJ, 10 U.S.C. §876 (1976).

12. See para. 109d(1), MCM, 1969.

matters.¹³ Either tribunal may evaluate witness credibility in cases where defense counsel allege false testimony as grounds for a new trial.¹⁴

If the appropriate reviewing authority grants the accused's petition for a new trial, the findings and sentence are vacated and he is restored to the status of unsentenced prisoner.¹⁵ He is not, ipso facto, entitled to his freedom,¹⁶ and the decision as to whether he must remain in confinement pending retrial is left to the appropriate authorities.¹⁷ Although there are provisions for deferring a sentence to confinement¹⁸, a petition for new trial does not automatically stay the sentence's execution. Furthermore, the reviewing authority may consider a petition without delaying execution.¹⁹

Grounds for a New Trial

There are two bases for granting a new trial: newly discovered evidence and fraud on the court.²⁰ The Manual also requires the accused to affirmatively establish that an injustice resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable

13. Para. 109f, MCM, 1969. Cf. United States v. Lebron, 46 CMR 1062 (AFCMR 1973).

14. See United States v. Turner, 7 USCMA 38, 21 CMR 164 (1956); United States v. Valenzuela, 7 USCMA 45, 21 CMR 171 (1956); United States v. Brozauskis, 46 CMR 743 (NCOMR 1972); United States v. Sutton, 44 CMR 859 (ACMR 1971).

15. See Johnson v. United States, 19 USCMA 407, 42 CMR 9 (1970).

16. Id. at 409, 42 CMR at 11.

17. Id.

18. Article 57(d), UCMJ, 10 U.S.C. §857(d)(1976); para. 89f, MCM, 1969.

19. Para. 109a, MCM, 1969.

20. Article 73, UCMJ, 10 U.S.C. §873 (1976).

result.²¹ Unlike the standard recited by most federal courts,²² the test set forth in the Manual permits a new trial even if it is unlikely to produce an acquittal, as long as it would probably result in a substantially more favorable sentence. The appropriate standard to apply when evaluating the potential impact of matters raised by the accused is the subject of some controversy, and certain circumstances may require the application of a standard less stringent than the Manual test if the accused's right to due process is to be safeguarded.²³

Newly Discovered Evidence

The most commonly raised ground for a new trial is the post-trial discovery of evidence which allegedly affects the adjudged findings or sentence. Not all information uncovered after the trial can be considered newly discovered evidence. A change in law, for example, does not fall within that category.²⁴ In addition, errors in post-trial proceedings cannot form the basis for a new trial because they are not part of the court-martial.²⁵ Courts are also reluctant to interpret a "trial tactic" as newly discovered evidence. For this reason, the court in United States v. Hambrick²⁶ denied a petition alleging, as newly discovered evidence, statements by a witness who the defense counsel failed to call at trial because of his uncertainty as to the testimony's content.

21. Para. 109d(1), MCM, 1969. Courts have held that the petitioner's burden is greater here than in the normal course of review. See, e.g., United States v. Walters, 4 USCMA 617, 16 CMR 191 (1954).

22. See, e.g., United States v. Jones, 597 F.2d 485 (8th Cir. 1979).

23. See United States v. Agurs, 427 U.S. 97 (1976). The Bill of Rights is applicable to servicemembers unless it is expressly or by necessary implication inapplicable. United States v. Ezell, 6 M.J. 307 (CMA 1979).

24. See United States v. Shelton, 459 F.2d 1005 (9th Cir. 1972).

25. See United States v. Washington, 9 USCMA 589, 26 CMR 369 (1958).

26. 43 CMR 835 (ACMR 1971).

New evidence will warrant a new trial if it is:

- a) in fact newly discovered, that is, discovered since [trial]; and
- b) not such that it would have been discovered by the petitioner at the time of the trial in the exercise of due diligence.²⁷

The government is precluded from arguing that evidence is not "newly discovered" merely because the accused knew of it during the trial. Thus, in United States v. Petersen,²⁸ there was no indication that a codefendant's statement was in fact newly discovered or that it could not have been obtained by exercising due diligence; the court nevertheless found that these requirements were satisfied when it appeared that the witness' attorney would not have allowed him to testify. Also, where a witness cannot testify because of a disability, his subsequent recovery can render the testimony newly discovered evidence.²⁹

Not only must the evidence be newly discovered, it must also have been unobtainable by the exercise of due diligence. The Army Court of Military Review ruled that a state court declaratory judgment validating a service-member's common law marriage could not form the basis for a new trial since the accused could have obtained the declaratory judgment prior to his court-martial for filing a false claim for increased quarters allowance.³⁰ Similarly, the defense counsel's failure to use truth serum at trial in order to overcome the accused's amnesia reflects a lack of due diligence and constitutes grounds for denying a new trial petition.³¹ The fact that evidence might have been obtained prior to trial does not necessarily

27. See para. 109d(2)(a),(b), MCM, 1969. These requirements are also imposed by civilian federal courts. See, e.g., United States v. Jones, supra note 22, at 488; United States v. Cardarella, 588 F.2d 1204 (8th Cir. 1978); United States v. Street, 570 F.2d 1 (1st Cir. 1977).

28. 7 M.J. 981 (ACMR 1979).

29. See United States v. Bouchier, 5 USCMA 15, 17 CMR 15 (1954) (defendant suffered from amnesia during trial).

30. United States v. Jophlin, 3 M.J. 858 (ACMR 1977).

31. See United States v. Hambrick, supra note 26.

reflect a lack of due diligence. Thus, where a trial witness' statement to a fellow inmate that he would "get even" with the accused could not have been elicited from the witness himself and would have been revealed only after an extensive "fishing expedition", the defense counsel's failure to uncover the evidence did not bar a new trial.³² If the degree of diligence which led to the post-trial discovery of evidence would have been equally fruitful had it been exercised prior to trial, courts are, of course, unlikely to find that counsel was duly diligent during the original proceeding.³³ A reviewing authority, however, may be reluctant to deny an otherwise meritorious petition solely because of a lack of diligence in obtaining evidence. Although this proposition is speculative, most of the cases citing a lack of due diligence when denying a petition also refer to the improbability of a more favorable result at a new trial.³⁴

Impeaching and Cumulative Evidence

Generally, new trials are not granted on the basis of evidence which restates matters introduced at trial or relates to a thoroughly litigated issue.³⁵ Defense counsel often urge a new trial on these grounds when an expert who will testify in the accused's favor is discovered after the original proceeding. Even if he is superior to the original witnesses, such an expert's testimony will not warrant a new trial if his opinions are predicated on the same evidence introduced at the first court-martial.³⁶ However, where new evidence would synthesize the agreement of all experts on both sides, a new trial may be appropriate.³⁷

32. United States v. Sutton, 34 CMR 490 (ABR 1963).

33. See 58 Am.Jur.2d §169 at 382.

34. See, e.g., United States v. Hurt, 9 USCMA 735, 27 CMR 3 (1958); United States v. Childs, 5 USCMA 270, 17 CMR 270 (1954); United States v. Jophlin, supra note 30; United States v. Ercolin, 46 CMR 1259 (ACMR 1973).

35. See United States v. Bouchier, supra note 29, at 25; United States v. Troutt, 8 USCMA 436, 24 CMR 246 (1957); United States v. Calley, 46 CMR 1131 (ACMR 1973).

36. See United States v. Henderson, 11 USCMA 556, 29 CMR 372 (1960); United States v. Tavares, 10 USCMA 282, 27 CMR 356 (1959); United States v. Hurt, supra note 34; United States v. Schroder, 47 CMR 430 (ACMR 1973).

37. See United States v. Henderson, supra note 36, at 377.

Evidence which merely affects the credibility or character of a witness is usually insufficient to warrant a new trial.³⁸ This principle, however, has not evolved into an absolute rule in military law. An Army Board of Review presented what appears to be the most logical approach to the problem in United States v. Sutton when it stated:

Appellate government counsel argue that newly discovered evidence which goes to impeachment of witnesses and not to the substantive facts of the case is not a sufficient ground for a new trial [citations omitted]. We do not agree. The prevailing consideration is whether a different result would probably occur with the new evidence, whether substantive or merely impeaching.³⁹

The Board of Review in Sutton granted the accused's petition based on new evidence which related solely to the credibility of the government's primary witness.

Courts have applied this view in other cases involving petitions citing newly discovered impeachment evidence. In United States v. Chadd⁴⁰, the petition was based on the discovery that an alleged rape victim who the government portrayed as a young woman of impeccable moral character was in fact homosexual. Although the evidence related solely to her character and credibility, the Court of Military Appeals granted the petition. While the evidence produced at trial was sufficient, the Court held that it was not so compelling as to justify the conclusion that the newly discovered evidence probably would not produce a more favorable result.⁴¹

38. See, e.g., Mesarosh v. United States, 352 U.S. 1 (1956); United States v. Jones, supra note 22; United States v. Sposato, 446 F.2d 779 (2nd Cir. 1971); United States v. Chisum, 436 F.2d 645 (9th Cir. 1971).

39. United States v. Sutton, supra note 32, at 494.

40. 13 USCMA 438, 32 CMR 438 (1963).

41. Id. at 443. See also United States v. Thomas, pet. for new trial issue specified, 8 M.J. 138 (CMA 1979), argued 13 Nov. 1980 (whether discovery of criminal misconduct and conviction of CID agent warrants new trial).

Moreover, in United States v. Whitely,⁴² the Court determined that evidence contradicting testimony by two assault victims that they had no prior association with each other related to a material matter — their credibility — and directed a new trial.

Where military courts deny petitions based on impeachment evidence, they appear to do so not because of an inflexible rule concerning character evidence, but because it seems improbable that a more favorable result would be achieved. In United States v. Troutt,⁴³ the accused was convicted of stealing from an enlisted mens' club fund. At trial he attempted to show that a civilian employee took the funds and in his petition for a new trial he cited newly discovered evidence concerning the civilian's spending habits. The Court of Military Appeals stated that nothing in the new evidence indicated that the civilian lied at trial, and that therefore the new evidence only affected his general credibility. Although this decision arguably announces a rule that evidence pertaining to a witness' general credibility does not warrant a new trial, a careful reading of the opinion indicates that the Court did not go so far. After pointing out that the civilian was subjected to "searching cross-examination"⁴⁴ by defense counsel at trial, the Court concluded that a new adversarial proceeding would merely result in the relitigation of his general credibility, an issue decided adversely to Troutt at trial.⁴⁵ The Court was primarily concerned with the fact that the cumulative nature of the evidence would probably preclude a more favorable result.

This proposition is supported by the reference in Troutt to United States v. Bouchier.⁴⁶ In Bouchier the Court denied a petition based on new evidence relating to a rape victim's truthfulness. In part, the Court based its denial on the fact that "able and ingenious" defense counsel repeatedly assaulted the victim's veracity at trial, where the issue was decided adversely to the defendant.⁴⁷ Again, the Court's decision was

42. 18 USCMA 20, 39 CMR 20 (1968).

43. See United States v. Troutt, supra note 35.

44. Id. at 248-9.

45. Id.

46. See United States v. Bouchier, supra note 29.

47. Id. at 25.

apparently shaped more by an evaluation of the new evidence's probable effect on a subsequent trial than by a general rule governing impeaching evidence. Thus, while the fact that newly discovered evidence merely impeaches a prosecution witness may be relevant to a determination of the likelihood of a more favorable outcome, the petition's validity should not turn on that fact. Federal courts also shun any talismanic rule requiring the denial of petitions based only on newly discovered character evidence. For example, in Garrison v. Maggio⁴⁸ the Fifth Circuit Court of Appeals held that a new trial will be granted even if the evidence is purely of an impeaching nature, if a new trial probably would result in acquittal.⁴⁹

Indeed, the Court of Appeals in United States v. Gabriel⁵⁰ ruled that a new trial is required where newly discovered evidence impeaches a witness who testified at trial, if the admission of the evidence "would probably produce a different result."⁵¹ The new evidence in that case consisted of a post-trial polygraph examination of a trial witness which indicated that he lied on a collateral matter. The court denied the petition, stating that the trial judge had the opportunity to evaluate the credibility of both the witness and the defendant at the trial. Therefore, it could not be said that he abused his discretion in denying the petition.⁵² Moreover, since defense counsel attempted to impeach the witness at trial, the polygraph evidence, even if admissible, was cumulative.⁵³

48. 540 F.2d 1271 (5th Cir. 1976).

49. Id. at 1274. The Garrison case involved nondisclosure of evidence by the prosecution, which generally reduces the burden imposed on the accused. However, the Court of Appeals did not rely heavily on this factor in reaching its decision and specifically stated that the case was not governed by the guidelines announced in Agurs. [See note 23, supra].

50. 597 F.2d 95 (7th Cir. 1979).

51. Id. at 99. See also United States v. Barrett, 505 F.2d 1091 (7th Cir. 1975); United States v. Curran, 465 F.2d 260 (7th Cir. 1972).

52. United States v. Gabriel, supra note 50, at 99.

53. Id. See discussion accompanying notes 37-39, supra.

Courts do not apply the general rule if the newly discovered evidence damages a witness' credibility with regard to a particular issue or statement of fact.⁵⁴ Nor will the courts automatically deny new trial petitions which are based on the government's conviction of its own primary witness⁵⁵ or the fact that the government raises questions about the veracity of its witness after the trial.⁵⁶ Appellate tribunals also find exceptions in situations where the government relied heavily on the unimpeached testimony of a particular witness⁵⁷ or portrayed the witness as unimpeachable.⁵⁸ The Tenth Circuit Court of Appeals in United States v. Harris described the circumstances under which the general rule is abandoned by stating that "a new trial is not necessitated because of newly discovered evidence of a cumulative or impeaching nature unless its potential impact upon the result of the trial is apparent."⁵⁹ It is not clear whether this language reflects a standard more stringent than the test generally applied.⁶⁰ However, if any form of evidence is in fact newly discovered and if the failure to produce it at trial is not attributable to the defense, justice seems to require a new trial, provided the evidence probably would produce a more favorable result.

