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# A Journal For Military Defense Counsel THE ADVOCATE

# THE ADVOCATE

Volume 12, Number 2

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### WELCOME NATIONAL GUARD AND RESERVE JAGS

The Editorial Board is pleased to announce that a total of 33 United States Army National Guard and 111 United States Army Reserve Judge Advocate Offices are now receiving The Advocate on a regular basis. Expanding circulation to these units will help to update our colleagues in the National Guard and Army Reserve on the current issues and trends in the military justice system. We welcome them and solicit their suggestions, comments, and contributions.

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### MILITARY RULES OF EVIDENCE

The new Military Rules of Evidence were approved by the President on 13 March 1980, to be effective on 1 September 1980. Watch for the next issue of The Advocate, which will be devoted to the new rules.

\* \* \* \* \*

## READERS RESPOND

Your comments and questions are presented in the debut of our "FIELD FORUM" section. If you've been having success with a particular tactic or approach to some problem, or you'd like to get another perspective on how to deal with some problem or question, drop us a line.

\* \* \* \* \*

## OVERVIEW

An eyewitness identification of your client often poses an almost insurmountable obstacle to the defense case. Captain Dennis E. Brower provides us with a discerning perspective and approach to this problem, and points out the limitations and possible ways to attack such evidence.

Our second article comes to us from Captain John B. McLeod, a Senior Defense Counsel at Fort Hood. He discusses the oft-troublesome area of prosecution evidence on sentencing, to include potentially devastating rebuttal which may inadvertently be set up by the defense, with suggestions on how to meet or avoid it.

Closing arguments can make or break a close case which has been laboriously litigated. The late Charles A. Bellows, a highly respected criminal trial practitioner who put great emphasis on this important part of the trial, presents us with some practical examples of good closing arguments.

\* \* \* \* \*

## ATTACKING THE RELIABILITY OF EYEWITNESS IDENTIFICATION

Captain Dennis E. Brower, JAGC\*

The unreliability of eyewitness identification has long been recognized as a serious problem in the administration of criminal justice. Justice Brennan noted in United States v. Wade<sup>1</sup> that

[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure."<sup>2</sup>

Even though the problems of eyewitness identification are amply documented,<sup>3</sup> this form of evidence is likely to be the most devastating to the defense counsel's case. Consequently, it is imperative that he attack the reliability of the identification.<sup>4</sup>

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1. 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).
2. Id. at 228, 87 S.Ct. at 1933, 18 L.Ed.2d at 1158 (footnote omitted).
3. E. Borchard, Convicting the Innocent XIII (1932); Buckhout, Eyewitness Testimony, 231 Scientific American 23 (Dec. 1974).
4. Cf. United States v. Greene, 21 USCMA 543, 45 CMR 317 (1972) (an accused has a right to cross-examine an eyewitness about the credibility of his testimony).

The first portion of this article will address the major areas into which the defense counsel should inquire while preparing his cross-examination of the eyewitness. The article will then examine the psychological factors which contribute to the unreliability of eyewitness identification, and finally a model instruction to be used when an eyewitness identification is an issue in the case is appended to the article.

#### POINTS TO CONSIDER IN CROSS-EXAMINING AN EYEWITNESS

The defense counsel should consider the following points when preparing to cross-examine an identification witness. This list is not meant to be all-inclusive, and its usefulness will vary according to the circumstances of each case.

1. Observation Conditions. To ascertain the accuracy of the eyewitness' testimony, it is important to understand the conditions under which he observed the accused. The defense counsel must determine the degree of lighting present in the area at the time of the observation. To properly assess the reliability of the eyewitness' observation, he must visit the scene of the observation at the time of day that it allegedly occurred.<sup>5</sup> Although this may sound burdensome, the counsel should ascertain for himself whether the eyewitness' testimony is probable. If his observations show that the identification would be hampered by the conditions present, he should send a witness to the scene in order to rebut the eyewitness' assertions. Weather also affects the eyewitness' ability to observe. If the eyewitness cannot remember the weather conditions that were present at the time of his observance, the defense counsel should be prepared to offer evidence of those conditions.<sup>6</sup>

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5. Light readings can be used to show the unavailability of sufficient light to observe properly. In one case, the defense presented light readings to prove to the Court that the light at the scene amounted to one-fifth of the light from a candle and that a positive identification was consequently unlikely. The Court acquitted the defendant. Expert Testimony on Eyewitness Perception, 82 Dickinson L. Rev. 465, 481 (1978).

6. Expert testimony is usually available on most posts through a member of the weather detachment or weather squadron. They are required to record daily weather observations on Federal Meteorological Form 1-10, Surface Weather Observations. They should also have available a Chart, Fraction of the Moon Illuminated, National Almanac Office, U.S. Naval Observatory, which shows the exact percentage of the moon illuminated on any given day.

2. Duration of Observation. Careful examination of the amount of time the eyewitness observed the suspect is crucial to the defense, especially if the time was brief. Eyewitnesses tend to judge time by the amount of activity occurring; thus, during sudden activity such as the commission of a crime, the eyewitness will usually overestimate the length of time actually involved.<sup>7</sup> Often it is a good practice to have the eyewitness act out the sequence of events (timed) during the pretrial interview. In this manner, counsel can determine whether the eyewitness had an accurate perception of the actual amount of time that transpired.

3. Physical and Emotional Condition of the Eyewitness. Many variables can affect the reliability of identification testimony.<sup>8</sup> Careful questioning about the senses of the eyewitness may be valuable to the defense case. If the eyewitness is a member of the military, the defense counsel can request his medical records and check his eyesight and physical history.<sup>9</sup> Counsel can also check for any history of drug or alcohol abuse. The medical records indicate whether the eyewitness was on any medications

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7. Buckhout, supra note 3, at 25. Dr. Buckhout reported that the average time estimate from over 140 observers for an incident of only 30 seconds, was almost a minute and a half.

8. Studies show that injury, illness, fatigue, alcohol or drug consumption, age, sex, intelligence, race and social class can all affect the perceptual ability to observe. J. Marshall, Law and Psychology in Conflict (1966); Levine and Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. Pa. L. Rev. 1079, 1101-03 (1973). See also Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1966), where the Supreme Court cited a list of factors in evaluating irreparable misidentification where there has been a too-suggestive lineup and stated that reliability depends on a totality of the circumstances; United States v. Quick, 3 M.J. 70 (CMA 1977); United States v. Morrison, 5 M.J. 680 (ACMR 1978), where military courts cited and adopted the Biggers standard.

9. Color blindness has often been used to prove that what the eyewitness testified to was not correct since he could not perceive color. Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 978 n.27 (1977).

during the time of the alleged incident or whether he has been treated for any psychiatric problems.<sup>10</sup>

The relative stressfulness of the event bears on the emotional condition of the eyewitness at the time of the observation. Did the eyewitness know a crime was being committed or did he merely observe a "neutral" event? Was the eyewitness the victim or a mere observer? If the eyewitness knew that the situation he was observing was a crime, particularly a crime of violence, or if he was the victim, the stressfulness of the situation would have been greatly increased and the accuracy of his perception would be reduced.<sup>11</sup> What the eyewitness represents as his knowledge is necessarily an impression derived from his own senses. The senses which notice the stimuli of the event, and therefore create the memory of the event, may be concentrating on the stimuli relevant to survival rather than the criminal's characteristics.<sup>12</sup> Observers often cope with excessive stress by simply blocking it out. If he is confronted with a frightening experience, the witness may only concentrate on one particular article or perhaps an escape route and ignore the other stimuli in an unconscious attempt to reduce anxiety and stress.<sup>13</sup>

4. Description of the Criminal to Police and Others. Counsel should determine whether the eyewitness previously described the suspect. If the eyewitness has, the counsel should ascertain the description that was given in as much detail as possible.<sup>14</sup> If more than one description

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10. The Fourth Circuit Court of Appeals permitted limited cross-examination of a witness about his past psychiatric history. Questioning was allowed if it was probative of the witness' credibility, his ability to testify accurately, and his capacity to recall events. *United States v. Lopez*, 26 Crim. L. Rptr. 2292 (4th Cir. 1980).

11. H. Burt, *Legal Psychology* 72 (1931); Levine and Tapp, *supra* note 8, at 1098-99. Research demonstrates that an eyewitness under stress is less capable of rendering an accurate account of a situation. Even skilled observers such as Air Force pilots became less accurate at visual detection in a stressful environment. Buckhout, *supra* note 3, at 25, 173.

12. Comment, *supra* note 5, at 473.

13. J. Marshall, *supra* note 8, at 19-20.

14. See *United States v. Wilson*, 419 F.2d 759 (D.C. Cir. 1969) (the Court ruled that effective assistance of counsel requires that defense attorneys be furnished with prior descriptions).

was given, counsel should compare the various descriptions and fully develop any inconsistency. The friends and close acquaintances of the eyewitness may be fertile sources of information relevant to his descriptions. Often the eyewitness will give differing descriptions or reveal his uncertainty as to the identification of the accused.

If the eyewitness has not made a prior description or could not do so, that fact should be stressed to the court. Counsel should also be wary if the eyewitness saw the suspect after the crime or knew him previously and did not identify him as the criminal until some later date.

If the crime was committed by several defendants, the eyewitness may be confused by the multitude of activities at the crime scene. The counsel should determine whether the eyewitness can accurately describe all the defendants, and whether the descriptions match the other defendants or are similar in some manner.

5. Identification at Photographic or Physical Line-ups. If the defendant was identified by the eyewitness during a line-up, the defense counsel should ask the following questions:

- a. Was the suspect pointed out by police beforehand?
- b. Was the suspect the only one required to act or speak like the perpetrator of the crime?
- c. Was the suspect the only one in handcuffs during the line-up?
- d. Did the witness see the suspect in police custody before the line-up?
- e. Was the suspect the only one required to dress similar to the perpetrator?<sup>15</sup>
- f. Was the witness told that the police apprehended the culprit?<sup>16</sup>

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15. See *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), and *Cannon v. Montayne*, 486 F.2d 263 (2d Cir. 1973), where the Courts ruled that because the accused was the only one in the line-up who wore the same distinctive clothing as that linked to the perpetrator, the line-up was unduly suggestive.

16. "The chance of misidentification is also heightened if the police indicated to the witness that they have other evidence that one of the persons pictured committed the crime." *Simmon v. United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968).

- g. Did the witnesses make identifications in the presence of each other?<sup>17</sup>
- h. Was the suspect dissimilar from others in the line-up?
- i. Did the witness see a photograph of the suspect before the line-up?

