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A Journal For Military Defense Counsel

THE ADVOCATE

CHIEF, DEFENSE APPELLATE DIVISION

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Solicitation

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

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

OPENING STATEMENTS

Overview of Contents

Are the death penalty provisions of the Uniform Code of Military Justice constitutional? The lead article in this edition addresses that question and concludes that various infirmities in the Code's provisions for imposing capital punishment may bar the execution of a military death sentence. One of the trial defense counsel's primary responsibilities is to preserve issues for appellate review. The second article should assist him in discharging that responsibility in "speedy trial" cases: it exhaustively explores the problem of demonstrating that the accused was prejudiced by governmental delays in prosecuting him. In the third installment of "Search and Seizure: A Primer," the staff examines the "automobile exception" to the Fourth Amendment's warrant requirement. Finally, we are reinstating a feature which was discontinued several years ago; henceforth, the journal will publish sample instructions on findings which have been approvingly cited by civilian courts and differ significantly from the corresponding instruction in the Military Judges' Guide.

Note of Appreciation to Departing Staff Members

We would like to publicly acknowledge the talent and dedication of several departing editors and staff members. Major Grifton Carden has been transferred to the Joint Service Committee on Military Justice; Major Alan Schon will soon join the Office of the Chief, Legislative Liaison, Office of the Secretary of the Army; and Major Bob Ganstine will be the Staff Judge Advocate at the 5th Signal Command, Federal Republic of Germany. In addition, Captain Courtney Wheeler is scheduled to attend the JAGC Graduate Course in Charlottesville, Virginia; Captain Charlie Trant will assume duties as Commissioner at the Army Court of Military Review; and Captain Bob Galloway is joining a California law firm. We thank them for their contributions to The Advocate, and trust that their association with the journal was professionally rewarding.

Preview

Upcoming articles in The Advocate will address the questions of whether the warning requirements of Article 31(b), UCMJ, apply to "undercover" agents, and whether the standard military instruction on entrapment accurately recites the law pertaining to that defense. In addition, we will continue our exploration of the Military Rules of Evidence in an article which suggests an analytic framework for structuring objections under Rule 403.

THE UCMJ'S DEATH PENALTY:
A CONSTITUTIONAL ASSESSMENT

*By Captain Joseph Russelburg**

In 1972, the United States Supreme Court reversed the death sentences of several similarly situated petitioners in Furman v. Georgia.¹ While the Court's landmark decision in Furman was undoubtedly significant to hundreds of prisoners awaiting execution, the fact that each participating Justice wrote a separate opinion diminished its precedential value. Despite its uncertain implications, however, Furman prompted several state legislatures to modify their capital punishment statutes in an effort to eliminate the defects denounced in that opinion; the Supreme Court has since reviewed these revised statutes, with varying results, in several cases. Its decisions may underlie the apparent resurgence of interest in capital referrals in courts-martial. A capital case is currently pending before the United States Army Court of Military Review, and that tribunal will soon have an opportunity to determine whether the death penalty provisions of the Uniform Code of Military Justice are constitutional. An analysis of the issue must begin with a discussion of Furman.

Furman: The Decision

In Furman, the Supreme Court held that the adjudication and imposition of the death penalty under a Georgia statute constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The five Justices who joined in this conclusion did so for a variety of reasons. Only Justices Brennan and Marshall believed that a death sentence necessarily violates the Eighth Amendment prohibition against cruel and unusual punishment. The three Justices who joined Brennan and Marshall in forming the majority did so because of defects in the procedures by which defendants convicted of capital offenses were selected

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1. 408 U.S. 238 (1972).

to receive the death penalty. Thus, in his concurring opinion Justice Douglas considered the flaw of a totally discretionary death penalty statute such as Georgia's to lie in its application rather than its form; he stated that such statutes are "pregnant with discrimination," an ingredient "not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."²

Justice Stewart concluded that the death sentences reviewed in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual" because "of all the people convicted of rapes and murders in 1967 and 1968 . . . the petitioners are among a capriciously selected random handful upon whom the sentence of death has been imposed."³ Justice White noted that the infrequency with which the death penalty was adjudged and actually exacted, relative to the number of instances in which it could be imposed, renders its occasional application ineffective as a deterrent. As a result, the imposition of the death penalty constitutes a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose."⁴ The only clear conclusion which can be drawn from Furman is that a death sentence imposed under a federal or state statute similar to those considered in that case is constitutionally defective. As a practical matter, however, Furman was interpreted as an invalidation of every pending death sentence in the United States.