Undisclosed Evidence

Special rules apply in cases where the government possessed newly discovered evidence during the trial. In United States v. Agurs,⁶¹ the Supreme Court discussed three different scenarios in which the government possessed but did not disclose evidence to the defense. The first category

54. See United States v. Sposato, supra note 38, at 781.

55. United States v. Chisum, supra note 38.

56. Mesarosh v. United States, supra note 38.

57. United States v. Harris, 462 F.2d 1033 (10th Cir. 1972).

58. United States v. Gordon, 246 F.Supp. 522 (D.D.C. 1965).

59. United States v. Harris, supra note 57, at 1035.

60. See textual material accompanying notes 22-24, supra.

61. 427 U.S. 97 (1976).

covers situations where undisclosed evidence demonstrates that the case-in-chief included perjured testimony of which the prosecutor had actual or constructive knowledge. Under these circumstances, "the conviction should be set aside if there is any reasonable likelihood that the false testimony could have affected" the jury's judgment.⁶² This standard also applies when the government does not elicit false testimony but fails to correct it,⁶³ and when the testimony relates only to a witness' credibility.⁶⁴ Thus, in Napue v. People of State of Illinois⁶⁵ the Supreme Court directed a new trial because the government failed to correct a prosecution witness' statement that he received no consideration for his testimony.⁶⁶

The accused is entitled to a new trial even if the prosecutor was unaware of the undisclosed evidence. Prosecutorial innocence in overlooking evidence in the government's possession is generally irrelevant.⁶⁷ Indeed, at least one court suggested that a prosecutor should be presumed to recognize the significance of highly probative evidence even if he overlooks its value.⁶⁸ Moreover, courts must examine the file of the government rather than the particular prosecutor. Thus, the Supreme Court

62. Id. at 103; see United States v. Librach, 602 F.2d 165 (8th Cir. 1979).

63. See Napue v. People of State of Illinois, 360 U.S. 264 (1959).

64. See United States v. Giglio, 405 U.S. 154 (1972).

65. 360 U.S. 264 (1976).

66. See United States v. Librach, supra note 62 (failure to disclose that witness was given compensation and protective custody); United States v. Harris, supra note 57 (failure to disclose that witness was given plea bargain which led to dismissal of charges); but see United States v. Cardarella, supra note 27 (trial judge did not abuse discretion in denying new trial where government failed to disclose that witness was paid informant). In Demarco v. United States, 415 U.S. 449 (1974), however, the Court limited this rule to situations where the promise is made before the witness testifies.

67. Id. at 103, 104 n.10 and 110 n.17.

68. United States v. Agurs, supra note 61, at 110.

applied the rule in a case where the government promised the witness that he would not be prosecuted even though the promise was not made by the trial attorney, who was unaware of any such obligation.⁶⁹

The second situation described in Agurs involves a defense counsel's pretrial request for specific evidence. If the government withholds requested evidence, the conviction cannot stand, provided "the suppressed evidence might have affected" the trial's outcome.⁷⁰ In the final scenario, newly discovered evidence in the government's possession is neither specifically requested nor the subject of a general demand for all exculpatory matters. According to the Court, "the fact [that] such evidence was available to the prosecutor and [was] not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source,"⁷¹ and appellate courts must determine whether the "omitted evidence creates a reasonable doubt that did not otherwise exist."⁷²

At least one court determined that a factual setting identical to the third category in Agurs is not governed by the rule announced therein because the evidence did not go to the merits.⁷³ The Fifth Circuit Court of Appeals held that a new trial is required only if the new evidence would probably produce an acquittal; the court reasoned that "requiring a prosecutor to volunteer impeachment evidence about his witnesses entails the risk that [these individuals] will be less open with the prosecutor or may even refuse to testify voluntarily."⁷⁴

69. United States v. Giglio, supra note 64.

70. United States v. Agurs, supra note 61, at 104; United States v. Librach, supra note 62, at 167.

71. United States v. Agurs, supra note 61, at 111.

72. United States v. Agurs, supra note 61, at 112; United States v. Librach, supra note 62, at 167. It should be noted that in his dissenting opinion in Agurs, Justice Marshall questioned whether this reasonable doubt standard lessened the accused's burden.

73. See Garrison v. Maggio, supra note 48.

74. Id. at 1274.

False Testimony

When newly discovered evidence indicates that a witness committed perjury,⁷⁵ appellate courts will generally direct a new trial if such an action would probably produce a more favorable result.⁷⁶ Although no cases directly address the issue, due process probably requires military courts to apply the Agurs standards in the event of prosecutorial misconduct.⁷⁷ An accused's claim that his trial included false testimony often arises in the form of a trial witness' post-trial recantation or a statement by a third party that the witness confessed to perjury.⁷⁸ These affidavits are frequently filed by the defendant's fellow inmates or by a co-accused after his own conviction.⁷⁹ Such circumstances, of course, raise immediate problems of credibility, and courts generally view recantations with skepticism. Accordingly, new trial petitions are often denied because of a judicial determination that the witness' recantation would so weaken his credibility before a new courts-martial that a more favorable result would

75. This discussion of false testimony is limited to those situations where it is raised as newly discovered evidence. The text accompanying note 92 infra, will deal with false testimony as a fraud upon the court.

76. See, e.g., United States v. Petersen, 7 M.J. 981 (ACMR 1979); United States v. Lebron, supra note 13; United States v. Brozauskis, supra note 14. Federal courts frequently apply the lesser standard announced in United States v. Larrison, 24 F.2d 82 (7th Cir. 1928). Under Larrison, the court will allow a new trial if it is reasonably convinced that a material witness gave false testimony which the defense did not recognize until after trial and that without the testimony, the jury might have reached a different conclusion. However, courts are increasingly dissatisfied with the application of this standard in the absence of prosecutorial misconduct. See, e.g., United States v. Stofsky, 527 F.2d 237 (2nd Cir. 1975).

77. See note 61, supra.

78. See, e.g., United States v. Petersen, supra note 76; United States v. Lebron, supra note 13; United States v. Brozauskis, supra note 14; United States v. Wedge, 9 CMR 437 (ABR 1952).

79. See, e.g., United States v. Day, 14 USCMA 186, 33 CMR 398 (1963); United States v. Petersen, supra note 76; United States v. White, 45 CMR 537 (ACMR 1972); United States v. McCarthy, supra note 1.

probably not be achieved.⁸⁰ In this context, appellate courts may weigh a witness' trial testimony against his recantation in order to evaluate his credibility and the likely impact of the revised testimony on a subsequent trial.⁸¹

Under certain circumstances, however, a confession of false testimony can necessitate a new trial. Thus the Army Court of Military Review in United States v. McCarthy⁸² acknowledged the rule that:

Where there is a full recantation bearing on its face no indication . . . of double dealing . . . it is the duty of the trial court to grant a new trial when a witness at the original trial subsequently admits on oath that he has committed perjury or that he was mistaken in his testimony, provided such testimony related to a material issue and was not merely cumulative.

In McCarthy, the Court recognized that reviewing authorities view with suspicion recantations by a co-accused who seeks to accept the entire fault for a crime after trial.⁸³ Under the facts in McCarthy, the Court granted a petition for a new trial based on a recantation. The witness' original testimony undermined the accused's credibility with regard to his contention that the homicide of which he was accused was an accident. If the issue affected by the recantation was thoroughly litigated at trial, however, courts are reluctant to grant the new trial petition.⁸⁴

The fact that a witness perjured himself affects not only the subject matter of his testimony, but the jury's opinion of his general credibility as well. Should a judge consider this double impact when he evaluates the

80. United States v. Petersen, supra note 76.

81. See United States v. Turner, supra note 14; United States v. Valenzuela, supra note 14.

82. United States v. McCarthy, 43 CMR 447, 453 (ACMR 1970), quoting Ledet v. United States, 297 F.2d 737 (5th Cir. 1962).

83. Id.

84. See note 35, supra.

effect the evidence would have on a new trial? At least one court has answered in the affirmative; the Second Circuit Court of Appeals in United States v. Stofsky⁸⁵ stated:

Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

Fraud on the Court

The second ground for granting a new trial under Article 73, UCMJ, is fraud upon the court.⁸⁶ The petitioner must show that an injustice resulted from the findings and sentence and that a more favorable result would probably be produced by a new trial.⁸⁷ The Manual provides several examples of fraud on the court which may warrant a new trial, including:⁸⁸

- (a) Confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect upon a finding of guilty and without which there probably would have been a finding of not guilty or a failure of proof of the offense alleged.
- (b) Willful concealment by the prosecution from the defense of evidence favorable to the defense which, if produced and considered by the court in light of all the other evidence, would probably have resulted in a finding of not guilty.

85. 527 F.2d 237, 246 (2nd Cir. 1975).

86. 10 U.S.C. §873 (1976).

87. See text accompanying note 22, supra.

88. Para. 109d(3), MCM, 1969.

- (c) Willful concealment of a material ground for challenge of the military judge or any member of the court or of the disqualification of any official of the court or the convening authority, when that ground or disqualification was not known to the defense at the time of trial.

There is a degree of overlap between petitions alleging fraud and those alleging newly discovered evidence. Although perjury and concealment of evidence are listed as examples of fraud,⁸⁹ they are often categorized as newly discovered evidence.⁹⁰ There is no barrier to raising both grounds in those situations,⁹¹ and it is unclear whether there is any advantage in using one ground instead of the other.

Aside from cases involving false testimony,⁹² military law provides little precedent for citing fraud as a basis for a new trial. Military courts have determined whether certain factual settings constitute fraud. For example, a defense counsel characterized an out-of-court discussion between the accused and a court member as a fraud in United States v. Thomas.⁹³ Although the court stated that the discussion constituted a material ground for challenge, it found that under the particular facts a new trial probably would not produce a more favorable result.⁹⁴ At least one defendant has alleged that an unauthorized visit to the crime scene by court members constitutes fraud.⁹⁵ The accused claimed that

89. See para. 109d(3)(a),(b) MCM, 1969

90. See textual material accompanying notes 62 to 87, supra.

91. See United States v. Wilson, 44 CMR 546 (ACMR 1971).

92. See United States v. Kennedy, 8 M.J. 577 (ACMR 1979); United States v. Scott, 8 M.J. 853 (NCOMR 1980); United States v. Wedge, supra note 78.

93. 3 USCMA 161, 11 CMR 161 (1953).

94. Id. at 166. The court also determined that since the discussion involved the accused, the failure to raise the issue at trial must be held against him.

95. United States v. Dorsett, 7 CMR 427 (NBR 1952).

the visit itself was a basis for challenging the court, and that a new trial was required since the visit was not disclosed to the defense. The court found no fraud in this situation because the accused was acquitted of the offense allegedly committed at the site visited by the court members.⁹⁶

Conclusion

The procedural aspects of the new trial petition appear to be well settled. Difficulties do arise, however, in determining what standard to apply when evaluating the impact of the matters raised in the petition. Although certain types of evidence cannot form the basis for a new trial, case law suggests that appellate courts are chiefly concerned about whether a new adversarial proceeding would likely result in a more favorable outcome. If the petitioner can convince the court that an injustice has occurred and that a more favorable result probably would be produced by a new trial, the type of evidence is not likely to constitute an obstacle. Counsel must also remember that, unlike the civilian federal courts, military tribunals will permit a new trial even if it is likely to result only in a substantially more favorable sentence.

96. Id. at 430-431.

[OFFICIAL LETTERHEAD]

[Date]

SUBJECT: Petition for New Trial, United States v. _____

The Judge Advocate General of the Army
ATTN: JALS-ED
5611 Columbia Pike
Nassif Building
Falls Church, Virginia 22041

The enclosed Petition for New Trial on behalf of [Rank] [Name] ,
 [SSN] , United States Army, is forwarded for action by The Judge Ad-
vocate General in accordance with Article 73, Uniform Code of Military
Justice, 10 U.S.C. §873 (1976).

1 Incl
as

(Name)
(Rank, Branch)
(Counsel for Petitioner)
(Address and Phone)

APPENDIX

(Rank, Name, SSN),)	PETITION FOR NEW TRIAL
[United States Army,])	[AND BRIEF IN SUPPORT] *
Petitioner)	
)	
v.)	
)	[(SP)CM 000000]
U N I T E D S T A T E S,)	
Respondent)	
)	[Docket No. 00,000]
)	
)	

TO (THE JUDGE ADVOCATE GENERAL OF THE ARMY) [THE JUDGES OF THE UNITED STATES (ARMY COURT OF MILITARY REVIEW) (COURT OF MILITARY APPEALS)]:

Preamble

The undersigned [petitioner] [counsel, pursuant to a Power of Attorney granted by the petitioner (Appendix A),] hereby prays in accordance with Article 73, Uniform Code of Military Justice (hereinafter UCMJ), 10 U.S.C. §873 (1976), and paragraph 109, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969], that he be granted a new trial for the reasons set forth infra.

Statement of the Case

Petitioner was tried at [place of trial] , before [a military judge sitting as a (general) (special) court-martial] [a (general) (special) court-martial composed of officer (and enlisted) members] [a summary court-martial] on [date(s) of trial . [Pursuant to (his) (her) plea(s)] [Contrary to (his) (her) plea(s)], (he) (she) was found

*At the Court of Military Appeals and Courts of Military Review, a brief in support of a petition for new trial is required by Rules 22(a) and 20d, respectively. Additionally, at the United States Court of Military Appeals, a final brief may be required under Rule 22(b).

guilty of _____

_____ ,
in violation of Article(s) _____, UCMJ, 10 U.S.C.
§ (§§) _____ 1976), (respectively). (He) (She) was sentenced to
(a) (dishonorable) (bad-conduct) discharge, confinement at hard labor for
_____ (years) (months), forfeiture of (all pay and allowances) (\$ _____
pay per month for _____ (years) (months), and reduction to (the grade of
E-____) (the lowest enlisted grade). On _____ [date of action] _____, the convening
authority approved (and ordered executed) (the sentence) [approved (and
ordered executed) only so much of the sentence as provides for _____
_____] .