An affirmative answer to any of these questions should alert the defense counsel to investigate fully the circumstances surrounding the line-up and inform the court that the line-up was probably improperly suggestive.

Although line-ups, both physical and photographic, are extensively used by the police, the procedures employed are notoriously unreliable because of their potential for exposing the eyewitness to suggestive influences.<sup>18</sup> The line-up is nothing more than a multiple-choice recognition test. An eyewitness will most likely perceive it as a test without a "none of the above" alternative.<sup>19</sup> He will feel compelled to aid

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17. See Monteiro v. Picard, 443 F.2d 311 (1st Cir. 1971), and United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969), where police questioned eyewitnesses in post line-up conference, and eyewitnesses were in same area and questioned together as to whether they identified the accused, the Courts ruled that in-court identification of accused was tainted.

18. Note, supra note 9, at 986. In one case that shows how line-ups can be inadvertently biased, a witness described her assailant as black, 5'6", 120 pounds, 21 years of age with a medium complexion, and a moustache. A line-up was conducted several months later and the suspect was identified by the victim. The line-up included five other persons and each had a slightly darker complexion than the suspect, although they were similar in all other areas. The photographs of the line-up, along with the witness' description, were given to a group of college students who were asked to choose the criminal based on the description. Seventy-two percent chose the suspect. The random percentage should have been only 16.67 percent. The students noted that the only difference in the photographs was that the suspect's complexion was a little lighter, and that therefore he was chosen. See also Clifford, The Relevance of Psychological Investigation to Legal Issues in Testimony and Identification, Crim. L. Rev. 153, 160 (1979).

19. Note, supra note 9, at 986.

the police in capturing the criminal, and will usually do all within his power to identify someone.<sup>20</sup> There is always the suggestion that the suspect is in the line-up.<sup>21</sup>

The problems in dealing with physical line-ups also pertain to photographic line-ups.<sup>22</sup> Indeed, photographic line-ups are potentially more unreliable than physical line-ups. Photographs may be old and out of date. Further, the photographs cannot show the true three-dimensional characteristics of facial features, nor can they show the face from different angles. Eyewitnesses also tend to regard pictures shown at the police station as "mug shots," and "mug shots" are pictures of criminals.<sup>23</sup> Thus when an eyewitness identifies a photograph as that of the criminal he feels that the picture must depict a criminal. Also, if the person who was identified in the photograph is included in the line-up, the eyewitness will probably pick the person again, whether or not that individual was the perpetrator.<sup>24</sup>

6. Use of Artist's Sketch and Composite Photo - "Ident-A-Kits." Often the police will use an artist or an "ident-a-kit" to render a likeness of a suspect. An artist's rendition is actually his impression

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20. Tests show that the witness wants to please the person exercising power over him. This was demonstrated in Professor Milgram's classic experiments on how far a subject would go to administer electric shock to an individual in order to please the psychologist. Milgram, Behavioral Study of Obedience, 67 J. Abnormal and Soc. Psych. 371 (1963).

21. The witness is usually told that he will be contacted when the police have "something else." When the police do contact him to observe a line-up, be it photographic or physical, the witness naturally assumes the police have caught the criminal. Thus he is extremely anxious to pick the criminal out and will pick out the person who most closely resembles the criminal.

22. See Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Simmon v. United States, supra note 16; and United States v. Gillespie, 3 M.J. 721 (ACMR 1977), for a discussion on the use of photographs for identification purposes.

23. Photographs are known to confuse the witness as to whether he saw the suspect in the "mug" book or at the site of the crime. Clifford, supra note 18, at 157. Counsel should refrain from using the phrase "mug shots," as it connotes to the jury a prior criminal record.

24. Note, supra note 9, at 984.

of the eyewitness' impression of what the eyewitness thought he saw. Both the artist and the person who handles the "ident-a-kit" incorporate their impressions into the final picture. When the eyewitness says the suspect had a big nose, the artist draws a picture of a nose which, in his opinion, is big. The eyewitness might agree with the artist's interpretation, but it was not the eyewitness' impression which recreated that portion of the face. Thus the eyewitness has created a picture from the impressions of many people. Based on that composite, a suspect is then picked up by the police. The eyewitness then identifies the suspect in a line-up because his face is the one which was partially created by him and is the freshest in his memory.

7. Interval Between Observation and Initial Identification. The accuracy of eyewitness testimony decreases as the interval between observation and subsequent identification increases.<sup>25</sup> Eyewitnesses begin to forget as soon as the observation is completed. Considerable memory loss occurs during the time that the eyewitness does not identify a suspect. To show the fallibility of the eyewitness, it is suggested that counsel conduct an experiment, before trial, in which he arranges for an aide or clerk to enter his office for the same period of time that the witness observed the suspect. The aide should interrupt the conversation so the eyewitness observes him. After an amount of time equal to the interval between the observation and the rendering of the first description, the counsel should ask the eyewitness for a detailed description of the aide. If his memory proves to be fallible, the experiment could be brought out during cross-examination.

#### PSYCHOLOGICAL FACTORS CONTRIBUTING TO THE UNRELIABILITY OF EYEWITNESS IDENTIFICATION

This section of the article presents a brief synopsis of the underlying psychological factors which make eyewitness identifications so unreliable. Although these factors could not be brought before the court without expert testimony, they are nonetheless important for a more thorough understanding of the eyewitness' subjective belief that he has identified the right person.

1. Function of Memory. Memory is the recognition and recall of certain perceptions which the brain receives through stimuli. Memory decays progressively over time. Like perception, memory is an active, constructive process that often introduces inaccuracies by adding details not

25. Clifford, supra note 18, at 155.

present during the initial observation.<sup>26</sup> The mind combines all the information acquired about a particular event into a single storage area. Consequently, it is difficult to distinguish what the eyewitness saw originally from what he learned later.<sup>27</sup> If the specificity of the eyewitness' description increases as the case proceeds, the additional facts are probably being gathered from surrounding circumstances. The witness may be reading newspaper accounts or otherwise acquiring details while with the police or from "mug shots" or similar visual aids. The eyewitness often has bits and pieces of information in his memory which, together, make no sense. The eyewitness then adds the new-found information to his memory and unconsciously modifies his memory so that his mental representation "makes sense." Unfortunately, this "new-found memory" is a bastardization of the eyewitness' perception of the actual observance and other perceptions which he has subsequently picked up and integrated into his memory.<sup>28</sup>

2. Interracial Recognition. It is a well-recognized socio-psychological phenomenon that members of one race have difficulty in properly identifying members of another race.<sup>29</sup> Most witnesses will refuse to concede that established point since they do not want to be characterized as a racist. To convince the eyewitness to accept that proposition, the counsel should present the witness with the proper facts of interracial recognition and show him that there is nothing abnormal with him stating that "they all look alike to me."

3. Intrinsic Motivation. When an eyewitness is asked to recall what he observed at the crime scene, various motives, not necessarily stimulated by the event, could affect the accuracy of his testimony. There is often a motive of revenge.<sup>30</sup> This motive is usually deeply hidden in the subconscious of the eyewitness, and he will rarely acknowledge its presence.<sup>31</sup> The eyewitness will also desire to perform his duty as a "good citizen." This, of course, necessitates identifying a suspect. When the police conduct a line-up and the eyewitness recognizes something familiar, this inner motivation to be a good citizen - to incarcerate the criminal for the protection of society - especially when coupled

26. Note, supra note 9, at 983.

27. Buckhout, supra note 3, at 178-79.

28. Bem, When Saying is Believing, Psychology Today, June 1967.

29. See Luce, They All Look Alike to Me, Psychology Today, Nov. 1974.

30. E. Borchard, supra note 3.

31. Id.

with latent feelings of vengeance, reinforces any recognition, however slight, and the witness makes what he believes is a positive identification.<sup>32</sup>

4. Predisposition of Eyewitnesses. The eyewitness' preconceptions will affect his perception of the event.<sup>33</sup> What the eyewitness sees with his eyes may not correspond with what registers in his mind. The eyewitness' personal biases and latent prejudices shape his perception and his recollection of what was actually observed.<sup>34</sup> Perception is a constructive rather than a reproductive process.<sup>35</sup> The eyewitness constructs his recollection from the events he has observed and what he already has in his mind. Thus, his testimony is a hybrid of intertwined mental perceptions and thoughts. The eyewitness feels that his recollection is true and complete, but his memory has been unknowingly altered by his own set of attitudes, prejudices, and stereotypes.

5. Perceptual Selectivity. An eyewitness can perceive only a limited number of the simultaneous stimuli present in the environment at any particular time.<sup>36</sup> In order to deal with this flood of information, the eyewitness learns to concentrate only on the most necessary and useful details. Thus a great amount of information remains unrecorded because the brain cannot handle the entire spectrum of information with which it is constantly being bombarded.<sup>37</sup> The eyewitness learns to

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32. Once a witness makes a decision on identification, it is doubtful that he will later change his mind in open court even if he has been given reasons to doubt the accuracy of his initial choice. The counsel's best opportunity is to try and convince the court that the witness is mistaken. See J. Marshall, supra note 8.

33. Buckhout, supra note 3, at 24. See also Gibson, The Theory of Information Pickup, Contemporary Theory and Research in Visual Perception 662 (1968).

34. In one experiment, subjects were shown a picture of several people on a subway train, including a white man holding an open razor and apparently arguing with a black man standing next to him. When asked to describe what they saw, over half the subjects reported that the black man was brandishing the razor. Note, supra note 9, at 981.

35. Levine and Tapp, supra note 8, at 1130.

36. Id. at 1095-1103.

37. Hilgard, The Role of Learning in Perception, An Approach to Personality 95-120 (1951).

take shortcuts and to sort out unnecessary information. Unfortunately, the resulting limitation of incoming stimuli also circumscribes the amount of stored data available for a proper identification. Thus, many details which seemed unimportant at the time were not encoded in the brain; the eyewitness is consequently left with an incomplete and inaccurate perception of the suspect.<sup>38</sup>

6. Use of Expert Testimony. If counsel wishes to introduce expert testimony on the unreliability of eyewitness identification, he must be aware of United States v. Hicks.<sup>39</sup> In Hicks, the defense counsel requested that the government produce, at its expense, an expert in "social and environmental psychology -- perception, memory, stress, and social influence."<sup>40</sup> The expert's testimony would deal with "social and perceptual factors in eyewitness identification."<sup>41</sup> The trial judge denied the request. The Army Court of Military Review upheld the trial judge's decision. The Court stated that the trial judge did not abuse his discretion by refusing the witness. The Court also held that the probative value of the tendered expert testimony must be weighed against its prejudicial effect, and that the four-part test employed in United States v. Amaral<sup>42</sup> should be applied to the case. Applying the Amaral test the Court found no error. The Court did not state that expert testimony was always inadmissible, but only that the trial judge did not abuse his discretion in the Hicks case and that a particular test was to be used in evaluating the use of expert witnesses. The trier of fact may be allowed to hear the expert testimony if the judge feels it is in the best interest of justice, and if the four-part Amaral test is met.