[Also include in this paragraph any and all subsequent modifications or
clemency action taken. Also state if, and when, any supervisory review
has been completed in accordance with Article 65(c), UCMJ.]

The petitioner's conviction [is presently pending review by the
United States (Army Court of Military Review) (Court of Military Appeals)]
[has been affirmed pursuant to Article(s) (66) (and 67) (69), UCMJ] [and
his petition for grant of review was (granted) (denied) on _____ [date] _____] .

Jurisdictional Statement

This petition is being filed within two years after the convening
authority's approval on _____ [date of action] _____ of the petitioner's court-
martial's findings and sentence.

Statement of Facts

[Furnish herein a full statement of the newly discovered evidence or fraud on the court which is relied upon for the remedy sought. Attach as appendices all affidavits which support these facts. Also attach as appendices all affidavits of persons whom the petitioner expects to present as witnesses in the event of a new trial. Each witness' affidavit should set forth briefly the relevant facts within the personal knowledge of the affiant.]

Statement of Issue

[Briefly describe any finding and/or sentence believed to be unjust.

For example,

WHETHER THE FINDING OF GUILTY OF AGGRAVATED ASSAULT
(SPECIFICATION 1, CHARGE II) RESULTED FROM THE PERJURED
TESTIMONY OF THE ALLEGED VICTIM.

AND: WHETHER THE PETITIONER IS ENTITLED TO A NEW TRIAL
BASED ON THE NEWLY DISCOVERED EVIDENCE OF CID SPECIAL
AGENT WALTER'S PAST CRIMINAL MISCONDUCT AND CONVIC-
TION FOR MAKING FALSE OFFICIAL STATEMENTS.]*

Argument in Support of Issue

[Furnish a complete argument, including, if applicable, citations of legal authorities in support of the argument.]

*Issue granted in United States v. Thomas, 8 M.J. 138 (CMA 1979).

Conclusion

WHEREFORE, for the foregoing reasons, the petitioner prays that he be granted a new trial.

(Name of petitioner)

[By]

(Signature of petitioner)
(Signature block of counsel)
(Title)
(Address and Phone)

Sworn to and subscribed before me on this _____ day of _____
19____, by the said _____ at _____,
_____.

My appointment expires:

(Name)
(Rank, if applicable)
[Notary Public]
[UP 10 U.S.C. §936 (1976)]

CERTIFICATE OF SERVICE*

I, the undersigned, herewith certify that an original and four copies of the foregoing were mailed or delivered to the Office of The Judge Advocate General of the Army and a copy to Appellate Government Counsel on _____ 19____.

*Only necessary if the case is presently pending review before either the Court of Military Review or Court of Military Appeals.

BURDENS OF PROOF, PERSUASION AND PRODUCTION:
A THUMB ON THE SCALES OF JUSTICE?

by Captain Charles E. Trant* and
Captain R. T. Harders**

I. INTRODUCTION.

The rules pertaining to burdens of proof, persuasion and production remain as uncertain in the wake of United States v. Verdi,¹ as they were under prior military and civilian law. Courts perpetuate this confusion by using the terms interchangeably,² despite the fact that they can hardly be regarded as synonymous. The effect of a burden of proof, persuasion or production is often outcome determinative in criminal cases, and the proper assignment of the various evidentiary burdens is especially critical if they relate to the establishment or rebuttal of a negative fact. While this task is not insurmountable, it is indeed formidable in a criminal trial if the government must establish or rebut a negative fact which is peculiarly within the accused's knowledge.

This was the precise dilemma the United States Court of Military Appeals faced in Verdi. That case involved an Air Force regulation which prohibited the wearing of wigs, except to conceal natural baldness

*An action attorney at Defense Appellate Division, Captain Trant received his B.A. and J.D. from Suffolk University and is an LL.M. candidate, Spring 1981, at Georgetown University Law Center. Captain Trant also serves as an Associate Editor of The Advocate.

**An action attorney at Defense Appellate Division, Captain Harders received his B.A. from the University of Illinois and his J.D. from the University of Virginia.

1. 5 M.J. 330 (CMA 1978).

2. This phenomenon is explainable, although hardly justifiable, because the distinction is seldom crucial to the resolution of the issue before the court. Thus, judicial language is often not meticulous enough to clarify the distinction. The usual result is that the court's language refers to the "burden of proof," while the more precise term is "burden of persuasion" or "burden of production."

or physical disfiguration.³ The government's evidence consisted of proof that Verdi wore a wig on the dates alleged in the specifications and a note that Verdi had written to his commander, which stated that one reason he wore the wig was "to create a facade of short hair while maintaining his naturally longer hair which he preferred during non-duty hours."⁴ The defense presented a physician who characterized a scar on Verdi's scalp as a "physical disfigurement."⁵ The military judge refused to give a defense-requested instruction that "the Government had the burden of proving that the appellant did not come within the exception to the prohibition against the wearing of wigs."⁶ The military judge never quoted the language of the applicable regulation in its entirety,⁷ and

failed to instruct the panel that the Government was required to prove, by competent evidence, each provision of the regulation, including the absence of those circumstances which otherwise would have brought the appellant under the exceptions to the wig prohibition.⁸

3. The prohibition appears in Air Force Manual 35-10(C1) (21 September 1973), which provided, inter alia, that:

Wigs or hairpieces will not be worn while on duty or in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions a wig or hairpiece is worn, it will conform to Air Force standards.

Id. at paragraph 1-12b(4) (emphasis added). This Air Force manual was superseded by Air Force Regulation 35-10 (25 February 1975) which, inter alia, permitted reserve personnel to wear short hair wigs (presumably over longer hair which would not comply with Air Force standards) while performing active duty. Verdi was tried prior to this amendment.

4. United States v. Verdi, supra note 1, at 337.

5. Id.

6. Id.

7. While the military judge did place the regulation, a government exhibit, before the panel, the Court found that he did not thereby comply with his duty to personally instruct the panel members on the regulation's language. Id. at 338 n.24.

8. Id. at 338.

The Court declared that a military judge must inform court members of each element of the offense as set forth in the statute or regulation "as well as all variations and exceptions that are set forth therein."⁹

The Court further stated that, as a general proposition, the military judge must instruct that:

the burden is upon the prosecution to prove beyond a reasonable doubt all the essential elements of the offense of which the accused is charged and that if the proof fails to establish any of these essential elements the accused is entitled to an acquittal.¹⁰ The jury must also be instructed that the burden of proof never shifts to the accused to establish his innocence or to disprove the facts necessary to establish the crime charged [footnotes omitted].¹¹

By way of contrast, the Court then noted that military judges must instruct the members on affirmative defenses only if they are reasonably raised by the evidence.¹² Exceptions contained in criminal statutes or regulations are categorized as essential elements,¹³ presumably with

9. Id. at 333.

10. In support of this proposition, the Court cited, inter alia, In Re Winship, 397 U.S. 358 (1970); Brinegar v. United States, 338 U.S. 160 (1949); and Christoffel v. United States, 338 U.S. 84 (1949).

11. United States v. Verdi, supra note 1, at 334. The court cited Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); and Davis v. United States, 160 U.S. 469 (1895).

12. Id.

13. Citing United States v. Vuitch, 402 U.S. 62 (1971), the Court stated that:

The jury must be instructed that where an exception is contained within the criminal statute or regulation, the burden of proof is upon the prosecution . . . to prove that the accused does not fall within the exceptions contained in the statute [footnote omitted].

Id. See Patterson v. New York, supra note 11; Mullaney v. Wilbur, supra note 11.

the corollary that the "burden"¹⁴ never shifts to the defendant. Affirmative defenses are treated differently.¹⁵

In its analysis of the burden of proof issue, the Court examined the regulation in question to determine if the exceptions contained therein were essential elements or affirmative defenses. While the Court does not specifically define these exceptions as elements,¹⁶ its intent is

14. The seeds of the conflict are still being sown because the Court continues to use only the general terminology of "proof" and "prove" without any indication of whether it is addressing burdens of persuasion, production, or both.

15. According to the Court,

When the affirmative defense which might be interposed on behalf of the accused does not appear within the statute (or regulation) which defines the criminal act, the prosecution does not have the initial burden to negative those affirmative defenses.

United States v. Verdi, supra note 1, at 334 [emphasis added]. The "initial" burden addressed here quite clearly envisions a burden of production because the Court cites paragraph 214, Manual for Courts-Martial, United States, 1969 (Revised edition) in support of its proposition. That paragraph provides, inter alia that:

the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the Government, both with respect to those elements of the offense which must be established in every case and with respect to issues involving special defenses which are raised by the evidence.

16. Thus,

A reading of this [regulation] at once discloses that the wearing of wigs and hairpieces is not prohibited under all circumstances. On its face the regulation provides an exception to the prohibition and its meaning is plain, even if we do not apply the general rule, which is that penal statutes are to be construed strictly against the Government. . . . Therefore, an offense cognizable under Article 92, UCMJ, exists only where a wig or hairpiece is not worn 'for cosmetic reasons to cover natural baldness or physical disfiguration.'

United States v. Verdi, supra note 1, at 334-335.

clear,¹⁷ and an analysis of the burden placed on the government inevitably leads to the conclusion that the Court considered the exceptions to be elements which the government must plead and prove.¹⁸ However, the

17. A fair interpretation of Winship is that "every fact necessary to constitute the crime" is synonymous with "elements of the offense." The Verdi Court set forth the exceptions as one of these "facts."

18. According to the Court,

There can be not doubt that AFM 35-10 recognizes circumstances when wigs and hairpieces may be worn. Only where those circumstances do not exist can one be held accountable for violating the regulation. Therefore the Government must prove that the accused did not qualify for the exception in order to convict him of violating the regulation.

United States v. Verdi, *supra* note 1, at 336 [emphasis added]. The government submits that this "burden" does not encompass the burden of production because it now concedes that Verdi met his burden of production [See United States v. Woods, 7 M.J. 750 (ACMR 1979), certified 1 June 1979, Final Brief on Behalf of United States, p. 17]. This, of course, was not the government's position in the actual processing of Verdi [see Post-Trial Review of Staff Judge Advocate cited at length in United States v. Verdi, *supra* note 1, at 343 (Cook, J., concurring and dissenting)]. According to the government, since Verdi met the burden of production, any language purporting to assign this burden to the government is *dicta*. Such an analysis fails because the burden of production was an issue in controversy in Verdi and the Court's language is explicit on the assignment of this burden, wherein it states:

The difference between the language of the New York statute in Patterson ("except that in any prosecution under this subdivision, it is an affirmative defense . . .") and the language of para. 1-12b(4), AFM 35-10, *supra* ("except for cosmetic reasons to cover natural baldness or physical disfiguration") is sufficient even to preclude application of the burden of production to the accused.

Id. at 336 n.21 [emphasis added].

intermediate military appellate courts differ over their application of Verdi to cases where an accused presents no evidence that he fell within the exception and the government fails to address the issue.¹⁹

Those courts which conclude that the government does not have to shoulder the burden of production in these situations attempt to limit Verdi to its facts and consider any language regarding burden of production to be dicta.²⁰ Courts which have applied Verdi to these situations have done so by strictly interpreting that decision and the rule of

19. Compare United States v. Woods, 7 M.J. 750 (ACMR 1979), certified 1 June 1979, with United States v. Acosta, 6 M.J. 992 (NCMR 1979).

20. See, e.g., United States v. Acosta, supra note 19 (involving regulation which proscribed, inter alia, use and possession of marijuana "except for authorized medicinal purposes"). There the court stated of the Verdi opinion:

The Court, in dicta, addressed the subject of the Government's burden of proof regarding exceptions and affirmative defenses. . . . We do not interpret Verdi, however, to mean that the Government must automatically negate all exceptions set forth in a statute or regulation.

Verdi must be read in the context of its facts [where the defendant has met the burden of production]. . . . In the absence of any evidence [introduced by the accused] which reasonably raises the applicability of the regulatory exception, the burden of going forward with evidence to negate the exception does not shift to the prosecution.

United States v. Acosta, supra note 19, at 997. The Court does not specifically note that the issue may be raised by prosecution evidence, which would place it in issue and impose upon the government the burden of persuasion, but clearly this result is not precluded. Accord, United States v. Brinkley, 7 M.J. 588 (NCMR 1979), wherein the court stated, "We believe appellant has read too much into the decision of Verdi." The holding comports with United States v. Acosta, supra note 19.

statutory construction set forth in United States v. Vuitch.²¹ One method of resolving the split in interpreting Verdi is to determine (1) whether the government has the inherent authority to draft a statute or regulation which places the burden of production or persuasion upon the defendant; and (2) whether the government properly exercised this authority in drafting the particular statute or regulation under review.

II. Inherent Right to Establish Burden

Inherent in the government's power to administrate justice is the right to regulate procedures under which its laws are carried out, including burdens of production and persuasion. Thus, in Morrison v. California,²² the court recognized the well-settled rule that "within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant".²³ The Court

21. See, e.g., United States v. Woods, supra note 19 (involving regulation which, inter alia, prohibited possession of hypodermic needle and syringe "except in the course of official duty or pursuant to a valid prescription"). There the court stated

The decision in United States v. Verdi . . . was in part based upon the decision of the Supreme Court of the United States in United States v. Vuitch We believe that the Supreme Court's rule of statutory construction as applied in Vuitch is controlling here. . . . If the prosecution is permitted to merely show that an accused possessed a hypodermic syringe and needle at a given time and place without showing that he was not authorized such possession, then the practical effect of mere possession, as in Vuitch, creates a presumption of guilt and transfers the burden of proof to that accused to prove that his possession was lawful.

United States v. Woods, supra note 19, at 752. Accord, United States v. Cuffee, 8 M.J. 710 (ACMR 1979), certified 8 M.J. 227 (CMA 1980), argued 28 January 1981.

22. 291 U.S. 82 (1934).

23. Id. at 88.

generally will not interfere with the government's establishment of burdens of proof, persuasion and production, unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁴ The Court fashioned the following limitations on the government's exercise of this power:

the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.²⁵

The Court set forth what then appeared to be two alternative predicates upon which the government could justify shifting the burden of proof. First, prosecution evidence from which the negative presumption arises must have a "sinister significance."²⁶ While the Court indicated that this "sinister significance" must be based upon "experience," an apparently objective standard, it set forth no guidelines to assist in this determination, probably because the situations in which presumptions could arise are numerous and variable and often turn on subtle distinctions of degree. Thus it would be impracticable to crowd all instances into a simple formula; "sinister significance" must accordingly be determined on a case-by-case basis.

The Court amplified the second predicate into a balancing test of "convenience of proof,"²⁷ which it regarded as subordinate to the "sinister significance" consideration. The Court stated that:

24. Patterson v. New York, supra note 11. See also, Speiser v. Randall, 357 U.S. 513 (1958); Leland v. Oregon, 343 U.S. 790 (1952); Snyder v. Massachusetts, 291 U.S. 97 (1934).

25. Morrison v. California, supra note 22, at 88-89. Cf. 5 Wigmore, Evidence §§2486, 2512.

26. Id. at 90. The Court cited Yee Hem v. United States, 268 U.S. 178 (1925); and Casey v. United States, 276 U.S. 413 (1928).

27. Morrison v. California, supra note 22, at 91.

if [sinister significance] at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception.²⁸

A literal interpretation of this "convenience of proof" rationale would clearly be too flexible to accord predictability to the administration of criminal justice. The amorphous parameters of such a rule would lead to a derogation of the presumption of innocence: the government would invariably seek to justify shifting the burden on the basis of the defendant's probable guilt — a factor which places him in the most advantageous position to know the true facts.²⁹

28. Id. The court set forth some examples, such as United States v. Turner, 266 F. 248 (W.D. Va. 1920) (defendant subjected to burden of producing license or permit for business or profession that would otherwise be unlawful). However, the court noted that:

The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.

29. In Morrison the interrelationship of these two prongs was not crucial because the Court regarded neither as a justification for shifting the burden. The statute in question made it a conspiracy to place an alien in possession and enjoyment of agricultural land within the state. The presumed fact was lack of citizenship based upon knowledge of the person's national origin. The Court rejected the "sinister significance" approach by noting:

[i]n the law of California there is no general prohibition of the use of agricultural lands by aliens, with special or limited provisos or exceptions. To the contrary, it is the privilege

(Continued next page)

The potential for mischief in such a test was severely limited in Tot v. United States,³⁰ a case involving a presumption created by the Federal Firearms Act,³¹ which declared that possession of a firearm or ammunition by any person convicted of a crime of violence or a fugitive from justice shall be presumptive evidence that the firearm or ammunition was shipped or transported in violation of the Act. The government proffered two alternative tests to validate the presumption: (1) a rational connection between the proven and presumed facts; and (2) the comparative convenience of proof in producing evidence of the ultimate fact.³² The Court settled upon the former and reduced the latter to a secondary role, stating that:

these are not independent tests[;] the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proven and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.³³

29. Continued.

that is general, and only the prohibition that is limited and special. Without preliminary proof of race, occupation of the land is not even a suspicious circumstance.

Id. Further, the Court rejected the "convenience of proof" approach by stating that:

[t]here can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People.

Id. at 96.

30. 319 U.S. 463 (1943).

31. 25 Stat. 1250, ch. 850, 15 U.S.C. §902(f) (1976).

32. Tot v. United States, supra note 30, at 467.

33. Id. at 436-468 [footnote omitted].

The court found no rational connection in Tot,³⁴ and greatly curtailed the "convenience of proof" approach. The court extended that form of analysis to its extreme by noting the potential for abuse which would ensue if a law could be drafted which would force defendants to go forward with the evidence simply because in "every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution."³⁵ The inherent flaw in the "convenience of proof" rationale has contributed to its decline as a viable justification for establishing burdens of proof.³⁶

The Supreme Court subsequently approved³⁷ the "rational connection" test, and in Leary v. United States³⁸ that tribunal stated:

a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.³⁹

34. According to the Court,

It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience.

Id. at 468.

35. Id.

36. In Tot the court also rejected another theory that enjoyed some support in the prior case law, specifically, whether the legislature might have made it a crime to do the act from which the presumption authorized an inference. See Ferry v. Ramsey, 277 U.S. 88 (1928).

37. See United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965). See generally, Comment, The Constitutionality of Statutory Criminal Presumptions, 34 U.Chi.L.Rev. 141 (1966).

38. 395 U.S. 6 (1969).

39. Id. at 36.

In that case the Court rejected the notion that possession of marijuana raised a presumption that the substance was imported or brought into the United States illegally; that the defendant knew of the unlawful importation; and that the importation was performed with intent to defraud the United States. The Court left no doubt that the "rational connection" test is controlling, and it reduced all other tests, including the Morrison "convenience of proof" test, to "footnote" status.⁴⁰

The government may therefore create burdens of proof, persuasion, or production based upon a presumption drawn from proven facts which meet the "rational connection" test. Thus in cases involving hypodermic syringes or needles, such as United States v. Woods and United States v. Cuffee, the government could create a burden of production requiring the defendant to raise the issue of legitimate possession once the government proves that his conduct presumptively violates the regulation.⁴¹

40. Id. at 32 n.56. Indeed,

It has been suggested . . . that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential. . . . In this respect, proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent; it may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide. And although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him.

Mullaney v. Wilbur, supra note 11, at 701-702.

41. Because there is a crucial difference between the possession and exercise of an inherent power, the operative word is "could."

III. Exercise of the Power

It does not, of course, ineluctably follow that every attempt by the government to exercise this inherent power will be successful. This is especially true when the government attempts to create an offense which has no counterpart in the common law and is not normally considered criminal. The government encountered this problem in Verdi. It obviously did not intend to make every act of wearing a wig criminal, and sought to exclude from the general prohibition those instances in which wearing a wig would be legitimate. In so doing, the government provided in the enacting clause that those who wore a wig for cosmetic reasons to cover natural baldness or physical disfiguration were beyond the prohibition's purview. Within the very definition of the offense, the government thus created an exception which the Court construed as an element of the offense. The distinction is subtle but crucial because the government did not intend to prohibit the act entirely and then allow those in the excepted categories to escape criminal liability.

The Court's rationale in Verdi is entirely consistent with the Supreme Court's pronouncement in United States v. Vuitch,⁴² a case dealing with a District of Columbia abortion statute which provided that:

Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years.⁴³

The district court, relying upon Williams v. United States,⁴⁴ concluded that once the government proved an abortion, the defendant-physician had "the burden of persuading the jury that the abortion was legal (i.e.

42. 402 U.S. 62 (1971).

43. D.C. Code Ann. §22-201.

44. 78 U.S. App. D.C. 147, 138 F.2d 81 (1943). That court held that the prosecution was not required to prove, as part of its case in chief, that the operation was not necessary to preserve life or health. Id. at 147.

necessary to the preservation of the mother's life or health)."45 From the Williams decision, which concerned the government's inherent power to establish burdens of production, the district court extrapolated the notion that the government could also shift the burden of persuasion. Since the Supreme Court was reversing the district court on the basis of an erroneous interpretation of the statute, it did not find it necessary to directly rule upon the district court's interpretation of Williams. The Court did note that:

Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment.⁴⁶

The Court founded its decision on statutory construction and upheld the subject provision's constitutionality. The Court held that the government had the burden to "plead and prove that an abortion was not 'necessary for the preservation of the mother's life or health.'"47 The manner in which the statute was drafted compelled this holding, because the exemption was part of the definition of the offense and thus an element. According to the Court:

The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception.⁴⁸

45. United States v. Vuitch, supra note 42, at 69.

46. Id. at 70.

47. Id. at 71.

48. Id. at 70.

The Court considered legislative intent in interpreting the statute and found it anomalous for the government to authorize this category of abortions and then place a burden of proof as to its legality on the defendant.⁴⁹

The United States Court of Military Appeals⁵⁰ and the Army Court of Military Review⁵¹ consistently endorse this method of determining whether the government properly exercised its inherent power to establish burdens. The standard government argument that a mechanical application of statutory construction places form over substance is fatally flawed because the "form" of the statute is indicative of the legislative intent in creating the "definition" (and delineating the elements) of the offense. This dichotomy is graphically illustrated in Mullaney v. Wilbur⁵² and Patterson v. New York.⁵³ In Mullaney, the state of Maine required a defendant charged with murder (which upon conviction carries a mandatory sentence of life imprisonment) to prove by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter (which carries a penalty not to exceed 20 years). The Mullaney court concluded that malice was a "fact necessary to constitute" murder under Maine law and thus an element of the offense. The Court noted that In Re Winship⁵⁴ held that:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.⁵⁵

49. Id.

50. United States v. Verdi, supra note 1.

51. United States v. Cuffee, supra note 21; United States v. Woods, supra note 19.

52. 421 U.S. 684 (1975).

53. Patterson v. New York, supra note 11.

54. 397 U.S. 358 (1970).

55. Id. at 364.

The Court concluded that to presume the element of malice unless rebutted by the defendant is to violate his due process rights. However, the Court's finding that the prosecution is required to prove beyond a reasonable doubt "the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case"⁵⁶ left the burden of production problem in doubt. This result is not uncommon when the burden of production is not directly in issue.

Some of this doubt was resolved in Patterson, a case involving a New York murder statute which stated that the crime contained two elements, including intent to cause the death of another person and an act which causes the death of that individual or a third person.⁵⁷ In a separate section, the legislature provided that "extreme emotional disturbance" constitutes an affirmative defense which would reduce murder to manslaughter. Based upon its interpretation of the statute, the Court concluded that this affirmative defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion[.]"⁵⁸ Maine and New York were attempting, for identical reasons, to establish procedural burdens. New York's success in this respect is due to the manner in which it defined the offense. Thus, the Court considered Patterson to be consistent with Mullaney and Winship because it did not

disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.⁵⁹

Lest the crucial distinction of statutory construction be lost, Justice Powell in his dissent pointedly noted that the "court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's"⁶⁰ because the "only 'facts'

56. Mullaney v. Wilbur, supra note 52, at 704.

57. Patterson v. New York, supra note 11, at 198.

58. Id. at 207.

59. Id. at 210.

60. Id. at 221.

necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime."⁶¹ Thus, cases such as Verdi correctly apply Winship and Vuitch, as evidenced by Mullaney and Patterson. In drafting the regulation at issue in Verdi, the government created only a limited category of violations within the definition of the offense. Accordingly, the government must bear the burden of proof and production with regard to negative elements.⁶²

III. An Alternative Analytic Framework

An alternative interpretation of this issue proceeds from the notion that the historical military rule with respect to regulatory exceptions is articulated in United States v. Gohagen⁶³; in that case, the Court of Military Appeals held that the accused must prove the exception's applicability. Since Winship and Mullaney prevent the government from allocating to the accused the burden of disproving a fact necessary to constitute an offense, the Court of Military Appeals, if it overrules Verdi or limits it to its facts, can impose only a burden of production upon the defense.⁶⁴ The "rational connection" test therefore provides an analytical framework useful to the military defense practitioner.

61. Id. In an additional comment, Justice Powell criticized the Court's rationale because:

The test the court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense. Id. at 223 [footnote omitted].

62. This is similar to the Court's comment in Leary that "[t]he Tot court stated simply that 'for whatever reason' Congress had not chosen to make the basic act a crime." Leary v. United States, supra note 38, at 34. The same can be said of the regulations involved in Cuffee and Woods: for whatever reason, the basic act is not an offense, but is actionable only if the defendant's conduct does not fall within the definitional exception. This conclusion results from strictly interpreting a penal regulation against the government.

63. 2 USCMA 175, 7 CMR 51 (1953).

64. See Patterson v. New York, supra note 11, at 204 n.9.

The Court of Military Appeals recognizes that Tot and Leary reaffirmed the Morrison standard and rendered Gohagen's blanket rule inappropriate. Reassessing essentially the same prohibition and exception at issue in Gohagen, the Court said⁶⁵

The interest of the armed forces in prohibiting wrongful narcotic use is enough reasonably to justify the transfer of this "obligation of going forward" to an accused. Here the regulatory presumption is valid, for "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." [Citations omitted.]

Two questions are implicit in the analysis Tee draws from constitutional precedent: (1) Does the law of the forum create a presumption of wrongdoing from the proof of certain facts? and (2) Do the proven facts logically compel the inference of wrongdoing absent evidence to the contrary? The Court's decision in Cuffee and Woods may answer the former question affirmatively, but the latter must be resolved on a case-by-case basis.⁶⁶ Trial defense counsel should evaluate regulatory exceptions in that light and present the issue to military judges in appropriate cases.