38. Note, supra note 9, at 981.

39. 7 M.J. 561 (ACMR 1979).

40. Id. at 562.

41. Id.

42. 488 F.2d 1148 (9th Cir. 1973). The four requirements in Amaral, cited in Hicks, are 1) a qualified expert, 2) a proper subject, 3) conformity to a generally accepted explanatory theory, and 4) probative value which outweighs prejudicial effect. The Court in Amaral also ruled that the test is whether the jury can receive "appreciable help" from such testimony. The denial of the expert witness was upheld by the Court. See also United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Watson, 587 F.2d 365 (7th Cir. 1978).

To use an expert witness, the defense counsel must convince the court that the testimony is necessary; that the average jury is not an expert in the field of eyewitness identification; that the information is proper for the jury and would not invade its province; that the well-documented findings on eyewitness identification are generally accepted; and, finally, that the expert witness would not be testifying as to the credibility of the eyewitness but merely supplying accepted scientific facts to the jury. The jury can then combine the expert and eyewitness testimonies in an attempt to accurately determine the credibility and reliability of the eyewitness.

USING SPECIAL INSTRUCTIONS  
ON EYEWITNESS TESTIMONY

If the defense counsel has properly prepared, there is a good chance that his cross-examination of the eyewitness will create some doubt in the minds of the jury. To take full advantage of this doubt, the defense counsel should request that the military judge give explicit instructions on eyewitness identification. To assist the defense counsel in preparing an appropriate instruction, the model instruction proposed in United States v. Telfaire<sup>43</sup> is appended to this article. The Telfaire instruction has been approvingly cited by most federal circuits.<sup>44</sup> The defense

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43. 469 F.2d 552 (D.C. Cir. 1972).

44. [Cited by circuit rather than chronologically] United States v. Kavanagh, 572 F.2d 9 (1st Cir. 1978) (Court ruled instruction should be given and cited Telfaire example, but left precise wording to trial judges); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), cert. denied, 435 U.S. 973, 98 S.Ct. 1618, 56 L.Ed.2d 66 (1978) (Court ruled judge should give instructions, but did not mandate a specific instruction). See also United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972); United States v. Wilford, 493 F.2d 739 (3d Cir. 1974) (Court ruled instruction should be given if requested, and cited Telfaire instruction as an example); Barber v. United States, 442 F.2d 517 (3d Cir. 1971); United States v. Holley, 502 F.2d 273 (4th Cir. 1974) (Court cited Telfaire instruction as one that should be used); United States v. Scott, 578 F.2d 1186 (6th Cir. 1978), cert. denied, 439 U.S. 870, 99 S.Ct. 201, 58 L.Ed.2d 182 (1978) (Court ruled judge should give instruction on identification and approved use of Telfaire instruction); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975) (Court ruled judge must give instruction when requested and cited instruction in Telfaire as one to be used); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976) (Court ruled that instruction must be given on identification); United States v. Greene, 591 F.2d

counsel should use the model instruction whenever there is doubt as to the accuracy of the identification of the accused. Counsel should incorporate the particular facts and circumstances of each case into this instruction in order to make it more relevant and useful to the accused's defense.

#### CONCLUSION

To prepare an effective cross-examination of an eyewitness, defense counsel must fully investigate the circumstances behind the initial observation and the subsequent identification of the defendant. Whenever possible, counsel should attempt to present expert witnesses who can testify as to the unreliability of eyewitness identification. Finally, defense counsel should submit specific jury instructions on the unreliability of eyewitness identification.

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44. Continued.

471 (8th Cir. 1979) (Court reaffirmed Dodge, supra, and ordered reversal where requested Telfaire instruction was not given); United States v. Cassasa, 588 F.2d 282 (9th Cir. 1978), cert. denied, 441 U.S. 909, 99 S.Ct. 2003, 60 L.Ed. 2d 379 (1979) (Court ruled judge should give instruction on identification and approved use of Telfaire model); United States v. Masterson, 529 F.2d 30 (9th Cir. 1976), cert. denied, 426 U.S. 908, 96 S.Ct. 2231, 48 L.Ed.2d 833 (1976); McGee v. United States, 402 F.2d 434 (10th Cir. 1968) (Court ruled that specialized identification instruction was not warranted, case was decided before Telfaire). The Fifth Circuit has not yet ruled on this instruction issue.

## THE MODEL TELFAIRE INSTRUCTION

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]\* \*Sentence in brackets [] to be used only if appropriate. Instructions to be inserted or modified as appropriate to the proof and contentions.

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.<sup>45</sup>

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45. Quoted from United States v. Telfaire, supra note 43, at 558-59.

## OPENING THE DOOR: SCOPE OF GOVERNMENT EVIDENCE ON SENTENCING

Captain John B. McLeod, JAGC\*

Since many servicemembers facing trial by court-martial are not strangers to conflicts with the law, it is important that defense counsel remain aware of the possible problems these prior brushes with the law can pose during the sentencing phase of the trial. Although the government's ability to introduce such evidence is circumscribed, an unwary defense counsel may inadvertently open the door for otherwise inadmissible evidence of prior misconduct. This article examines the methods by which the government can introduce such evidence, and it provides trial defense counsel with a guide through these rather perilous waters.

### EVIDENCE IN AGGRAVATION

Paragraph 75b(3), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969], permits the prosecution to introduce "available and admissible evidence as to any aggravating circumstances" after findings based upon a guilty plea. However, such matters in aggravation "must go to the particular offense of which an accused has been convicted, not to general denigrations of the accused or to unrelated incidents."<sup>1</sup> In addition to this limitation on the scope of aggravation, it is also error to introduce matters in aggravation which are unduly inflammatory and irrelevant.<sup>2</sup> Defense counsel should object to evidence which raises the impermissible inference that the accused has a criminal disposition to commit acts of the kind charged or criminal acts in general.<sup>3</sup> Finally, it is error for the government to present matters in

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\* Captain McLeod, presently the Senior Defense Counsel of the U.S. Army Trial Defense Service at the 1st Cavalry Division, Fort Hood, Texas, received his B.A. from Wofford College, and his J.D. from Duke University. He has also served as a legal assistance officer, trial counsel, and chief defense counsel at the 1st Cavalry Division.

1. United States v. Peace, 49 CMR 172, 173 (ACMR 1974).
2. United States v. Roberts, 18 USCMA 42, 39 CMR 42 (1968).
3. United States v. Potter, 46 CMR 529, 530 (NCOMR 1972).

aggravation after findings, not in rebuttal, other than prior convictions and personnel record entries, when an accused pleads not guilty.<sup>4</sup>

#### PERSONNEL RECORDS

Paragraph 75d, MCM, 1969, allows the government to introduce, prior to sentencing, "any personnel records of the accused or copies or summaries thereof."<sup>5</sup> This provision of the Manual was upheld in United States v. Montgomery, 20 USCMA 35, 42 CMR 227 (1970). The Court noted that such records are not limited to past military conduct and performance, but are governed by the standards of relevancy. However, a record does not automatically become admissible under this provision simply because it is contained in the accused's personnel records. Therefore, it was error to admit the entire record of an administrative elimination action just because it was required to be filed by appropriate regulations.<sup>6</sup> Not only does this provision allow records of Article 15 proceedings into evidence,<sup>7</sup> it has recently been utilized to allow the admission of proof of a civilian offense which occurred subsequent to the military offense of which the accused was convicted.<sup>8</sup> Additionally, even if the proffered exhibit is admissible as a "personnel record," there may be categories of information,

4. United States v. Peace, supra note 1; United States v. Taliaferro, 2 M.J. 397 (ACMR 1975). Conversely, in a guilty plea case it would be error for the military judge, in a judge alone trial, to consider in aggravation matters brought out during the providency inquiry, United States v. Richardson, 6 M.J. 654 (NCFMR 1979), and defense counsel should object to any attempt by trial counsel to make use of such matters in argument on sentence.

5. Para. 75d, MCM, 1969, defines "personnel records" to "include all those records made or maintained in accordance with departmental regulations which reflect the past conduct and performance of the accused."

6. United States v. Newbill, 4 M.J. 541 (AFCMR 1977). Furthermore, it has been held to be error for the prosecution to introduce an accused's request for discharge under Army Reg. 635-200, Personnel Separations - Enlisted Personnel, Chapter 10, even though properly filed and despite the accused's trial testimony that he wanted to stay in the Army. United States v. Hughes, 6 M.J. 783 (ACMR 1978).

7. United States v. Taylor, 20 USCMA 93, 42 CMR 285 (1970); United States v. Montgomery, 20 USCMA 35, 42 CMR 227 (1970).

8. United States v. Krewson, 8 M.J. 663 (ACMR 1979).

e.g., religious preference, which do not concern performance or conduct and which should be redacted.<sup>9</sup>

#### SPECIFIC ACTS OF MISCONDUCT

Paragraph 75e of the Manual allows the government to rebut evidence presented by the accused. In addition, paragraph 76a(2) states "the court may consider evidence of other offenses or acts of misconduct which were properly introduced in the case, even if that evidence does not meet the requirements of admissibility in 75b(2) and even if it was introduced for a limited purpose before the findings. See 138g and 153b(2)(b)." (Emphasis added). The cumulative effect of these two provisions seems to comport with the general rule that "character evidence in rebuttal which may properly be received will be limited by the scope of the character evidence introduced by the accused."<sup>10</sup> Therefore, the government may introduce in rebuttal specific acts of misconduct when evidence is brought forth by the defense that the accused did not commit such acts.<sup>11</sup> The requirement that the accused raise the issue is stressed in United States v. Sanders, 42 CMR 839 (ACMR 1970).<sup>12</sup> In that case, the defense introduced evidence proving that the accused had received a good conduct medal and had completed six years of good time in the service. The Court held that this did not permit the prosecution to introduce evidence relating to specific acts of uncharged misconduct for the purpose of rebutting the evidence of the accused's good character. In so doing, the Court noted that the defense did not introduce evidence to establish that the accused had not committed other offenses or acts of misconduct.

In upholding paragraph 76a(2), the Court of Military Appeals noted that "[t]he rules for the admissibility and applicability of other offenses

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9. United States v. Montgomery, supra note 7.

10. Paragraph 138f(2), MCM, 1969. In United States v. Watts, 24 CMR 384 (ABR 1957), the Court cited this provision from the 1951 Manual. Cf. United States v. Jenkins, 7 M.J. 504 (AFCMR 1979) (error for government witness to recommend that the accused be given the maximum punishment in rebuttal to defense witness recommendations for sentence "leniency").

11. See United States v. Jones, 4 M.J. 545, 546 (ACMR 1977). Cf. para. 183g(7), MCM, 1969.

12. Sanders applies para. 138g(7), MCM, 1969, after findings.

or acts of misconduct are grounded on relevance and materiality."<sup>13</sup> In order to be "properly introduced," the misconduct must be "in rebuttal to a defense contention made in extenuation and mitigation, or [be] otherwise relevant to the offenses charged . . . ."<sup>14</sup>

In presenting evidence pertaining to the accused on extenuation and mitigation, it is important to limit such evidence to the period prior to the commission of the offense of which the accused is convicted. By so doing, it may be possible to prevent the government from introducing misconduct or character of the accused subsequent to these offenses.<sup>15</sup> Furthermore, it is error to rebut the accused's statement that he had no prior convictions with testimony to the effect that his general military character was substandard.<sup>16</sup>

### CIVIL CONVICTIONS

Defense counsel often represent servicemembers who have also been in trouble with the civilian authorities. Therefore, one must be even more cautious about presenting evidence pertaining to the accused when the trial counsel has evidence of a civilian conviction at hand. Prior to setting forth specific acts of good conduct or presenting broad-based evidence of good character, trial defense counsel should balance the beneficial effects thereof vis-a-vis the detrimental effects of the government then being able to offer the evidence of the civilian conviction. In United States v. Hamilton, 20 USCMA 91, 42 CMR 283 (1970), the Court allowed the government to introduce an earlier United States District Court conviction of the accused. The Court felt that the accused had opened the door by offering evidence proving that he had been on continuous active duty since 1961, and indicating the various places that he had served, and the medals he earned. "Where the defense makes an issue of the [accused's] military record and standing, rebuttal evidence of a previous conviction is relevant to his character and his performance of duty." Id. at 92, 42 CMR at 284. However, Hamilton has been limited to cases in which the defense puts on broad-based evidence of good soldierly character.<sup>17</sup>

13. United States v. Worley, 19 USCMA 444, 445, 42 CMR 46, 47 (1970) (the Court cited para. 138g of the current edition of the Manual as well as the two previous editions).

14. United States v. Mandurano, 1 M.J. 728, 731 (AFCMR 1975).

15. See United States v. Monroe, 39 CMR 479 (ABR 1968).

16. United States v. Reis, SPCM 13464 (ACMR 11 Dec. 1978) (unpub.).

17. United States v. Whitmore, 50 CMR 537 (CGCMR 1975).

## CONCLUSION

Only if the defense counsel astutely manages the case during extenuation and mitigation will the government be foreclosed. The facility with which the prosecution can exploit the slightest opening for this purpose is illustrated by the recent case of United States v. Konarski, 8 M.J. 146 (CMA 1979). During the sentencing phase for an accused convicted of indecent assault and sodomy with a ten-year old girl, the defense presented several witnesses who testified that further confinement was not necessary for the accused; eight witnesses who recommended that the accused be retained in his present grade; and one who said the accused was not dangerous. Over defense objection, the government called a psychiatrist and a psychologist to testify that the accused would pose a danger to the community and should be confined. The Court held this to be proper rebuttal, noting that the recommendations for retention in rank "clearly implied a belief that the accused would perform his military duties as well as he had before he committed the offenses of which he was convicted; it also implied a belief that the accused was not likely to repeat the crimes." Id. at 148. The lesson to be learned from this is that defense counsel must be careful to guard against the rebuttal of "implications" as well as the rebuttal of facts.

## THE IMPORTANCE OF THE CLOSING ARGUMENT FOR THE DEFENSE IN A CRIMINAL CASE

Charles A. Bellows\*

After spending all my professional life as prosecutor and defense lawyer, it is my belief that the closing argument by defense counsel plays an important role in the result of a criminal trial. Not only is it the most spectacular and dramatic part of the case but it permits defense counsel to assemble a mosaic of evidence and to argue it in the most favorable light for the defense.

An ineffective closing argument is a disservice to the defendant who relies on his lawyer to present his case to the jury, logically and eloquently. Moreover, a poor argument will disappoint the jurors who expect the defense lawyer to make a good presentation of the case to assist them in arriving at a verdict.

When I was a young prosecutor in the Criminal Court of Cook County, I prosecuted a case in which Clarence Darrow represented the defendant. I learned then the importance of a good closing argument. Mr. Darrow's summation before the jury was eloquent and persuasive. After the jury returned a verdict of not guilty, I told Mr. Darrow what a great experience it had been for me to try a case against him and that I would always remember his brilliantly effective closing argument. Darrow, who was known for his helpfulness to young lawyers, delivered a brief lecture on the importance of the closing argument. He said that the closing argument to a jury in a criminal case was often a decisive factor in influencing the result of a trial. The essential attributes of a good trial lawyer in making a closing argument, said he, were sincerity, an analytical ability to see the flaws of his adversary's case, ability to present facts that favor his side, and finally, he must possess a talent for eloquence. As a young prosecutor, trying cases against some of the best criminal lawyers in this state, I observed that they all had essentially the talents that Mr. Darrow described.

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Time has not diminished the importance of the closing argument. The styles may have changed somewhat over the years, but a good trial lawyer today differs very little from his predecessor in the use of a persuasive and dramatic closing argument to win a favorable verdict. Several years ago I tried a case against Barnabas Sears, a great trial lawyer who was a special prosecutor for the state in the famous Summerdale Police case. His closing argument was an oratorical masterpiece of persuasion and may well have been the decisive factor in obtaining a guilty verdict.

Although a criminal case is not won solely on the basis of a closing argument, it affords the defense lawyer an opportunity for the first time to attempt to convince the jury by his logic, his persuasiveness and his oratorical skills, that his client is innocent. To fail to do this competently is inexcusable.

A good argument requires well-planned preparation for its presentation. The preparation for a closing argument should begin the moment the defense lawyer enters the case. Throughout the trial notes should be taken of favorable or unfavorable points which will have to be argued. Thought should be directed toward answering the prosecution's strong points and how to present the defense in the best possible light.

The length of the argument must be appropriate to the time it took to try the case and the seriousness of the charge. A closing argument should never be waived; this tells the jury that the defense counsel lacks confidence in the case and invites a charge of incompetency of counsel.

I always begin my argument to the jury with an expression of appreciation for the jurors' attention and consideration. The jury should be told about the fundamental rules of law governing the trial of this case. Any special instruction given by the court which may effect the result of the trial should also be thoroughly discussed. It cannot be taken for granted that the jurors fully understand the fundamental rules of law and it is worth the time to explain them.

In analyzing the prosecution's case the argument should bring home to the jurors any unfavorable characteristics of a witness or witnesses such as lack of memory, evasiveness, improbability of the testimony, discrepancies, immunization of the witness, bias or prejudice. If the defense cannot answer every issue raised by the prosecution, reply should be made only to those for which a reasonable explanation can be made.

It is impossible in this short article to present all the arguable issues that can arise in the trial of a criminal case. Therefore, I have only chosen those situations which arise most frequently.

Criminal prosecutions often involve the use of immunized witnesses or informants. I take the approach in my argument that an immunized witness or informant does not usually give assistance to the prosecution out of a desire to uphold the law, but rather one that has a selfish motive to keep himself from going to prison or to receive a reduced sentence. An informant or an immunized witness, I suggest, can easily stretch the fabric of the testimony to help the side that will shield him from punishment.

Identification is often a serious issue in the trial of a criminal case. I have often witnessed lawyers, jurors and spectators identified in court as the person who committed the crime. On one occasion my son and co-counsel, Jason Bellows, was identified by the assistant state's attorney as the self-confessed offender who was on trial. The argument on this point depends a great deal on the particular evidence in the case, such as length of time the identifying witness had for observation of the offender, ability to remember facial characteristics and what subtle or direct influences were brought to bear on the identifying witness.

Identification evidence can be erroneous, for it is not uncommon to mistake one person for another. I have posed the question to the jurors whether they have not at sometime thought they recognized an old acquaintance who turned out to be a complete stranger.

A defendant's prior record can seriously affect his testimony if he takes the witness stand. It must be pointed out to the jury that the prior conviction should not prejudice them against the defendant in determining his guilt or innocence and that his previous conviction has been admitted for the sole purpose of determining his credibility. It should be argued that the defendant has paid his debt to society and that it would be unfair to convict him on his past misdeeds.

The good reputation of a defendant is a very important point to be argued in his favor. It should be argued that a good reputation is not easily gained; that a man of good repute does not suddenly change his character and commit a crime; and, that a good reputation may create a reasonable doubt that the defendant is guilty. It is my experience that jurors are impressed by testimony bearing on the good reputation of a defendant, and such testimony should be strongly argued as evidence which tends to establish his innocence.

Prosecutions are frequently based on circumstantial evidence; the law makes no distinction between circumstantial evidence and direct evidence. Nonetheless, it should be argued that there is a practical difference. Direct evidence is found where one can see a crime committed or hear an occurrence taking place. Circumstantial evidence consists of facts upon which a conclusion may be reached. Where the case rests on circumstantial evidence and there are facts that are inconsistent with the charge in the indictment, it can be argued that circumstantial evidence may be compared to a chain which is only as strong as the weakest link and the evidence warrants a verdict of not guilty.

The closing argument in a conspiracy prosecution involves problems that are different from that of most other offenses. The conspiracy trial involves multiple defendants; en masse introduction of evidence against all; and, possible conflict among defendants and lawyers. Therefore, there is a need of developing a plan of participation by each lawyer, concerning content, length of argument and the order of lawyers making the closing arguments.

I argue that the conspiracy laws make it difficult for an individual to defend himself against the charges because it is a device whereby the defendant is made responsible for statements and acts of others which could not be used if the charge was not conspiracy. I suggest that the charge of conspiracy is being used as a dragnet to prosecute the defendant against whom the evidence is weak or nonexistent. A skilled advocate will make the jury see the injustice arising out of the use of the charge of conspiracy known as the "darling of the prosecutor."