IV. Conclusion

The creation of burdens of proof, persuasion and production is a matter of critical importance in the administration of criminal justice. The government may regulate these burdens consistent with the defendant's due process rights. The government should be held to a demanding standard

65. United States v. Tee, 20 USCMA 406, 408, 43 CMR 246, 248 (1971).

66. In Verdi, the defense might have questioned the government's assumption that an airman's wearing of a wig raises an inference that he is not doing so to cover natural baldness or physical disfigurement. Similarly in United States v. Crooks, 12 USCMA 677, 31 CMR 263 (1962), in which the regulation prohibited wearing field uniforms outside military installations "except as provided for the work uniform or when performing in field exercises outside of military installations," the accused might well have raised the issue of whether an allegation that he appeared "in a public establishment in a field uniform" alleged facts which, if proved, would place him outside the exception.

of precision in exercising this power: the stakes are high and so should be the concomitant responsibilities. This is especially true where a burden of production is involved, because a defendant's failure to carry this burden will preclude a jury instruction, a result tantamount to a judicially directed verdict on the particular issue. When this issue is an element of the offense, such a result is abhorrent to our system of justice. If the government elects to exercise its power carelessly, it cannot protest when the spectre of this carelessness is strictly construed against it. A contrary conclusion would enable the government to place its thumb on the scales of justice.

SEARCH AND SEIZURE: A PRIMER

Part Two - Border and Overseas Gate Searches

Searches conducted at United States borders pursuant to the sovereign's long-standing right to protect itself by stopping and examining persons and property entering its territory are "reasonable"¹ under the Fourth Amendment and are beyond the ambit of that amendment's warrant requirement.² Because this exception is grounded on the sovereign's right to control who and what may enter its territory, courts do not require proof that government agents had probable cause to believe that the subjects of border searches were engaged in criminal activity.³

The "Gate Search" Analogy

In United States v. Rivera,⁴ the Court of Military Appeals held that the border search exception permits a warrantless "gate search"⁵ without probable cause at the entrance to overseas United States military

1. But see text accompanying notes 8 & 9, infra.

2. United States v. Ramsey, 431 U.S. 606, 616-18 (1977); Carroll v. United States, 267 U.S. 132 (1925).

3. Id. at 619. See United States v. Parker, 8 M.J. 584, 586 (ACMR 1979). The "border search" exception must be carefully distinguished from the "border zone search" exception. While no showing of probable cause is required at the border itself, probable cause is necessary elsewhere. See Alameida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973). Warrantless searches, however, are permissible within the border zone. Id. See Note, Alameida-Sanchez and Its Progeny: The Developing Border Zone Search Law, 17 Ariz. L. Rev. 214, 216-20 (1975).

4. 4 M.J. 215 (CMA 1978).

5. The term "gate search" raises an important problem of nomenclature. Searches at the gate of a military installation within the United States are also referred to as "gate searches." Those searches do not fall within the border search exception and are regulated by a separate set of rules. An analysis of the case law pertaining to gate searches within the United States will be the subject of a future installment of Search and Seizure: A Primer. See also Eisenberg and Levine, The Gate Search: Breaches in the Castle's Fortifications, The Army Lawyer, Sept. 1979, at 5.

installations. Although the border search exception affords military authorities broad latitude in stopping and searching subjects entering overseas installations, the Court of Military Appeals has suggested that, consistent with civilian practice,⁶ the exception will not apply to searches conducted beyond the immediate vicinity of the gate.⁷ Both the Supreme Court⁸ and the Court of Military Appeals⁹ have indicated that the exception is not an unlimited license for all police conduct. The border or gate search must be properly authorized and limited in scope, and justified by a legitimate national or military interest.¹⁰

Limitations of Gate Searches

Civilian¹¹ and military¹² courts responded to that signal by developing rules and standards for border searches attended by a governmental intrusion greater than that involved in searches conducted in other settings. The Navy Court of Military Review requires the prosecution to show "real suspicion" or "articulable suspicion of criminal

6. See note 2, supra.

7. See United States v. Rivera, supra note 4, at 216 n.4.

8. United States v. Ramsey, 431 U.S. 606, 608 n.13 (1977).

9. United States v. Rivera, supra note 4, at 216 n.5.

10. In United States v. Paige, 7 M.J. 480 (CMA 1979), the Court of Military Appeals held a border search to be unlawful when conducted on the Dutch-German border by American personnel. Because the American authorities lacked the requisite national interest in protecting that border, they could not rely on a border search standard of intrusion. Also, in United States v. Harris, 5 M.J. 44 (CMA 1978), the Court of Military Appeals noted that discretion as to who is subject to a gate search cannot be left to individual policemen. See United States v. Stanley, 545 F.2d 661 (9th Cir. 1976).

11. See, e.g., United States v. Nelson, 593 F.2d 543, 545 n.4 (3d Cir. 1979); United States v. Klein, 592 F.2d 909, 911 n.2 (5th Cir. 1979); United States v. Wordlaw, 576 F.2d 932, 934 (1st Cir. 1978).

12. See, e.g., United States v. Gardina, 8 M.J. 534 (NCMR 1979), pet. denied, 8 M.J. 177 (CMA 1979).

activity" in those cases.¹³ Because this standard is similar to that applied to traditional border searches involving personal strip searches,¹⁴ military defense counsel should argue that, absent such suspicion, any intrusion greater than a traditional baggage search violates the Fourth Amendment. In resolving Fourth Amendment issues, courts traditionally balance the individual's expectation of privacy against the societal need for the intrusion. This form of analysis has been applied in the area of border searches¹⁵, airport security searches¹⁶, and in "stop

13. Id. Real suspicion is defined as a

subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must meet the reasonableness standard of the Fourth Amendment.

Id., citing *United States v. Rodriquez*, 592 F.2d 553, 556 (9th Cir. 1979).

14. The border strip search involves an intrusion which is greater than that accompanying normal investigatory stops and routine baggage checks. See *United States v. Nelson*, 593 F.2d 545 (3d Cir. 1979); *United States v. Carter*, 592 F.2d 402, 405 (7th Cir. 1979); *United States v. Leverette*, 503 F.2d 269 (9th Cir. 1974). Strip searches are unreasonable under the Fourth Amendment unless the customs officials have "at least a real suspicion directed specifically to that person." *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967). This "real suspicion" must be supported by "objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purposes of transporting it into the United States contrary to law." *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970).

15. *Boyd v. United States*, 116 U.S. 616 (1886).

16. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

and frisk" cases.¹⁷ The Court of Military Appeals implied that such a balancing analysis is appropriate in Rivera, where border search cases were analogized to gate searches conducted on closed ports outside the United States. It concluded that "[t]he magnitude of the service's need — to maintain the security of the installation . . . and to combat . . . drug traffic . . . when coupled with the reasonableness of the procedures . . . meets the requirements of the Fourth Amendment."¹⁸

Military defense counsel should also note that paragraph 2-3, Army Regulation 190-22 and paragraph 2-23, Army Regulation 210-10, establish strict standards pertaining to gate searches. They require that the search be based upon probable cause or military necessity, and prohibit the search of incoming personnel over their objection; servicemembers who refuse to submit to a search may be denied entry onto the installation. In United States v. Unrue,¹⁹ the Court of Military Appeals discussed the limitations of these searches. In that case, the subjects of the search were warned of the search and accorded an opportunity to discard any contraband. Thus, servicemembers who are subjected to a search which is not founded upon probable cause are given full notice and the opportunity to avoid criminal sanctions, while the government's interest in controlling a perceived drug problem is adequately protected.²⁰

Exit Searches

In Rivera, the Court applied the "border search" exception to entry searches, and did not address the question of whether the similarities between a gate and an international boundary justified the exception in cases involving overseas exit searches. The Army Court of Military Review held that the exception applied to exit searches in United States v. Zachary,²¹ and the applicability of the border search exception to

17. Terry v. Ohio, 392 U.S. 1 (1969).

18. United States v. Rivera, supra note 4, at 217-218.

19. 22 USCMA 466, 47 CMR 556 (1973).

20. In this regard, counsel should note that "to meet the test of reasonableness, an administrative screening search must be limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it." United States v. Davis, supra note 16, at 910.

21. 10 M.J. ____ (ACMR 1980). See also United States v. Alleyne, CM 439423 (ACMR 30 Dec. 1980) (unpub.).

exit searches can be found in federal case law.²² In United States v. Swarowski,²³ a case relied upon by the court in Zachary, the Second Circuit upheld the warrantless search of luggage possessed by an individual about to depart the United States, and in Samora v. United States,²⁴ the court upheld the warrantless search of an automobile operated by an individual who was about to cross the border into Mexico.

The court in Zachary relied upon the concept of a "functional border" in its Fourth Amendment analysis. The test to determine the existence of a "functional border" is set out in United States v. Stanley,²⁵ where the court recognized such a "border" if:

- (1) the government is interested in protecting some interest of U.S. citizens, such as restriction of illicit international drug trade;
- (2) there is a likelihood of smuggling attempts at the border;
- (3) there is difficulty in detecting drug smuggling;²⁶
- (4) the individual is on notice that his privacy may be invaded when he crosses the border; and
- (5) he will be searched only because of his membership in a morally neutral class.

22. See, e.g., California Bankers v. Shultz, 416 U.S. 21 (1974); United States v. Chabat 193 F.2d 287 (2d Cir. 1951).

23. 592 F.2d 131 (2d Cir. 1979).

24. 406 F.2d 1095 (5th Cir. 1969).

25. United States v. Stanley, supra note 10. In Stanley the Court held that a ship outside territorial waters could be searched without a warrant if it had departed waters contiguous to the United States border. The Court held that "customs waters" are the functional equivalent of a border.

26. Presumably this criterion embraces any crime capable of being committed in the international arena.

In Zachary, the Court held that this test applies to overseas gate searches. It thereby reaffirmed that a gate is functionally equivalent to a border.

The court's ruling in Zachary does not legitimate all foreign gate searches; indeed, it raises several significant questions. Thus, the opinion notes that certain persons are exempt from search requirements. Arguably, the court erred in requiring a selective search authorization to satisfy the morally neutral class. Equally significant is the court's failure to address knowledge as a prerequisite to invocation of the exception at functional borders. If a servicemember is unaware that he may be searched without a warrant as he exits an installation, and that the fruits of that search are admissible in a criminal prosecution, the fourth requirement of a functional border is not met. Furthermore, since the test in Stanley appears to depend heavily on the particular facts before the court, its application to searches conducted at overseas gates might well subject their classification as international boundaries to case-by-case review. In United States v. Harris,²⁷ the Court of Military Appeals provided a more detailed view of the balancing analysis required in this context. In assessing the validity of a gate search, the following factors must be weighed: (1) the public need; (2) the availability of alternatives to the search; (3) the degree of potential for frightening or offending motorists; (4) the scope of the intrusion; (5) the extent of interference with legitimate traffic; (6) the amount of discretion involved in the operation of the search; and (7) the practicality of requiring reasonable suspicion.²⁸

Conclusion

The border search exception enables military authorities to conduct warrantless searches without probable cause at the gates of overseas installations. Defense counsel should consider attacking the validity of such a search on several grounds, contending, where appropriate, that it was not conducted within the immediate vicinity of the gate and should therefore be treated as a "border zone" search, or that the nature and manner of the intrusion demand a prosecutorial showing of real suspicion.

27. 5 M.J. 44 (CMA 1978).

28. Id. at 55-57. Although the gate search in Harris was conducted inside the United States, nothing in the opinion restricts the application of these balancing factors to domestic gate searches.

Counsel should also be prepared to attack a properly authorized search in which the law enforcement agents exercise excessive discretion, regardless of the wording of the authorization. There are serious questions as to the circumstances under which the government may conduct searches at gates to installations located within the United States. Obviously, the competing interests which courts must balance in resolving this constitutional issue are qualitatively different in the domestic setting, since the absence of a border or its true functional equivalent removes the central justification for enabling the sovereign to protect its territory. Finally, where the overseas gate search may be justified only through an expansion of the border search exception, counsel should argue that governmental interests are insufficient to outweigh the servicemember's expectation of privacy.

SIDE BAR

A Compilation of Suggested Defense Strategies

Presenting Favorable Sentencing Evidence

Trial counsel routinely introduce adverse material from an accused's personnel file during the court-martial's sentencing phase. Because prosecutors rarely present positive information from the file, the accused's attorney must weigh the beneficial effect of favorable documents against the prospect of potentially devastating rebuttal. Faced with this dilemma, the accused's counselor may decline to present favorable information from the accused's military records. Under these circumstances, however, the defense counsel should shift the burden of introducing favorable official records to the government. Arguably, the trial counsel must introduce any official records favorable to the accused if he presents records containing derogatory information.¹

First, counsel should contend that American Bar Association (ABA) standards require the prosecutor to introduce this information. According to the pertinent ABA standards, "[t]o the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made" with regard to punishment.² The standards exhort the prosecutor to disclose all relevant sentencing information contained in his files.³ Counsel should note that these standards comport with the military practice of relaxing evidentiary rules during sentencing in order to insure that the court receives a complete, accurate view of the accused's character.⁴

1. This issue was granted by the Court of Military Appeals in *United States v. Morgan*, 10 M.J. 116 (CMA 1980).

2. ABA Standards for Criminal Justice (2d ed. 1980), the Prosecution Function, Standard 3-6.1 (Role in sentencing). These standards have been adopted by the Army in AR 27-10.

3. *Id.*, at Standard 3-6.2 (Information relevant to sentencing).

4. *United States v. Mack*, 9 M.J. 300 at 316-319 (CMA 1980); *United States v. Spivey*, 10 M.J. 7 (CMA 1980); see, e.g. para. 75c(1), *Manual for Courts-Martial, United States, 1969* (Revised edition) [hereinafter referred to as *Manual*].

Military Rule of Evidence 106 also supports the contention that a trial counsel must introduce favorable information contained in the accused's personnel records if he introduces adverse information from that file.⁵ The Rule states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party . . . to introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."⁶ The Rule applies if individual military records are considered a part of a "larger document." Paragraph 75d of the Manual implicitly recognizes that a single record is, in fact, part of a "larger document," since it allows the admission of these records only if they establish an accused's past conduct and performance. Further, paragraph 2-20b of Army Regulation 27-10, Military Justice-Legal Services (C20, 1 Sept. 1980), indicates that trial counsel who introduce documents reflecting past conduct and performance should present records containing both derogatory and laudatory information. This regulation correctly suggests that an accurate picture of an accused's military record can be gleaned only from a composite of all records in his file, not a select few.

Trial counsel will probably respond by arguing that the defense can offer such evidence in extenuation and mitigation. Defense counsel should note that Rule 106 eliminates the dual dangers inherent in such an approach. First, there is a risk of undue emphasis and distortion if a trial counsel places only a portion of the accused's military record before the court. Second, these impressions may not be fully corrected by the subsequent admission of the subject documents. Counsel should also note that the court in United States v. Oakes, 3 M.J. 1053 (AFCMR 1977), held that the rule of completeness requires the proponent of evidence pertaining to performance and conduct to present all relevant information.⁷ Shifting the responsibility of introducing favorable evidence helps to defuse potential rebuttal testimony and forces the government to either present no evidence or risk a weakened case in aggravation.

5. This rule is frequently referred to as the "rule of completeness."

6. Mil. R. Evid. 106.

7. In Oakes, the defense attempted to introduce an efficiency evaluation report. These reports are properly maintained in an airman's personnel file. The trial judge ruled that the report was admissible only if the defense introduced the five remaining reports.

Drafting Pretrial Agreements

The Court of Military Appeals recognizes the convening authority's right to approve a punishment not specifically mentioned in a pretrial agreement, provided the sentence considered as a whole is less severe than the adjudged punishment and no more severe than that agreed upon in the agreement. See United States v. Brice, 17 USCMA 336, 38 CMR 134 (1967). Convening authorities frequently commute punishments (particularly confinement) which exceed the agreement's limitation to equivalent punishments permitted by the agreement but not adjudged by the court. The Army Court of Military Review recently held that a pretrial agreement can prevent a convening authority from commuting excess punishments, notwithstanding Brice. In United States v. Bond, CM 439172 (ACMR 9 January 1981), the Court held that the proviso, "if adjudged by the court," when inserted in the quantum portion of an agreement, prevents commutation of excess punishments to levels which would have been permissible had they been adjudged.⁸ Accordingly, counsel should include the words "if adjudged by the court" whenever possible.

Attacking the Credibility of the Prosecutrix in Rape Cases

Counsel defending clients charged with rape frequently contend that the prosecutrix is lying. A significant problem with such an approach arises when the "victim" made a fresh complaint and was visibly upset by the alleged assault. Defense counsel usually decline to introduce evidence of objective standards by which the prosecutrix and her claim can be evaluated. In a recent case arising at Fort Carson, however, the defense called an expert in rape counseling and rape trauma syndrome who

8. The defendant in Bond was sentenced to a dishonorable discharge, confinement at hard labor for five years, and reduction to the lowest enlisted grade. Notwithstanding a pretrial agreement requiring the convening authority to approve no sentence in excess of a dishonorable discharge, confinement for two years, total forfeitures and reduction to Private E-1, if adjudged by the court, the convening authority approved a sentence providing for a dishonorable discharge, confinement for two years, forfeiture of \$250 pay per month for two years, and reduction to the lowest enlisted grade. The Army Court of Military Review affirmed a dishonorable discharge, confinement at hard labor for two years and reduction to the lowest enlisted grade.

testified about symptoms frequently observed in persons making unfounded complaints.⁹ According to the expert, such an individual is typically passive, and is "both intimidated [by] and very dependent upon authoritarian figures in her environment." These "victims" have little self-esteem and resent their feeling of powerlessness in social relationships. The expert also testified that a bogus victim commonly makes an immediate complaint; indeed, approximately 75 to 80 percent of all complaints of sexual assault are made within the first hour after the alleged incident.

Actual victims, including small children, are capable of giving detailed reports even though they are frightened. Conversely, vagueness or inability to recall, unless caused by physical injury, suggest that the report is false. A hallmark of an honest victim is her fear of retaliation for reporting the crime; in addition, many honest victims want to punish the perpetrator. While all rape victims display heightened emotional responses, the degree of exaggeration is significantly greater in deceitful victims, who often attempt to mimic the symptoms associated with rape trauma syndrome. These victims generally speak of how dirty they feel. Legitimate victims typically do not make this type of statement. When contending that a victim is deceitful, counsel should consider contacting civilian local mental health or social services offices in order to identify experts on rape complaints. If properly introduced, this type of testimony may establish a reasonable doubt as to the accused's guilt. Contact the TDS office at Fort Carson if you need further details.

Prior Misconduct Stipulations and Pretrial Agreements

A review of records of trial received at the Defense Appellate Division reveals that some pretrial agreements require a stipulation of fact as to the existence of records of nonjudicial punishment. The Army Court of Military Review finds this practice to be highly questionable. See United States v. Smith, 9 M.J. 537 (ACMR), pet. denied 9 M.J. 186 (CMA 1980). Because trial counsel frequently decline to introduce records of nonjudicial punishment if they are the subject of a stipulation, a question arises as to whether the accused is waiving legitimate objections to otherwise inadmissible evidence. The Court of Military Appeals proscribed the waiver of valid objections under the guise of a pretrial

9. United States v. Carr, CM 440271, tried 30 August 1980.

agreement in United States v. Holland, 1 M.J. 58 (CMA 1975), and stated that pretrial agreements cannot limit an accused's right to contest collateral issues affecting the fairness of his trial. The Court in Smith specifically found that a clause requiring an accused to waive his right to challenge evidence offered in aggravation is as offensive as requiring him to waive presentation of extenuation and mitigation evidence. See United States v. Callahan, 22 CMR 443 (ABR 1956).

According to the Army Court of Military Review, these agreements are not contrary to public policy unless the accused actually abandoned evidentiary objections or unless the stipulation is a condition precedent. United States v. Smith, *supra*; United States v. Sanders, CM 439553 (ACMR 10 Dec. 1980) (unpub.). Counsel should avoid entering pretrial agreements which suggest that the client waived his right to contest collateral issues. The Court of Military Appeals' recent rejection of post-trial misconduct clauses in guilty plea agreements supports this position. United States v. Dawson, 10 M.J. 142 (CMA 1981). If the government requires such terms, counsel should nevertheless raise any valid objections to the evidence and state for the record that the provision constitutes a condition precedent to the agreement.

Insuring Qualifications of Interpreters

Under paragraph 50b of the Manual, interpreters will be provided to translate trial proceedings for an accused who is not conversant in English. Several records of trial reviewed by the Defense Appellate Division include translations by interpreters who are marginally competent or lack special qualifications. Although military law does not prescribe standards for interpreters, 28 U.S.C. §1827 (1976) states that a certified interpreter must be used where reasonably available; otherwise, a "competent" interpreter may be used. If the appointed interpreter is in any sense unqualified to perform such duties, counsel should argue that federal rules governing interpreter qualifications apply to the military since the policy of adopting federal rules not incompatible with military requirements supports incorporation of those standards. The Trial Defense Service periodically receives updated lists of certified interpreters from the Director of the Administration Office of United States Courts, Washington, D.C.

USCMA WATCH

Synopses of Selected Cases In Which The Court of Military Appeals Granted Petitions for Review or Entertained Oral Argument

GRANTED ISSUES

APPELLATE REVIEW: Abuse of Discretion in Denying Clemency

Under what circumstances will the Army Court of Military Review be deemed to have abused its clemency authority under Article 66(c), Uniform Code of Military Justice? The Court of Military Appeals will confront this issue in United States v. Olinger, CM 439358, pet. granted, 10 M.J. ____ (CMA 1981). The accused was tried by general court-martial for larceny of government property; pursuant to his pretrial agreement, the approved sentence provided for a bad-conduct discharge, confinement at hard labor for seven months, total forfeiture, and reduction to the grade of Private E-1. Eight other servicemembers were convicted by separate general and special courts-martial for the same offense; none of their adjudged sentences included confinement in excess of six months or a punitive discharge. Nothing in the accused's record of trial indicated that he was especially culpable, and the evidence introduced during the sentencing portion of his trial was unusually persuasive and favorable. In addition, appellate defense counsel documented the disparity between the accused's sentence and the punishments imposed upon the other individuals who committed the offense. The Army Court of Military Review nevertheless declined to reassess the sentence. The Court of Military Appeals will determine whether the lower tribunal abused its discretion by failing to approve only that portion of the appellant's sentence which is comparable to the sanctions imposed upon the other individuals convicted of the same offense.

SENTENCING: Completeness of Documentary Evidence Introduced by The Prosecution

The trial counsel introduced the appellant's Department of the Army Forms 2 and 2-1 and three records of nonjudicial punishment during the court-martial's sentencing phase. The defense counsel tendered a motion requiring the prosecution to introduce favorable documentary evidence in the appellant's field personnel file, urging that the doctrine of completeness required the admission of that material. See paragraph 75d, MCM, 1969, and para. 2-20b, AR 27-10. The prosecutor countered that the defense could offer the favorable material. The

military judge denied the motion, which would have enabled the appellant to bring favorable evidence to the court members' attention without opening the door to rebuttal. In United States v. Morgan, SPCM 14523, pet. granted, 10 M.J. 116 (CMA 1980), the Court of Military Appeals will determine whether the military judge erred.

PROSECUTORIAL DISCRETION: Unreasonable Multiplication of Charges

In United States v. Sturdivant, 9 M.J. 923 (ACMR 1980), pet. granted, 10 M.J. ____ (CMA 1980), the Court of Military Appeals will decide whether the appellant's right to a fair trial was abridged by the number of charges preferred against him. At trial, defense counsel attacked the unreasonable multiplication of charges. Finding that the prosecution took "what is essentially one transaction, appellant's effort to buy his monthly measure of marijuana, and multiplied it into ten offenses," the Army Court of Military Review dismissed all but two specifications and reassessed the sentence. In United States v. Middleton, 12 USCMA 54, 30 CMR 54 (1960), the Court recognized that, under certain circumstances, an unreasonable multiplication of charges may affect findings by portraying the accused as a "bad character" against whom court members should resolve any doubts raised by the evidence. The Court will also decide whether the first sergeant committed illegal monitoring when he overheard the drug transaction on an extension phone in the orderly room.

GUILTY PLEA: Impact of Evidentiary Rulings on Voluntariness

Appellate defense counsel will urge the Court of Military Appeals to recognize that adverse rulings on evidentiary motions should not be considered by military judges in determining the voluntariness of guilty pleas, in United States v. Bethke, CM 439241, pet. granted, 10 M.J. ____ (CMA 1980). The accused moved to suppress pretrial admissions and the fruits of an allegedly improper search. The military judge agreed to receive evidence on the motions, but advised the accused that if the motions were denied and a guilty plea were entered, the defense would have to "work very hard to convince me that your plea is, in fact, voluntary and not entered solely because of an adverse ruling on my part." The accused withdrew his motions and pled guilty. On appeal, he contends that the military judge's admonition impermissibly forced him to choose between pursuing his motions and protecting his pretrial agreement, and that the judge erred in advising him that his plea would be held to a higher standard of voluntariness if the motions were denied.

Under similar circumstances, counsel should consider the use of the conditional guilty plea, or a confessional stipulation, to preserve a pretrial issue for appellate review. See 11 The Advocate 93 (1979); 12 The Advocate 87 and 165 (1980). This plea procedure conserves prosecutorial and judicial resources and advances speedy trial objectives. The Supreme Court has expressed no views on the propriety of such arrangements. United States v. Morrison, 28 Crim. L. Rptr. (BNA) 3042, 3043 n.1 (U.S. Sup. Ct. 12 Jan. 1981). The Court of Military Appeals has permitted the practice if certain procedural safeguards are observed. United States v. Bertelson, 3 M.J. 314, 315 n.2 (CMA 1977).

REPORTED ARGUMENTS

BURDEN OF PROOF: Exceptions to Punitive Regulations

Command regulations which proscribe certain conduct often recognize exceptions. The possession of drug paraphernalia pursuant to official duty, for example, is not actionable. Does the prosecution have the burden of establishing that the accused's conduct did not fall within an exception, and must the military judge so instruct the court members, or do the exceptions constitute special defenses which must be raised by the evidence before the burden shifts to the prosecution? The Army Court of Military Review, citing United States v. Verdi, 5 M.J. 330 (CMA 1978), reversed a conviction because the military judge failed to instruct the members that the government bears the burden of negating the exception. United States v. Cuffee, 8 M.J. 710 (ACMR 1979), certificate of review filed, 8 M.J. 227 (CMA 1980), argued 28 January 1981.

In his argument before the Court of Military Appeals, the government counsel attempted to distinguish Verdi by noting that the defense presented evidence raising the exception in that case, and requested an appropriate instruction. The government asked the Court to limit Verdi to its facts and to follow earlier cases, such as United States v. Gohagen, 2 USCMA 175, 7 CMR 151 (1953). Appellate defense counsel contended that the issue is one of legislative draftsmanship and that the exceptions in the USAREUR drug regulation are part of the enabling statute. Accordingly, under a series of recent Supreme Court cases, including, Patterson v. New York;¹ Mulaney v. Wilbur;² United States v.

1. 432 U.S. 197 (1977).

2. 421 U.S. 684 (1975).

Vuitch;³ and In re Winship;⁴ and the decision in Verdi, the Court of Military Review correctly held that the exceptions are "an element of the offense to be proven in every case," and that the Court's prior decisions must yield to supervening Supreme Court pronouncements.