The defense argument to the jury against the infliction of the death penalty has become more difficult by the recent enactment of the homicide statute which provides for a bifurcated trial and permits the presentation of evidence in aggravation and mitigation under the rules governing the admission of evidence at criminal trials.

The defense argument should express the degrading, brutalizing and inhumane aspects of the death penalty; that it is contrary to twentieth century concepts of the importance of human decency and dignity and that the taking of the life of a human being by the demand for the death penalty is motivated by a desire for vengeance or retaliation and is not a deterrent to murder. I have, on occasion, painted a vivid portrait of an electrocution with telling effect. A man with his head shaven and his trousers split being dragged to the electric chair, while a priest follows along mumbling something which cannot be appreciated; the frantic struggle cut short; the strapping of limbs and the throwing of the switch; the violent arching of a body and a face convulsed in the agonies of

death; the smell of ozone and burning flesh - are images which cannot fail to give the jury some appreciation for the intrinsically barbaric nature of the act.

Finally, in most contested cases there may be an element of doubt about the guilt of the accused and an argument that the execution if carried out is irrevocable and precludes relief if new evidence is uncovered which may prevent the infliction of the death penalty.

In concluding the argument, the defense should not omit a subtle appeal for sympathy and a review of the important rules of law which protect and shield the defendant from the beginning of the case to the end.

In making the closing argument for the defense the sincerity of the defense lawyer, his voice, demeanor, ability to persuade and oratorical skill will cause the jury to give full consideration to the defense and may bring a favorable verdict.

My advice to those who desire to be successful criminal defense lawyers is that they must be prepared to devote as much time to the preparation of the closing argument as they would give to the preparation of the defense or the cross-examination of the prosecution witnesses.

# "SIDE BAR"

or

## Points to Ponder

### 1. MORE ON PRESERVING ISSUES FOR APPEAL.

In the last issue, we provided some additional ideas on conditional guilty pleas. While the conditional guilty plea is the preferred method of preserving an issue for appellate review, another approach, using a confessional stipulation, may prove equally successful.

Prior to trial, the accused will enter into a confessional stipulation with the government in exchange for a sentence limitation by the convening authority. This agreement should specify that if the accused is successful on the motion, he will withdraw from the confessional stipulation, which cannot then be used against him. At trial, the accused will enter a plea of not guilty, allowing motions to be litigated and preserving the issues for appeal. In most cases, this procedure will require the government to present evidence on the motions raised, but will lighten its burden in other areas. In the proper case, the burden will be lessened enough to gain a sentencing concession from the convening authority. Following the motions, assuming the accused loses, the confessional stipulation, which must be carefully drafted to avoid conceding the issue litigated during the motions session, will be introduced by the government. A Bertelson\* inquiry, which, of course, covers the same areas required to be covered in a guilty plea, is then conducted by the military judge.

For more details on how this procedure works, contact MAJ Squires in TDS at AV 289-1391.

### 2. SPECIAL FINDINGS -- BE SPECIFIC

In a case recently considered by the Army Court of Military Review, the trial defense counsel requested the military judge to make special findings as to corroboration in a sexual assault "if the testimony of [the victim] is found to be self-contradictory, uncertain, or improbable." (Emphasis supplied). The military judge responded by written indorsement that the precondition was not met;

\* 3 M.J. 314 (CMA 1977).

therefore he deemed that no special findings were necessary. The Appellate Court found that the trial judge complied with the defense request.

Article 51(d), UCMJ, and paragraphs 39b(5) and 74i, Manual for Courts-Martial, United States, 1969 (Revised edition), provide that the military judge sitting as a court without members must make special findings, upon request, of factual matters reasonably in issue. United States v. Hussey, 1 M.J. 804 (AFCMR 1976); United States v. Falin, 43 CMR 702 (ACMR 1971). The request for special findings must be made prior to the announcement of the general findings by the military judge and must specify the matter to be determined.

There are several advantages to special findings. If they are prepared in writing prior to trial, they force the defense counsel to analyze the elements of the case at an early stage. Secondly, if carefully and specifically drafted, they force the military judge through the same mental process previously used by defense counsel, and etch the military judge's reasoning into the record, thus taking the place of jury instructions for appellate purposes. If properly done, the special findings will preclude speculation at the appellate level as to whether the military judge misunderstood testimony, knew the law, excluded improper testimony, or mistakenly relied on excluded testimony or otherwise improper evidence. In order to accomplish that, the request should cover the same areas for which counsel would request or expect jury instructions.

Special findings also preclude the government from arguing a completely different legal theory on appeal than that relied upon by the military judge at trial. See United States v. Raymo, 23 USCMA 408, 50 CMR 290 (1975).

The consideration of most importance, however, is to tailor specifically the request for special findings to reveal the military judge's thought processes in interpreting the evidence, evaluating credibility of witnesses, and understanding of the law to be applied. In a close case, the request for special findings may carry the day for the defense by forcing the factfinder to outline specifically his thought processes in arriving at the finding. The key is to require each and every step in the process to be spelled out by a special finding.

The lesson to be learned from the case set out above is to not omit the first step in the process, because the remaining steps may not nec-

essarily follow. One possible way to have avoided that problem, in this example, would have been to request first a special finding as to the judge's factual basis for finding the witness' testimony either credible or not credible, self-contradictory or not self-contradictory, and improbable or probable. Having established the reasons for that finding, then special findings as to corroboration could be requested with the preliminary findings as a basis. To make the special findings helpful on appeal, they must cover each step of the judge's analysis of the issues. It is obviously better to err in the direction of being too precise than to pose general questions which the judge can sidestep or answer in an obfuscating manner. See 7 The Advocate 9 (1975).

### 3. SUGGESTED FORMAT FOR A DEFERMENT APPLICATION.

Beginning on the next page is a format for deferment applications, courtesy of LTC Herbert J. Green, Chief, Criminal Law Division, at the Army JAG School. In addition to the use of this form, counsel should always attach exhibits as appropriate to substantiate the reasons deferment should be granted. These exhibits could be mortgage documents, custody orders, promissory notes, etc., which indicate the accused's ties to the community. See Serene, A Practical Approach To Requests For Deferment, 11 The Advocate 286 (1979); Note, Securing "Bail" for a Military Client Pending Appellate Review of a Court-Martial Conviction and Sentence: Litigating Under Article 57(d), The Advocate, Vol. 9, No. 2, p. 8 (Mar. - Apr. 1977); and 11 The Advocate 204 (1979), for additional considerations and discussion.

U N I T E D   S T A T E S

v.

)  
)  
)    APPLICATION FOR DEFERMENT  
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)

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THRU: Staff Judge Advocate  
Fort Bank, Missouri

TO: Commander  
Fort Blank, Missouri

1. Under the provisions of Article 57(d), Uniform Code of Military Justice, and paragraph 88f, Manual for Courts-Martial, 1969 (Revised edition), the accused requests that the confinement portion of (his) (her) sentence adjudged on \_\_\_ 19 \_\_\_, by the (General) (Special) (Summary) Court-Martial convened by Court-Martial Convening Order Number \_\_\_, Headquarters, Fort Blank, Missouri, dated \_\_\_ 19 \_\_\_, be deferred until (special date) (the date the sentence is ordered into execution) (\_\_\_).

2. The accused submits:

a. That the purpose of the deferment provision of Article 57(d), UCMJ, is to "increase the post-conviction safeguards and remedies available to the accused," page 4504, Senate Report Number 1601, 90th Congress, Second Session, and to "remedy the situation" of an accused serving his sentence to confinement before appellate review, which may result in reversal, is completed. United States v. Corley, 5 M.J. 558, 568 (ACMR 1978);

b. That (he) (she) is not a danger to the community;

c. That there is no likelihood that (he) (she) may repeat the offense(s) of which (he) (she) has been convicted;

d. That there is no substantial risk that (he) (she) will commit a serious crime;

e. That there is no likelihood that (he) (she) will flee to avoid the service of (his) (her) sentence, and that there is no substantial risk that (he) (she) will not appear to answer the judgment following the conclusion of appellate proceedings; and

f. That there is no likelihood that (he) (she) will intimidate witnesses or otherwise interfere with the administration of justice.

3. The following establishes that the accused is not a danger to the community, and that (he) (she) will not flee the jurisdiction:

a. The offenses of which the accused was convicted are nonviolent;

b. The accused has never previously been convicted of a crime, nor has (he) (she) been punished under the provisions of Article 15, UCMJ;

c. The offense was one of impulse which will not be repeated;

d. The accused's first sergeant, company commander, and supervisor all testified at trial that the accused is a hard worker and a nonviolent person. All testified they would like (him) (her) back in the unit immediately;

e. The accused was not in any restraint during the investigation of the offenses prior to preferral of charges nor during the pretrial proceedings after preferral of charges;

f. The accused made no attempt to flee the jurisdiction prior to trial;

g. The accused has custody of (his) (her) minor daughter who lives with (him) (her) (is sole support for his wife and children who live with him in offpost quarters. These quarters are owned by the accused subject to a home mortgage for which the accused must make monthly payments);

h. The accused has substantial investments in the local area, to wit: (home improvement loan) (loan secured by personal property), the security for which may be forfeited if the accused flees; and

i. . . . .

4. The following errors which substantially prejudiced the accused were committed at trial:

a. The military judge improperly admitted into evidence Prosecution Exhibits 1, 2, and 3, which were obtained as a result of an illegal search and seizure;

b. The military judge improperly admitted into evidence a pretrial statement of the accused (Prosecution Exhibit 7) which was obtained in violation of Article 31, UCMJ; and

c. The military judge improperly permitted a prosecution witness (name of witness) to refresh his memory, in violation of Military Rules of Evidence, Rule 612.

Private John Smith  
Accused

Wanna Freum  
CPT, JAGC  
Defense Counsel

NOTE: Paragraph 3 should be tailored to those facts and circumstances of the particular case which tend to prove that the accused is not a danger to the community and is not a risk to flee the jurisdiction. For example, the fact that an accused had sole custody of his minor daughter and had substantial personal property in the local community may be sufficient to establish the absence of a flight risk. United States v. Brownd, 6 M.J. 338 (CMA 1978). On the other hand, merely setting forth conclusions that the accused will not flee nor commit a serious offense is insufficient to establish the accused's entitlement to deferment. United States v. Thomas, 7 M.J. 763 (ACMR 1979). Similarly, indicating that the accused "had twenty-six months creditable service, was promoted to the grade of SP4, was being considered for promotion to E-5, was the distinguished graduate in his AIT class at Fort Dix for which he had received a letter of commendation, that his superiors and peers in the motor pool regarded him as trustworthy and reliable, that he graduated at the top of his class at the Primary Noncommissioned Officer Course and that he would submit a petition for clemency" may establish grounds for clemency but does not "adequately . . . [allege] facts relevant to deferment of confinement." United States v. Alicea-Baez, 7 M.J. 989, 991 (ACMR 1979).

## USCMA WATCH

### NEW USCMA JUDGE

President Carter has nominated Robinson O. Everett, a practicing attorney and a law professor at Duke University, to complete the remaining months of the unexpired term of Judge Perry. On 28 March 1980, the U.S. Senate confirmed Professor Everett's nomination. He will be administered his oath of office on 16 April 1980.

Professor Everett was born in Durham, North Carolina, on 18 March 1928. He received his undergraduate degree and his J.D. from Harvard University. He also holds an LL.M degree from Duke University. Following a tour on active duty as an Air Force Judge Advocate (1951-1953), Professor Everett served as a commissioner for the United States Court of Military Appeals from 1953 to 1955. In addition to maintaining an active law practice, he has been a professor of law at Duke University Law School since 1966. Professor Everett has published numerous articles on military justice; he is also the author of Military Justice in the Armed Forces of the United States. He presented the Third Annual Edward H. Young lecture on Military Legal Education at The Judge Advocate General's School, U.S. Army, in 1974.

Professor Everett will join the Court of Military Appeals in time for oral arguments in April. Some cases that he and the other members will consider are digested below.

### GRANTED ISSUES

#### MATHEWS INQUIRY - IMPROPER?

Two recent grants of import indicate a renewed concern with presentencing procedures and attempts by military judges to extend the holding in Mathews.<sup>\*</sup> They deal with the military judge's inquiry into the accused's understanding of his rights to counsel and to a criminal trial prior to acceptance into evidence of records of previous nonjudicial punishment or summary court-martial.

United States v. Turrentine, pet. granted, No. 38,598, \_\_\_ M.J. \_\_\_ (CMA 20 Mar. 1980), involves a prior summary court-martial, while United States v. Spivey, pet. granted, No. 38,555, \_\_\_ M.J. \_\_\_ (CMA 20 Mar. 1980), involves nonjudicial punishment. The granted issue in both cases is identical:

<sup>\*</sup>United States v. Mathews, 6 M.J. 357 (CMA 1979).

Whether an accused may lawfully be compelled, over his objection, to respond to an inquiry by the military judge made in presentencing proceedings in an effort to supply information mandated by United States v. Booker, 5 M.J. 238 (CMA 1977), in order for a prosecution exhibit, otherwise inadmissible on its face because it omits such information, to be made admissible.

In both cases the accused pleaded guilty. Turrentine was a general court-martial in which the defense counsel not only objected to the evidence of a prior summary court-martial, but he also generally objected to the Mathews inquiry (without stating specific grounds). Spivey was also a general court-martial in which the defense counsel, after objecting to the admission of evidence of nonjudicial punishment on Booker grounds, specifically objected to the inquiry, citing Mathews. In both cases, the military judge overruled the objections.

Both cases are clearly distinguishable from Mathews wherein the accused stated he had no objection to the record of nonjudicial punishment, and raised no objection to the bench colloquy regarding the understanding of the accused's rights. Defense counsel should object to the admission of a record of previous nonjudicial punishment or summary court-martial on Booker grounds, and then object to any attempt by the military judge to lay the foundation for such prosecution evidence through questioning the accused. See generally 11 The Advocate 317.

#### ISSUES PENDING

##### IMPROVIDENCE OF GUILTY PLEA - MAXIMUM PUNISHMENT

Although the Court of Military Appeals announced in United States v. Harden, 1 M.J. 258 (CMA 1976), that a plea of guilty may be rendered improvident because it is predicated on a substantial misunderstanding on the part of the accused as to the maximum punishment to which he is subject, the elastic standard of "substantial misunderstanding" apparently has not been susceptible of consistent interpretation by reviewing courts. United States v. Lundberg, 5 M.J. 776 (ACMR 1978); United States v. Riggs, 4 M.J. 607 (ACMR 1977); United States v. Shrum, 2 M.J. 996 (ACMR 1976); United States v. Adams, 2 M.J. 580 (NCMR 1976). In United States v. Hunt, pet. granted, 8 M.J. 182 (CMA 1979), the Court will consider whether the belief by the accused that the maximum authorized punishment was more than two thousand (2,000) per cent greater than the actual permissible sentence rendered a plea of guilty improvident.

## SEARCH AND SEIZURE

In United States v. Hayes, pet. granted, No. 34,415, 8 M.J. \_\_\_\_ (CMA 25 Feb. 1980), the Court will consider whether a barracks security scheme, which required the disclosure of items carried into a barracks by military personnel, constituted an exploratory search in violation of Fourth Amendment standards.

Several other search and seizure issues are still pending decision by the Court of Military Appeals. Some of these issues relate to offenses committed as far back as 1974, and at least one was addressed by appellate counsel in oral argument as long ago as 1977. Search and seizure cases pending before the Court include: United States v. Bunkley, pet. granted, 2 M.J. 145 (CMA 1976); United States v. Middleton, pet. granted, 3 M.J. 425 (CMA 1977); United States v. Stuckey, pet. granted, 4 M.J. 341 (CMA 1978); United States v. Young, pet. granted, 5 M.J. 274 (CMA 1978); United States v. Land, pet. granted, 5 M.J. 399 (CMA 1978); United States v. Murray, pet. granted, 6 M.J. 129 (CMA 1978). Some of these cases involve issues similar to those decided by the Court of Military Appeals in United States v. Ezell, 6 M.J. 307 (CMA 1979); United States v. Fimmano, 8 M.J. 197 (CMA 1980); and United States v. Dillard, 8 M.J. 213 (CMA 1980), and the disposition of those issues is expected to turn on the facts of the respective case. United States v. Middleton, supra, may provide an opportunity for the Court to clarify the confused state of the law regarding the use of marijuana detection dogs under the Fourth Amendment. See United States v. Roberts, 2 M.J. 31 (CMA 1976); United States v. Thomas, 1 M.J. 397 (CMA 1976). In Middleton, a marijuana detection dog used in a "health and welfare inspection" alerted on a wall locker inside Middleton's room. As a result of the dog's alert, Middleton's locker was searched and marijuana was found inside some clothing in the locker. The commander conducting the inspection testified that if the dog had not alerted, Middleton's wall locker would not have been "routinely opened for visual inspection" of the contents.

## ADMISSIONS

Another issue pending before the Court involves the admissibility of certain incriminating statements made by an accused. In United States v. Dowell, pet. granted, 5 M.J. 266 (CMA 1978), appellant Dowell was in pre-trial confinement when his company commander visited the stockade to bring him his pay check. The company commander was aware that Dowell was represented by counsel, but he did not notify counsel of his visit to the stockade. Dowell discussed the pending charges with his commander and made an incriminating statement. Over defense objection the commander was allowed to testify concerning the admission made by Dowell, despite the commander's

failure to notify counsel of his intended visit and his failure to advise Dowell of his right to remain silent under Article 31. A similar issue is presented in United States v. McDonald, pet. granted, 4 M.J. 160 (CMA 1977), involving admissions obtained from an accused by a secret service agent, who conducted an interview of the accused without notice to counsel.

#### EFFECTIVE ASSISTANCE OF COUNSEL - DISCOVERY

In United States v. Killebrew, pet. granted, 2 M.J. 211 (CMA 1977), the issue before the Court is whether an accused has been denied effective assistance of counsel when the government refuses to allow trial defense counsel to interview a potential witness. The witness, an informant, did not testify at trial. The defense counsel, both prior to and at trial, requested the opportunity to interview the witness, arguing that the witness may have been material to a possible entrapment defense, and that there was no valid reason for the government not to grant an interview. The question of whether the testimony or information he may have provided during an interview would have benefited the appellant was never resolved because the defense counsel was not permitted to interview the potential witness. The problems facing the trial defense counsel were (1) how to find out what the potential witness would testify to if called as a witness by the defense, and (2) how to show materiality of a witness the government will not allow to be interviewed.

#### UNCHARGED MISCONDUCT

The Army Court of Military Review, following the mandate of United States v. Grunden, 2 M.J. 116 (CMA 1977), reversed an appellant's conviction because the military judge failed to give an instruction concerning uncharged misconduct disclosed during the course of the trial. The trial defense counsel had expressly requested that such an instruction not be given. The Judge Advocate General of the Army certified the issue of interpretation and application of the mandate of Grunden. United States v. Fowler, cert. filed, 4 M.J. 143 (CMA 1977).

#### VOLUNTARY DISCLOSURE OR SUBTLE INTERROGATION

An interesting case which will be argued before USCMA with Judge Everett sitting is United States v. Fox, 8 M.J. 526 (ACMR 1979), pet. granted, 8 M.J. 220 (CMA 1980). The accused was pending a special court-martial when he was approached by a CID agent. The agent was investigating another offense that the accused was suspected of having committed. Because the accused had previously refused to be interviewed concerning the offense without first consulting with counsel, the CID agent prefaced his interview by asking the accused if he had spoken with counsel. The accused stated that he wanted to talk with counsel but that his unit would not provide

him a vehicle to do so. The CID agent did not question the accused about the alleged offense, but he remained in the battalion recreation center at least 2 hours, engaging in what he described as a "social chat" with the accused. Subsequent to the "chat," the accused and the CID agent were walking out of the building together when the accused made an admission to the agent. Because the admission was made after the "chat" and not during it, the Court of Military Review found the admission to be the "product of appellant's free will," and not in any way "elicited" by the CID agent. The admissibility of the incriminating statement is being contested on the issues of whether the admission was obtained as the product of a subtle interrogation in violation of the accused's right to counsel, see Brewer v. Williams, 430 U.S. 387 (1977) and United States v. McOmber, 1 M.J. 380 (CMA 1976), and in violation of the accused's right against self-incrimination.

#### ORAL ARGUMENTS

The Court of Military Appeals appears to have had a de facto suspension of oral arguments pending the installation of the third member of the Court to fill the seat vacated by Judge Perry. No oral arguments were held in February and March 1980. The Court will resume oral arguments on 22-24 April after Professor Everett joins the Court.