The government's counter argument proceeded from the notion that the accused's conduct was malum in se and that the exceptions were not in issue because the accused testified that an informer planted the drug paraphernalia on him. Chief Judge Everett candidly noted that applying rules regarding burden of proof, burden of persuasion, and burden of going forward with the evidence is still as troublesome as it was when he studied in Professor Morgan's classroom. Whatever the result in Cuffee, trial defense counsel should preserve the record for appeal in similar cases by requesting the military judge to instruct that the "burden of proof is upon the prosecution . . . to prove that the accused does not fall within the exceptions" United States v. Verdi, supra at 334.

EVIDENCE: Admissibility of Reprimand

Several days prior to the accused's court-martial for larceny, his commander prepared a letter of reprimand which included a police report of a firebombing incident in which the accused was involved, as well as his confession to that offense. During the sentencing phase of the trial, the prosecutor introduced, over objection, a copy of the reprimand, which was maintained in the accused's official records, and referred to it extensively during his cross-examination of the accused. Appellate defense counsel contend that the military judge erroneously denied the objection, since the reprimand was prepared primarily for the trial. United States v. Boles, AFCMR 24825, pet. granted, 9 M.J. 4 (CMA 1980), argued 28 January 1981. The case provides the Court with an opportunity to define rules of admissibility with regard to allegations of criminal conduct not amounting to a conviction.

The trend emerging from decisions by federal courts and the Court of Military Appeals suggests that trial counsel may introduce proof of such allegations provided the information is properly included in the accused's personnel records. Thus in United States v. Cook, 10 M.J. 138 (CMA 1981), the Court allowed a prosecutor to introduce civilian convictions pursuant to paragraph 75b(2), Manual for Courts-Martial, United

3. 402 U.S. 62 (1971).

4. 397 U.S. 358 (1970).

States, 1969 (Revised edition). Federal courts allow judges to consider allegations of criminality not amounting to a conviction and one court held that, for sentencing purposes, a judge may consider evidence of criminal conduct of which the accused was acquitted. See United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979).

SEARCH AND SEIZURE: Expectation of Privacy

To what extent does a superior's noninvestigatory, duty-related desire to enter a barrack's room abridge a servicemember's reasonable expectation of privacy? In United States v. Lewis, 8 M.J. 754 (ACMR 1979), pet. granted, 9 M.J. 147 (CMA 1980), argued 28 January 1981, the Court has an opportunity to address this issue, and further define the scope and nature of the servicemember's privacy expectations. See United States v. Middleton, 10 M.J. 123 (CMA 1981). In Lewis, a noncommissioned officer approached the appellant's barracks room door in search of a third individual. The sergeant's suspicions were aroused when his knock was unanswered, since he heard voices from within the room; in addition, the door was locked, in violation of company policy. The sergeant walked outside to the barracks room window, where he peered through an opening in the drawn curtains and observed soldiers packaging drugs. He notified the commander, who observed the appellant's room through the window. The commander then demanded entry and apprehended everyone in the room.

In addition to determining the relationship between a superior's noninvestigative, duty-related purpose for entry and a servicemember's expectation of privacy in his barracks room, the court must examine the implications of a change in the superior's intentions. If a superior may enter a room for noninvestigative purposes, does he retain that right if his purpose becomes investigative, or is the servicemember's privacy expectation restored? Further, does a superior's right to gain entry into a barracks room enable him to surreptitiously observe the room through a curtained window? An additional unrelated aspect of the case involves the retroactivity of United States v. Porter, 7 M.J. 32 (CMA 1979) and United States v. Neutze, 7 M.J. 30 (CMA 1979). See USCMA Watch, 12 The Advocate 391 (1980).

SEARCH AND SEIZURE: Probable Cause

The Court will address the "basis of knowledge" aspect of the probable cause test in United States v. Barton, AFMCR 24736, pet. granted, 8 M.J. 221 (CMA 1980), argued 28 January 1981. The Air Force Office of Special Investigations notified the commander that a reliable, anonymous informer claimed the accused possessed drugs in his room. A second anonymous informer whose reliability was unknown provided specific details

pertaining to this allegation. The commander authorized the search of the room on the basis of this information. The crux of the accused's argument before the Court is that the neither informant independently satisfies the two-prong test in Aguilar v. Texas, 378 U.S. 108 (1964). While the initial informant may have been reliable, he did not furnish detailed information sufficient to convince a reasonable person that the items described in the authorization were located in the area to be searched. The second informant did provide detailed information, but he was not known to be reliable or credible. Appellate government counsel argued that the first informant's reliability was bolstered by the second informant's detailed observations, and that probable cause was adequately demonstrated.

CONVENING AUTHORITY: Disqualification

Congress' broad grant of discretion to the convening authority under Article 64, UCMJ, requires appellate courts to remain especially sensitive to allegations that his action was not premised upon an impartial review of the record. In United States v. Crossley, NCM 790176 (NCMR 30 Nov. 1979), pet. granted 10 M.J. ___ (CMA 1980), argued 27 January 1981, the Court will confront the problem of defining those circumstances which disqualify a convening authority from acting on a case. The convening authority in Crossley organized a small drum and bugle corps, and used it extensively in recruiting and public relations endeavors. At a Flag Day ceremony in New Orleans, the band members refused to perform, and the unit's protest was carried as a news item in the Philadelphia Enquirer and the Navy Times. The convening authority was highly embarrassed, and regarded the band's action as a personal and professional affront and a public insult to the Marine Corps. All band members were court-martialed.

On appeal, the appellant contends that the convening authority was disqualified from acting since he was, in essence, a witness and a victim of the band's action. He attended the ceremony at which they refused to play, and he was humiliated by their conduct and the media coverage it generated. The defense counsel argued that the Court should not find that a convening authority is disqualified only when he testifies at trial, grants immunity to witnesses, or manifests a predisposed or inflexible attitude. The government, on the other hand, urged the Court to view the issue restrictively, and contended that the only proper bases for a finding of disqualification are personal testimony contrary to other witnesses on a material issue, and actions reflecting an inflexible attitude or predisposition with regard to a particular case.

PRETRIAL AGREEMENT: Withdrawal by Convening Authority

The similarities between a pretrial agreement and a traditional contract are readily apparent: in exchange for the accused's admission of factual guilt, which relieves the government of its burden to prove legal guilt, the government agrees to limit punishment. But how should an appellate court apply established principles of contract law in determining the rights and responsibilities of the parties to the agreement? The Court will confront this problem in United States v. Kazena, 8 M.J. 814 (NCOMR 1980), Certificate of Review Filed, 9 M.J. 7 (CMA 1980), argued 29 January 1981. The certified issue posed by that case concerns a convening authority's power to unilaterally abrogate a pretrial agreement by referring to trial charges which were not encompassed by the agreement. The appellant's offer to plead guilty to three offenses was accepted by the convening authority. The accused then went AWOL. The government prepared an additional charge based on this offense, and referred it to trial with the original charges. When the military judge discovered that the agreement did not address the additional charge, he inquired as to its status and discovered that the convening authority had withdrawn from the agreement.

Appellate defense counsel contend that the convening authority's purported withdrawal was invalid, since the appellant entered guilty pleas and thereby fulfilled his part of the bargain. Conceding that an accused's detrimental reliance on an agreement after entry of pleas would preclude the convening authority from abandoning it, the government argued that there was no reliance in this case since the military judge had not accepted the guilty pleas. The Court's questions indicated the relevance of this factor. When a convening authority desires to withdraw from a pretrial agreement which the accused would like to enforce, defense counsel should therefore establish, on the record, the manner and degree to which the accused relied on the agreement.

CASE NOTES

Synopses of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

SEARCH AND SEIZURE: Exit-Gate Searches

United States v. Alleyne, CM 439423 (ACMR 30 Dec. 1980) (unpub.).
(ADC: CPT Walinsky)

Military police searched the appellant as he was exiting an installation in Korea. The law enforcement authorities found government property in his possession and he was ultimately convicted of larceny. A majority of the Army Court of Military Review viewed exit searches in overseas areas in the same light as entry searches in overseas areas, and found the search to be lawful. The dissenting judge, who believed that the search was unreasonable, stated that courts should not adopt different standards for overseas and CONUS installations, and should instead uniformly apply the administrative search and inspection model found in federal case law. See, e.g., Marshall v. Barlow's, Inc., 429 U.S. 1347 (1977); Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Davis, 482 F.2d. 893 (9th Cir. 1973).

PRESENTENCING EVIDENCE: Previous Convictions

United States v. Lee, SPCM 15317 (ACMR 30 Dec. 1980) (unpub.).
(ADC: CPT Castle)

During the appellant's trial, the prosecutor introduced a record of a summary court-martial conviction for a crime which the appellant committed subsequent to the charged offense. The Army Court of Military Review determined that because this document reflected an offense committed subsequent to the charge for which the appellant was being tried, it was inadmissible. See paragraph 75b(2), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter Manual]. See also United States v. Geik, 9 USCMA 392, 26 CMR 172 (1958); United States v. Crusoe, 3 USCMA 793, 14 CMR 211 (1954).

EFFECT OF PRETRIAL AGREEMENT: Military Judge's Inquiry

United States v. Elliott, ___ M.J. ___ (NCMR 21 Jan. 1981).
(ADC: CDR Landen, Sr., USN)

After noting during his providency inquiry that the appellant's pretrial agreement was silent as to the effective date of the required suspension of discharge and confinement, the military judge declared that the suspension would be in effect for one year from the date of trial. Because the convening authority suspended the punishments for one year from the date of the action, the appellant alleged that the convening authority ignored the military judge's declaration. The Navy Court of Military Review agreed. The court adopted the opinion of Senior Judge Fulton in United States v. Panikowski, 8 M.J. 781 (ACMR 1980), as to the effective date of suspended sentences when there is no agreement or understanding between the accused and the convening authority. Senior Judge Fulton determined that in such cases suspension is effective as of the date of the convening authority's action. In this case, however, the court found no abuse of judicial authority by the military judge (see United States v. Partin, 7 M.J. 409 (CMA 1979); United States v. Lanzer, 3 M.J. 60 (CMA 1977)), although it admonished judges to obtain the parties' understanding with respect to defects or omissions in pre-trial agreements, and not to unilaterally impose his interpretation upon them.

PRETRIAL PROCEEDINGS: Right To Investigator's Services

United States v. Drouin, NCM 78-0319 (NCMR 21 Jan. 1981) (unpub.).
(ADC: CPT Poirier, USMC)

The appellant alleged on appeal that the military judge erred by denying his request for the services of a criminal investigator. He contended that investigative assistance was constitutionally mandated, that military law permitted it, and that he was entitled to such services pursuant to 18 U.S.C. §3006A(e) (1976) (assistance to indigent accused). The Navy Court of Military Review rejected the applicability of 18 U.S.C. §3006A(e) to the military (see United States v. Johnson, 22 USCMA 424, 47 CMR 402 (1973); Hutson v. United States, 19 USCMA 437, 42 CMR 39 (1970)), and the contention that investigative assistance is constitutionally required. With respect to the argument that Article 46, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §846 (1976) and paragraph 58d of the Manual create a right to investigative services, the court found only that military law contemplates an equal opportunity for the prosecution and defense to prepare and present evidence; it

does not require the services of a professional investigator. See generally Gilliam, Defense Testing of Physical Evidence At Government Expense, 11 The Advocate 184 (1979); Schmit, Government Funding of Defense Investigations, 10 The Advocate 81 (1978).

STATUTES: Retroactive Application

United States v. McDonagh, ___ M.J. ___ (ACMR 27 Jan. 1981).
(ADC: CPT Walinsky)

The appellant challenged the in personam jurisdiction of his court-martial at trial and on appeal, alleging that recruiter misconduct nullified his enlistment. The issue before the Army Court of Military Review involved the effect of the change to Article 2, UCMJ (10 U.S.C. §802 (1980 Supp.), Act of 9 Nov. 1979, Pub. L. 96-107, 93 Stat. 810) on United States v. Russo, 1 M.J. 134 (CMA 1975). The court unanimously agreed that the amendments were retroactive. Two of the appellate judges, however, concluded that because the record established acts of purposeful recruiter misconduct rather than mere negligence, Russo would apply since it had not been modified by case law. See United States v. Stone, 8 M.J. 140 (CMA 1979); United States v. Valadez, 5 M.J. 470 (CMA 1978). Contra United States v. Quintal, 10 M.J. 532 (ACMR 1980) (Jones, S. J., concurring), pet. granted, Docket No. 39,894 (CMA 5 Jan. 1981). The court did determine that the amendments were designed to overrule Russo and retrospectively change enlistment law, and that Article 2(b), UCMJ, as amended, was therefore applicable.

Two judges agreed that the application of the change to offenses committed prior to its enactment did not constitute an ex post facto law, and the conviction was affirmed. The third judge likened the change to the removal of a defense to criminal charges and found that its retroactive application was impermissible. See Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). He also noted that the United States Supreme Court closely guards court-martial jurisdiction. See, e.g., Kinsella v. Singleton, 361 U.S. 234 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960).

PRESENTING EVIDENCE: Vacation of Nonjudicial Punishment

United States v. Comeau, SPCM 15449 (ACMR 27 Jan. 1981) (unpub.).
(ADC: CPT Martin)

At trial, the government introduced, over defense objection, a record reflecting the vacation of suspended nonjudicial punishment. The appellant alleged that the admission of the document violated the

procedural safeguards set forth in United States v. Covington, 10 M.J. 64 (CMA 1980). The Army appellate court agreed. In Covington, the Court of Military Appeals held that the procedural rules set out in paragraph 134 of the Manual must be satisfied before a record of vacation may be admitted. The court did state that a vacation hearing was only required in cases involving punishments enumerated in Article 15(e)(1)-(7), UCMJ. When other punishment is imposed, no hearing is required, but the accused must be informed of the bases for the proposed vacation and have an opportunity to dissuade the commander from acting. Further, there is a presumption of regularity with respect to a vacation action, and the appellant bears the burden of challenging its validity. In the case under review, the appellant testified that he was never told why the punishment was vacated, and that he was not allowed to explain his version of the facts. The court found that the appellant's un rebutted sworn testimony negated the presumption of regularity, and concluded that the military judge erred by considering this evidence.