#### APPELLATE ADVOCACY CONFERENCE

The United States Court of Military Appeals' 5th Annual Homer Ferguson Conference on Appellate Advocacy will be held at the Georgetown University Law Center in Washington, D.C., on 22-23 May 1980. Topics to be discussed include written and oral appellate advocacy, recent Supreme Court decisions, and changing roles from judge to prosecutor. Featured as speakers will be Richard "Racehorse" Haynes, Honorable James Duke Cameron, Honorable Albert Tate, Jr., Honorable Wade H. McCree, Honorable William A. Grimes, and Dean John J. Douglass. For additional information and registration, contact Jesse Clark, Conference Director, USCMA, 450 E St., N.W., Washington, D.C. 20442. Telephone: (202) 693-7100, AV 223-7100.

## CASE NOTES

### SUPREME COURT DECISION

#### SPOUSAL INCAPACITY - PRIVILEGE

Trammel v. United States, 26 Crim. L. Rptr. 3019 (U.S. 1980).

Prior to his trial in federal district court on drug charges, Trammel advised the Court that the government intended to call his wife as a witness against him and that he was asserting the spousal privilege to prevent her testimony. The District Court granted the privilege to the extent of confidential marital communications, but the wife was permitted to testify to acts that she observed and communications made in the presence of others. The defendant was convicted, primarily based upon his wife's testimony, and the Court of Appeals affirmed.

The Supreme Court modified the marital privilege, and held that the witness spouse alone has a privilege to refuse to testify adversely; the witness spouse may neither be compelled to testify, nor foreclosed from testifying. Conversely, a defendant may no longer claim the privilege to prevent the spouse from voluntarily testifying. See also Mil. R. Evid. 504, effective 1 September 1980, which incorporates the Trammel ruling.

### COURT OF MILITARY REVIEW DECISIONS

#### MARIJUANA - MINOR OFFENSE

United States v. Miller, SPCM 14048 (ACMR 29 Nov. 1979) (per curiam) (unpub.) (ADC: CPT Abercrombie).

The defendant was convicted of robbery and housebreaking. During the trial, evidence of uncharged misconduct by the defendant was brought out, to wit: buying marijuana. Although there was no instruction on uncharged misconduct given by the trial judge, a panel of the Court of Military Review held that the error was not prejudicial. The Court's reasoning is significant. The basis for the decision was that "[u]se and possession of marijuana, unfortunately, are not uncommon and are offenses generally considered to be minor." (Emphasis supplied). Query: If use and possession of marijuana are minor offenses, shouldn't they be treated under Article 15 proceedings instead of court-martial?

REBUTTAL - MATTER NOT IN ISSUE

United States v. Balzesk, CM 438066 (ACMR 19 Dec. 1979) (unpub.) (ADC: CPT Rothlein).

After pleading guilty to possessing and selling marijuana, the defendant made an unsworn statement to court members to the effect that his involvement was "stupid," that he had never sold marijuana before, that he was frightened, and that he couldn't go home with a "bad" discharge. Over strenuous defense objection, the military judge allowed the trial counsel to call a rebuttal witness to attack the defendant's credibility and to give his negative opinion of the defendant's truth and veracity. This was error, the Court held, citing United States v. McCurry, 5 M.J. 502, 503 (AFCMR 1978), and reassessed the sentence. See United States v. Stroud, 44 CMR 480 (ACMR 1971). A similar holding obtained before another panel of the Court is United States v. Anderson, CM 438540 (ACMR 31 Jan. 1980) (unpub.).

SERVICE RECORD - MATTER IN MITIGATION

United States v. Brinson, CM 437499 (ACMR 4 Jan. 1980) (unpub.) (ADC: CPT Ganstine).

In deciding that the defendant was not prejudiced by the defense counsel's failure to introduce, during the sentencing portion of the trial, the defendant's excellent service record, to include two tours of combat duty in Vietnam, as a matter in mitigation (See United States v. Pointer, 18 USCMA 587, 40 CMR 299 (1969)), the Appellate Court noted that the length of the defendant's service was stated (read from the front page of the charge sheet) and, although nowhere reflected in the record, the Court presumed that the defendant was wearing his ribbons on his uniform, indicating the awards he had received, as required by regulation.

ADVISORY RULING - CHILLING EFFECT

United States v. Cofield, CM 438090 (ACMR 29 Jan. 1980) (unpub.) (ADC: CPT Rothlein).

The defense counsel asked the military judge to render an advisory ruling as to the admissibility of a summary court-martial conviction under Booker\* to impeach the accused, if he should testify

\* United States v. Booker, 5 M.J. 238 (CMA 1977).

on the merits. The military judge ruled that the conviction would be admissible for impeaching the accused's credibility. The accused, thereafter, did not testify on the merits.

On appeal, the accused alleged that the military judge was wrong in his ruling as it improperly had a "chilling effect" upon the accused's election. The Army Court of Military Review, in refusing to be swayed by the accused's claim, noted that the defense did not make an offer of proof as to what the testimony would have been or that the accused would have testified but for the advisory opinion of the military judge. Absent these matters on the record, the Appellate Court would have had to make assumptions as to what the testimony would have been and to its impact on the trial. The Court declined to do so. See United States v. Harris, 10 USCMA 69, 27 CMR 143 (1958).

#### CRIMINAL INTENT - FORMATION

United States v. Boykin, NCM 79 1411 (NCMR 26 Feb. 1980) (unpub.) (ADC: LT Haskel, USN).

The defendant pleaded guilty to, among other charges, wrongful appropriation of another's vehicle. During the providency inquiry, the defendant related that he had authority to borrow the car and to drive it off base. Later, while he was off base, there was a wrongful withholding of the car. The providency inquiry failed to disclose when and where the intent to withhold the car arose. It was therefore impossible to show that the offense was service-connected. That specification was dismissed by the Navy Court of Military Review.

#### SJA DISQUALIFICATION

United States v. Hackleman, NCM 79 0757 (NCMR 29 Feb. 1980) (unpub.) (ADC: LT Durbin, USNR).

The defendant, at his general court-martial, challenged the military judge for cause, alleging that the military judge lacked an impartial attitude toward sentencing. The defense called the command SJA, who testified that he had had a conversation with the military judge during which the judge asked the SJA to inform the convening authority that he, the judge, was really "hammering" with respect to sentence. The judge refused to recuse himself, the defendant pleaded guilty, and was sentenced by a court with members. The case was reviewed by the same SJA.

The Navy Court of Military Review set aside the review and action. It indicated that the SJA had reviewed the correctness of the military judge's decision and it was in the interest of the SJA to insure that the case was not overturned. He was so intrinsically involved that fair play required a new review and action.

Of particular note is the little significance which the Court attached to the guilty plea and sentencing by members. The Court noted that it can be argued "that a judge's demeanor and trial conduct can influence and shape the atmosphere of the courtroom and the attitudes of court-members in their deliberations. Also, the fact remains that despite his plea of guilty and his sentencing by members, the appellant did possess the statutory right to challenge the military judge and have the merits of his challenge fairly and impartially evaluated on review."

#### ORDERS - INABILITY TO OBEY

United States v. McGann, NCM 79 1255 (NCMR 25 Feb. 1980) (unpub.)  
(ADC: LT Haskell, USN).

The defendant was convicted, inter alia, of disobeying a lieutenant's order that all passengers on a military bus remain on board while the bus was stopped due to mechanical failure. The defendant defended on the grounds of physical inability. Having previously drunk a significant quantity of beer and soda, the defendant "felt an urgent need not to remain on the bus," and departed to answer the "call of nature." The Navy Court of Review agreed that the accused was unable to comply with the order through no fault of his own, and dismissed the charge.

#### POST-TRIAL REVIEW - AMENDMENT

United States v. Grant, CM 437847 (ACMR 29 Feb. 1980) (unpub.)  
(ADC: CPT Rothlein).

Defense counsel was served with a copy of the post-trial review which indicated, on the cover sheet, that the military judge's finding of guilty as to Charge I and its specification was incorrect. The defense counsel did not file a Goode response. By appellate affidavits it appeared that a draft copy of the review may have been served on defense counsel and raised the possibility that the cover sheet was later changed to indicate that the military judge's ruling was correct and that a greater punishment was recommended. The result was a deprivation of the defendant's "opportunity to attempt to

persuade the convening authority that these findings should not be approved." The Army Court of Military Review ordered a new review and action.

#### DISCLOSING CONFIDENTIAL COMMUNICATIONS

United States v. Pratt, NCM 79 0754 (NCMR 22 Feb. 1980) (unpub.) (ADC: CPT Meltzer, USMCR).

After an improvident guilty plea, the accused was convicted and he presented no evidence in extenuation and mitigation. Two days after trial, the defense counsel submitted an affidavit to the convening authority detailing the advice he had given the accused regarding his options at trial, his rights to counsel, his right to challenge, the effects of a guilty plea, confrontation rights, allocution rights, and the elements of the offenses. The defense counsel further detailed his discussions with the defendant regarding trial preparation, the fact that the defendant admitted his guilt, and that the defendant wanted to be discharged as fast as possible. The defense counsel added that the accused told him that he did not want any assistance at the trial, and that he wanted his attorney to insure that he would receive a bad-conduct discharge. At the time of the submission of the affidavit, there was no accusation that the defense counsel had been ineffective or engaged in improper conduct.

The Navy Court of Military Review held that the unsolicited affidavit improperly disclosed the confidences of the client in violation of the Code of Professional Responsibility, and that such action denied the defendant effective post-trial assistance of counsel. However, no prejudice was found.

#### DISOBEDIENCE - BREAKING RESTRICTION

United States v. Langley, NCM 79 1246 (NCMR 15 Jan. 1980) (unpub.) (ADC: CPT Meltzer, USMCR).

The defendant pleaded and was found guilty, inter alia, of willful disobedience of the direct order of a superior commissioned officer restricting the accused to his barracks, in violation of Article 90, UCMJ. The Court of Military Review held that the ultimate offense was, in reality, a breaking of restriction, in violation of Article 134, and reassessed the sentence. See United States v. Nixon, 21 USCMA 480, 45 CMR 254 (1972).

## STATEMENTS - RIGHTS WAIVER

United States v. Griffis, NCM 79 1102 (NCMR 27 Dec. 1979) (unpub.) (ADC: LT McCullough, USNR).

The trial counsel elicited testimony, without any defense objection, from a naval investigator concerning the defendant's pretrial statements. Although the agent indicated he had "gone over his rights under Article 31," there was no showing of what transpired or that there was any express voluntary waiver of rights. The Navy Court of Military Review, citing United States v. Dohle, 1 M.J. 223 (CMA 1975), held the use of the defendant's statement to be improper. Compare with the new Military Rules of Evidence, Rule 304 (effective 1 Sept. 1980) which will require an objection or suppression motion to preclude such evidence from being considered.