SENTENCE: Multiplicious Offenses

United States v. Ueda, SPCM 14892 (ACMR 21 Jan. 1981) (unpub.).
(ADC: MAJ Johnson)

The appellant was charged with possessing, using, and selling marijuana. Prior to entering pleas of guilty to these offenses, the defense argued that the specifications of possession and sale were multiplicious for sentencing purposes since they were based on the same alleged transaction. The government concurred and the military judge so ruled. During the providence inquiry, the military judge reversed his ruling because the appellant stated that he only sold a portion of the marijuana he obtained from his source and retained the remainder. According to the military judge, this purchase and retention of more marijuana than he had agreed to sell created two separate offenses. The Army Court of Military Review disagreed. The court found that the chain of events linked these two offenses to the extent that they should be treated as a single act for punishment purposes. See United States v. Irving, 3 M.J. 6 (CMA 1977); United States v. Smith, 1 M.J. 260 (CMR 1976). The court extended no sentence relief, however, because the adjudged sentence was less than that bargained for in the pretrial agreement.

GUILTY PLEA: Providence Inquiry

United States v. Lay, 10 M.J. ____ (ACMR 8 Jan 1981).
(ADC: MAJ Nagle)

The appellant pled guilty pursuant to a pretrial agreement. The military judge did not address each of the cancellation provisions contained within the agreement during his colloquy with the appellant. As formulated by the Army appellate court, the issue on appeal was whether the military judge's inquiry fell below "the standard for determining providence." In light of the responsibilities of counsel before and at trial, the court found no reason to enforce a ritualistic approach to plea bargain inquiries and determined that the military judge's omissions were harmless error. See United States v. Hinton, 10 M.J. 136 (CMA 1981); United States v. Passini, 10 M.J. 108 (CMA 1980).

WITNESSES: Competency Determination

United States v. Bolling, CM 439753 (ACMR 27 Jan. 1981) (unpub.).
(ADC: MAJ Ganstine)

The appellant was charged and convicted of attempted forcible sodomy on a child. Prior to the victim's testimony, the government conducted voir dire to determine the witness' competency. The military judge refused the defense counsel's request for a similar opportunity. The Army Court of Military Review found that the military judge did not err. The court stated that although the judge could have extended this privilege to the defense, he is not required to do so. The military judge is solely responsible for determining a witness' competency (see United States v. Slozes, 1 USCMA 47, 1 CMR 47 (1951)) and the form of the hearing is a matter within his discretion. [Note that child witnesses are now presumed to be competent to testify. See Mil. R. Evid. 601.]

PREVIOUS CONVICTIONS: Summary Court-Martial

United States v. Anderson, ____ M.J. ____ (NCOMR 28 Jan. 1981).
(ADC: CAPT Gaeta, Jr., USN)

The appellant declined trial by summary court-martial and was subsequently convicted by special court-martial. On appeal, he alleged that he was not informed of the differences between summary and special courts-martial and was denied an opportunity to talk to an attorney before deciding whether to accept trial by that forum. The Navy appellate court concluded that an accused has no right to consult with counsel

prior to deciding whether to accept trial by summary court-martial since there is no right to counsel at those proceedings. See Middendorf v. Henry, 425 U.S. 25 (1976); United States v. Hayes, 9 M.J. 331 (CMA 1980). The absence of this right does not invalidate a summary court-martial conviction, but it does render it inadmissible at a subsequent court-martial unless the accused had an opportunity to consult with counsel. See United States v. Mack, 9 M.J. 300 (CMA 1980); United States v. Booker, 5 M.J. 238 (CMA 1977), vacated in part, 5 M.J. 246 (CMA 1978).

DEFENSES: Statute of Limitations

United States v. Taylor, NCM 80-1960 (NCOMR 29 Jan. 1981) (unpub.).
(ADC: LT Murphy, USNR)

The appellant was convicted of six specifications of unauthorized absence. On appeal, he alleged that the statute of limitations had run on five of the offenses because of the re-referral of these offenses. The Navy Court of Review disagreed. Distinguishing United States v. Arsneault, 6 M.J. 182 (CMA 1979) and United States v. Rodgers, 8 USCMA 226, 24 CMR 36 (1957), where new charge sheets were prepared prior to re-referral, the court held that, because the charge sheets in this case remained the same, the original receipt of charges by the summary court-martial convening authority tolled the statute. The procedures used by the government complied with paragraphs 32c and 215d of the Manual, and the statute of limitations did not bar the government from prosecuting the appellant.

FEDERAL COURT DECISIONS

IDENTIFICATION EVIDENCE: Out of Court Hearing

Watkins v. Sowders, 49 U.S.L.W. 4082 (U.S. Sup. Ct. 13 Jan. 1981).

The United States Supreme Court addressed the issue of whether a state trial court erred by refusing, over defense objection, to conduct a hearing outside the presence of the jury in order to determine the admissibility of identification evidence against the accused. The Kentucky Supreme Court had noted that such a hearing would have been preferred, but held that the judge's failure to conduct one does not require reversal of the accused's conviction; the procedure utilized at trial raised no issue of impermissible suggestion, and the record did not indicate that the accused was prejudiced. The accused sought a writ of habeas corpus from the United States District Court for the Western District of Kentucky. The district court agreed with the Kentucky Supreme Court, and found that no constitutional standards were violated. The United

States Court of Appeals for the Sixth Circuit affirmed the decision of the district court. The Supreme Court, while noting that an out-of-court hearing is a procedure which trial courts have been "admonished" to use, held that the trial judge did not violate the Due Process Clause of the Fourteenth Amendment. Distinguishing Stovall v. Denno, 388 U.S. 293 (1967) and Jackson v. Denno, 378 U.S. 368 (1964), the court found that, unlike cases involving the admissibility of confessions, there is no basis for concluding that a jury, having heard the arguments on the motion, would not follow the trial judge's instructions in weighing the reliability of the evidence.

INVESTIGATION: Right to Counsel

United States v. Morrison, 49 U.S.L.W. 4087 (U.S. Sup. Ct. 13 Jan. 1981).

Two agents of the Drug Enforcement Agency approached the appellant and solicited her aid in an investigation they were conducting. Although both agents knew that the appellant had retained counsel in connection with a pending indictment, they talked to her without the knowledge or consent of her counsel. During the conversation, the agents disparaged her counsel and suggested that she would be more effectively represented by a public defender. The agents also described various benefits which would result from her cooperation with them. The appellant declined to cooperate and immediately told her counsel what had transpired. The agents again approached the appellant without her counsel's knowledge or consent, but she did not aid them or incriminate herself. At trial, the defense counsel unsuccessfully moved to dismiss the indictment because of these alleged violations of the appellant's Sixth Amendment right to counsel. The motion did not allege prejudice. The district court denied the motion, but the United States Court of Appeals for the Sixth Circuit reversed that decision, holding that, regardless of a showing of prejudice, a violation of an accused's Sixth Amendment right required dismissal of the indictment. See United States v. Morrison, 602 F.2d 529 (6th Cir. 1979).

The Supreme Court reversed. The Court held that, absent a showing of prejudice or a substantial threat thereof, dismissal is plainly inappropriate, even though the constitutional violation was deliberate. Unless there is some indication that an accused is denied the effective assistance of counsel or a fair trial, no dismissal should be ordered because the remedy in a criminal proceeding is limited to denying the prosecution the fruits of its transgressions. See, e.g., United States v. Blue, 384 U.S. 251 (1966) (Fifth Amendment remedy); United States v.

Dowell, 10 M.J. 36 (CMA 1980) (Article 31(b) remedy); United States v. McOmber, 1 M.J. 380 (CMA 1976) (Articles 27 and 31(d) and Sixth Amendment remedy).

TRIAL: Right to Consult With Counsel During Recess

United States v. Conway, 632 F.2d 641 (5th Cir. 1980).

The trial judge ordered the accused not to discuss his case with his attorney during a lunch break which interrupted the government's cross-examination of the accused. The United States Court of Appeals for the Fifth Circuit held that this order violated the accused's right to counsel. The court noted that attorneys are duty bound not to engage in the type of activity which the trial judge feared in this case. Citing Geders v. United States, 425 U.S. 80, 91 (1976), the Court concluded that depriving an accused of the right to consult with his counsel during court recesses violates his right to effective assistance of counsel. The court observed that a trial judge who believes that counsel will improperly coach or influence a party-witness can take steps to alleviate that possibility (see Geders, *supra* at 89-90) but those measures cannot be applied to an accused and his counsel. See United States v. Vesaas, 586 F.2d 101 (8th Cir. 1978); United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976).

EVIDENCE: Photographic Lineup

Branch v. Estelle, 631 F.2d 1229 (5th Cir. 1980).

The United States Court of Appeals for the Fifth Circuit held that the failure of law enforcement authorities to preserve the photographic array used in conducting photographic line-ups raises a presumption that the array was impermissibly suggestive. The court found that the appellant's confrontational and due process rights under the Constitution would be undermined if law enforcement authorities could prevent the application of these principles merely by destroying the photographic array. The Court also discussed the issue of whether an accused has a constitutional right to a corporeal lineup. Although the court noted that this form of lineup is the most reliable identification procedure, it determined that the procedure is not constitutionally required. See e.g., United States v. McGhee, 488 F.2d 781 (5th Cir. 1974), cert. denied, 417 U.S. 949 (1974). But see United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976).

REGULATIONS: Constitutionality

Record Revolution No. 6, Inc. v. City of Parma, 28 Crim. L. Rptr.
(BNA) 2405 (6th Cir. 8 Dec. 1980).

Business owners in three Ohio cities challenged the constitutionality of municipal ordinances which prohibited the use, sale, or manufacture of "drug paraphernalia." The Court of Appeals for the Sixth Circuit reversed the lower court's decision upholding the constitutionality of the ordinances and enjoined enforcement of the provisions, which were adopted almost verbatim from the Federal Drug Enforcement Administration's Model Drug Paraphernalia Act. The court found that a precise and unambiguous definition of "drug paraphernalia" was essential because the ordinances could otherwise be interpreted as a ban on innocuous, everyday items. The ordinance defined drug paraphernalia as items "used, intended for use or designed for use" in unlawful drug-related activities. The court said this definition is impermissibly vague and overbroad, since it rests upon subjective states of mind, enables the prosecution of seller or purchaser under the doctrine of transferred intent, and enumerates no specific design characteristics distinguishing those items intended to be used for unlawful purposes. The court also concluded that the ordinances effectively delegate to law enforcement agents, prosecutors, and juries policy-making decisions "with respect to what is or is not drug paraphernalia." [Note that the Department of the Army is considering changes to AR 190-24, AR 190-30, and AR 600-50 in light of DOD Directive 1010.4 (25 Aug. 1980), which pertains to "head shops" and drug paraphernalia. The changes would prohibit the possession of such paraphernalia. See The Army Times, 19 Jan. 1981, at 30, col. 1.]

STATE COURT DECISION

EVIDENCE: Assertion of Fourth Amendment Rights

People v. Redmond, 169 Cal. Rptr. 253, 111 Cal. App.3d 742 (1980).

The accused refused to consent to a search of his garage. In his closing argument on findings, the prosecutor frequently referred to this refusal and characterized it as an admission of guilt. The trial judge declined to present the defense counsel's suggested instruction that such a refusal carries no inference of guilt. Relying upon Griffin v. California, 380 U.S. 609 (1965), and United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), the California Court of Appeals held that an accused's assertion of Fourth Amendment rights cannot be considered an indication of guilt, and that trial counsel may not comment upon the assertion.

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

(The DC asked an undercover drug agent if he had signed anything for the accused at the time of alleged drug sale.)

WIT: Yes, it was on a bond piece of paper. It started out -- "I, --" and then it had a blank space, I believe, where I was supposed to put my name, and then I believe it said something like, "I do hereby state that I am not a CID, MPI agent, civilian, or any other type of police force individual." Underneath I signed it, the accused signed it, and then his wife witnessed it.

DC: Was the purpose of that --

WIT: He told me the reason he wanted me to sign this was just in case I was a cop, I wouldn't be able to arrest him if I signed that piece of paper saying I wasn't a cop.

* * * * *

TC: Sir, I will try to be brief, although that is something that I am not usually famous for --

MJ: You just blew it.

* * * * *

DC: Can you hear normal conversation?

WIT: Pardon me, sir?

DC: Can you hear normal conversations all right?

WIT: Sir, my battery just went out on my hearing aid. I can hardly hear you.

* * * * *

(MJ to IDC): Well, it troubles me to inconvenience people, but it does no more than trouble me. I do it despite the trouble that it causes me.

* * * * *

DC: Objection. Irrelevant, improper foundation.

MJ: That objection is overruled. Do you have another one, counsel?

DC: Objection, irrelevant.

MJ: You made that one.

DC: Objection, hearsay.

MJ: Objection overruled. You want to try again counsel?

* * * * *

TC: Do you know the accused in this case?

WIT: Yes, I do sir.

TC: If you see him in the courtroom could you point to him and state his name?

(The witness looked around the courtroom.)

TC: Do you see him in here?

WIT: Not here.

* * * * *

DC: I was just merely trying to clarify your ruling, Your Honor.

MJ: Well, I thought it was clear. I'm a little confused as to how you got me so confused.

* * * * *

(The following notice was spotted on a JA Bulletin Board.)

For sale. Cheap. One set of Military Justice Reporter, Vols. 1-8. Excellent condition; slightly used. However, of little precedential value.