## REBUTTAL ARGUMENT

United States v. Rollins, NCM 79 0518 (NCMR 16 Oct. 1979) (unpub.) (ADC: LT Durbin, USNR).

After pleading and being found guilty, and after receiving evidence in aggravation and in extenuation and mitigation, the trial counsel waived an opening argument on sentence. The defense counsel also waived argument. Over defense objection, the military judge then allowed the trial counsel to present argument in rebuttal, although the military judge acknowledged that "there appears to be nothing to rebut."

The Appellate Court found this to be error. However, after reviewing the trial counsel's argument, and finding that it was not "overly partisan" but rather asked that the military judge consider all the evidence submitted by both government and defense, the Court was unable to perceive any possible prejudice. Accordingly, the sentence was affirmed.

## STATE DECISIONS

### CONSENSUAL SODOMY - RIGHT OF PRIVACY

New York v. Onofore, 48 LW 2520 (N.Y. App. Div. 1980).

The defendant admitted engaging in homosexual consensual sodomy in the privacy of his own home over a period of time. He was convicted pursuant to a state statute proscribing sodomy between persons not married to each other.

The intermediate New York Appellate Court reversed, based upon the fundamental and constitutional right of privacy. The Court recognized that the right was not absolute, but it determined that there must be a valid state interest before the state may restrict personal conduct. It noted that the state's interest in protecting the public sensibilities, prevention of physical violence, and preserving marriage and the nuclear family are all valid interests; however, prohibiting private consensual sodomy does not advance any of the state's interests. The prohibition, therefore, runs afoul of the Due Process Clause of the U.S. Constitution. But see United States v. Harris, 8 M.J. 52 (CMA 1979).

#### OPENING CAR DOORS - ILLEGAL SEARCH

Hudson v. State, 588 S.W.2d 348 (Tex. Crim. App. 1979).

After the defendant was arrested on charges of kidnapping, police went to his home and inspected his car, which they suspected of having been used in the crime. The police took pictures of the exterior of the car and then opened the car doors to take close-ups of the interior. The car was then taken to the police station where a section of the rear seat was removed and chemically analyzed. No search warrant was ever obtained. At the trial, the pictures, rear seat, and the chemical analysis were introduced into evidence.

The Court of Criminal Appeals of Texas held that the opening of the car doors to take pictures and the seizure of the rear seat for analysis were illegal searches. The Court noted that there were no exigent circumstances, as the defendant was in custody, and there was no indication that the car would be moved before a warrant could be obtained. Case reversed and remanded.

## FIELD FORUM

As indicated in previous issues of The Advocate, the Editorial Board has created this new feature to answer questions and solicit comments/suggestions from trial defense counsel and other interested readers. In response, the following questions have been submitted:

1. Question (two parts):

A). Why is it that appellate defense counsel do not always raise the issues or errors raised by trial defense counsel?

B). How can a trial defense counsel get his/her error(s) before the appellate courts?

Answer:

A). We, as appellate counsel, appreciate the effort that trial defense counsel put into motions or other litigated issues at trial (most of us have been in your position ourselves). However, we often do not assign an issue raised at trial because, after researching the issue, we believe that the issue either has no merit or, although error is present, it is determined to constitute "harmless error" and therefore nothing will be gained by raising the issue before the appellate courts. Many times trial defense counsel will raise issues that have been concomitantly considered and rejected by our appellate courts, but such actions do not appear in published opinions.

B). If a trial defense counsel feels strongly about a particular issue/error, the easiest way to get it before the appellate courts is to contact the appellate defense counsel by telephone or letter and detail why he/she believes the issue has merit. Furthermore, you should highlight what you believe to be appealable issues in the Goode rebuttal and in an Article 38(c), UCMJ, brief. Citation of authority for the proposition presented should always be given.

It is presently unclear whether or not the Court of Military Review will generally entertain an "appellate brief" from a trial defense counsel, since it is The Judge Advocate General who is responsible for appointing appellate counsel to represent accused, pursuant to Article 70, UCMJ. The Court of Military Review may consider a trial defense counsel's "appellate brief" as a matter

submitted pursuant to Article 38(c), UCMJ. United States v. Brickey, SPCM 13754, 8 M.J. \_\_\_\_ (ACMR 29 Jan. 1980), is a case of some import in this area. In addition to errors asserted by the appellate counsel in the case, the trial defense counsel moved to file an appellate pleading. The motion was denied, but the brief was considered by the Court of Military Review under the provisions of Article 38(c), UCMJ.

On the other hand, another panel of the Army Court of Military Review has entertained such a brief as an appellate brief. In that case, the accused specifically instructed, on his request for appellate counsel form, that certain issues be raised on appeal. After researching the issues and discussing them with the accused, the appellate counsel, with the consent of the accused, raised no errors on appeal. The trial defense counsel, not knowing that appellate counsel had obtained a waiver from the accused, moved to file assignments of error, citing United States v. Palenius, 2 M.J. 86 (CMA 1977), as authority for his action. The government did not oppose this motion, and the Court of Military Review accepted the brief. United States v. Smith, SPCM 14303 (ACMR, filed 30 Nov. 1979). However, such tactics may not benefit our clients to the maximum extent possible. We suggest coordination with appellate defense counsel first.

Consider also the Air Force case of United States v. Conquest, ACM S24787, 8 M.J. \_\_\_\_, slip op. at 2' (AFCMR 28 Jan. 1980), where an accused, in his request for appellate representation, asserted an error which was directed to the attention of the Air Force Court of Military Review by his appellate counsel. The Court considered this error without discussing the precise basis of review, although it was probably enough that the appellate counsel called the Court's attention to it.

Further, trial defense counsel should rest assured that errors raised at trial are being considered by the Court of Military Review and the Court of Military Appeals even if those errors are not raised by appellate defense counsel. Under Article 66, UCMJ, the Court of Military Review has the independent duty to review the record in all cases referred to it, United States v. Palenius, *supra* at 91, and to re-evaluate the appropriateness of the sentence, United States v. Glaze, 22 USCMA 230, 46 CMR 230 (1973). The Court of Military Review has even examined other records of trial to identify errors not raised at the trial or

on appeal. See United States v. Fuentes, CM 437786, 8 M.J. \_\_\_\_ (ACMR 9 Jan. 1980). Fuentes has been discussed at 12 The Advocate 43 (1980). In Fuentes, the Court of Military Review sought out and discovered significant misconduct by the trial counsel by examining the record in a related case which did not have appellate counsel assigned and was not subject to automatic review pursuant to Article 66, UCMJ. The Court of Military Appeals will also search the record of trial for possible errors and independently consider issues not raised by the parties.

2. Question: What are the chances for getting a conviction reversed on appeal?

Answer: In fiscal year 1979, the Army Court of Military Review rendered decisions in 1584 cases pursuant to Article 66, UCMJ. What follows is a percentage breakdown of how the Court of Military Review disposed of those cases:

Findings and sentence affirmed.....	89.6
Findings affirmed, sentence modified.....	2.4
Findings affirmed, sentence commuted.....	0.06
Findings affirmed, no sentence affirmed.....	0.06
Findings affirmed, sentence reassessment or rehearing as to sentence only ordered.....	0.3
Findings partially disapproved, sentence affirmed.....	1.1
Findings partially disapproved, rehearing ordered.....	0.06
Findings & sentence affirmed in part, disapproved in part.....	1.6
Findings & sentence disapproved, rehearing ordered.....	1.8
Findings & sentence disapproved, charges dismissed.....	1.4
Returned to field for new SJA & C/A action.....	1.2
Order for psychiatric examination.....	0.1
Proceedings abated, death of accused.....	0.1
Miscellaneous decisions disposing of a case.....	0.2

As can be seen from the above statistics, almost 90% of the cases reviewed are affirmed without any modification by the Court of Military Review. Therefore, the best chance for success lies at the trial level. Out of the 1584 decisions rendered in fiscal year 1979, only 22 cases had the findings and sentence disapproved, and charges dismissed. Clearly, the best chance for success lies at the trial level.

3. "Thanks" from the field.

"Thanks for your quick response with one of your writs of mandamus briefs on file. I've always gotten excellent assistance from DAD when I've called for aid!

"We (the civilian [attorney and I]) filed the writ a few days after I talked to you. The day after the writ was filed, the GCMCA . . . dismissed the charges on the advice of the SJA. So we saved a lot of work by not having to go to court."

(YOU'RE WELCOME, Ed.).

# ON THE RECORD

or

## Quotable Quotes from Actual Records of Trial Received in DAD

TC: Your Honor, the government has no further evidence to present on this case, and is ready to argue.

MJ: All right.

DC: The defense moves for a finding of not guilty as to specification . . . .

TC: Oh, no.

\* \* \* \* \*

(After argument on a motion).

MJ: Private [accused], during your counsel's argument, you unbuttoned the shirt that you're wearing on your khaki uniform. You are out of uniform, button up your shirt, please.

ACC: Out of uniform? I'm out of the [expletive deleted] Army!

(Later in the same trial where the accused was charged with assault upon Sergeant X, the following transpired).

TC: Your Honor, at this time the government would call Sergeant X. (The witness entered the courtroom. The accused left the counsel table and struck the witness in the face with his fist. Defense counsel, the bailiff, and a spectator subdued the accused).

\* \* \* \* \*

MJ: Argument.

TC: Your Honor, it's the government's contention that in this case we have an example of good police work. You saw before you-----

MJ: That I've got to hear. I'm looking forward to that.

TC: Maybe I've overstated my case. . . .

\* \* \* \* \*

(Accused testifying on extenuation and mitigation).

DC: Is there anything else that you would like to tell the court here today?

ACC: Yes.

DC: Go ahead.

ACC: Well, I like to make sure everybody makes a million dollars. And I'd like to see the world move around real fast. I want to see the stock market go up so everybody can live a free life and all everybody got to do is just write your name and you've got it. Cause when you get it you better pass it around. If you don't I'm going to take it back and die. And I don't plan on dying so keep passing it around. Keep passing it around. That way——

DC: Your Honor, I would like——

ACC: All you got to do is sign for stuff for the rest of your life. Why not? It's possible. How much is the tea in China? It better be cheap.

\* \* \* \* \*

(MJ discussing the defense counsel's motion for discovery form).

MJ: [I]t appears to be more or less the standard motion which I have seen before?

DC: Yes, Your Honor.

MJ: Which asks for everything?

DC: Yes, Your Honor.

MJ: Including an original manuscript of the Bible . . . .

\* \* \* \* \*

MJ: The record may note that the knob fell off the door due to the decrepit status of the building.