Furman: The Aftermath

After the Court announced its decision in Furman, various state legislatures amended their death penalty statutes to incorporate the standards suggested by the opinion. In Gregg v. Georgia,⁵ the Court evaluated Georgia's revised death penalty statute in order to determine whether it shared the procedural deficiencies condemned in Furman. The new Georgia statute retains the death penalty for six offenses, including murder and rape. It provides for a bifurcated trial in which a defendant's guilt or innocence is determined either by judge or jury. Upon a finding of guilty of a capital offense, the fact-finder hears additional

2. Id. at 257 (Douglas, J., concurring).

3. Id. at 309 (Stewart, J., concurring).

4. Id. at 311 (White, J., concurring).

5. 428 U.S. 153 (1976).

evidence in extenuation, mitigation, and aggravation. The defendant or his counsel and the prosecuting attorney then present sentencing arguments, and the defendant enjoys substantial latitude as to the type of evidence he may introduce.⁶ The Georgia statute further provides that the judge must consider (or address in his instructions to the jury) any mitigating or aggravating circumstances in the case. Before a convicted defendant may be sentenced to death, the jury or judge must find beyond a reasonable doubt one of the ten aggravating circumstances⁷ specified in the statute, and the fact-finder must then elect to impose the death sentence. If the death penalty is adjudged, the jury or judge must specify the aggravating circumstance justifying that sentence.⁸

In considering whether this statute was constitutional, the Court stated that Furman "held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner," and "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁹ The Court supported the bifurcated trial system and jury sentencing in capital cases, but recognized a problem where the jury must reach a sentencing decision. Although they may be given all information relevant to sentencing, jurors normally have little, if any, experience in discharging that responsibility.

The Court saw a partial solution to this problem where the jury was specifically informed of the aspects of the crime and the defendant which the state deemed relevant to the sentencing decision. This type of guidance reduces the likelihood that an arbitrary or capricious sentence will

6. See Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975).

7. The aggravating circumstances recognized by the statute are based upon the accused's history of previous convictions, the status of the victim, the commission of other capital felonies in conjunction with the subject offense, the motive and purposes of the offense, the degree of public hazard it creates, and the manner in which it was committed. Georgia Code Ann. §27-2534.1 (Supp. 1975).

8. Id. at §27-2534.1(c).

9. Gregg v. Georgia, supra note 5, at 188-89.

be imposed, especially since the jury must state the facts upon which it relies. In analyzing Georgia's new procedure, the Court initially emphasized that the jury's attention was directed to the specific circumstances of the crime and the characteristics of the accused, and that it was required to make specific findings as to the justification for the death penalty. These procedures satisfied the Court's concern that there was "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."¹⁰

On the same day that Gregg was announced, the Court released its decisions in Proffitt v. Florida¹¹ and Jurek v. Texas.¹² Both States had revised their death penalty statutes after Furman. The new Florida statute is similar to Georgia's in that it requires the jury to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances" and "[b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death."¹³ The statute specifies the aggravating and mitigating circumstances to be considered.¹⁴ The jury reaches the sentencing verdict by a majority vote; however, its conclusion is only advisory. The trial judge determines the actual sentence. According to state case law, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting [that punishment] should be so clear and convincing that virtually no reasonable person could differ."¹⁵ Further, when the trial judge imposes a death sentence, he must set forth, in

10. Furman v. Georgia, supra note 1, at 313 (White, J., concurring).

11. 428 U.S. 242 (1976).

12. 428 U.S. 262 (1976).

13. Proffitt v. Florida, supra note 11, at 248.

14. The aggravating circumstances recognized by the statute are similar to those summarized in note 7, supra. Fla. Stat. §921.141(5) (Supp. 1976-77). Mitigating circumstances stem from the absence of a significant history of criminal activity by the accused, his mental and emotional status during the offense, his age, his role in the crime, and the victim's conduct. Id. at §921.141(6).

15. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

writing, the facts supporting the conclusion that there are aggravating circumstances and insufficient mitigating factors. The Court sanctioned Florida's procedure and opined that sentencing by the trial judge should encourage consistency since judges are generally more experienced in performing that duty.

Under the Texas statute reviewed in Jurek, the jury must find beyond a reasonable doubt that a murder was committed under one of five circumstances¹⁶ before it may impose the death penalty. Texas law also requires that a separate sentencing proceeding be conducted. During this hearing, any relevant evidence may be introduced and argument from both parties is allowed. The jury must then affirmatively answer, beyond a reasonable doubt, three questions before a death sentence may be adjudged.¹⁷ Although Texas has not adopted a statutory list of aggravating circumstances, the Court found that the narrowing of the categories of murder in which the death sentence may be imposed serves the same purpose. Each of these categories is encompassed by one or more of the aggravating circumstances considered by Georgia and Florida.

Thus, the aggravating circumstances recognized by those states are elements of Texas' capital murder offenses at the guilt-determining stage. The Supreme Court felt that this procedure produced a smaller class of criminals potentially subject to the death penalty than either the Georgia or Florida statutes. In determining the constitutionality

16. Under the statute, aggravating circumstances arise from the status of the accused and the victim, the motive for the offense, and the commission of other felonies in conjunction with the offense. Tex. Stat. Ann. Art. 1257 (1973). Article 1257 has been superseded by Tex. Penal Code Ann. §19.03.

17. The jury must determine:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Id. at 37.071(b).

of the Texas provision, the Court held that a jury must consider, on the basis of all relevant evidence, not only why a death sentence should be imposed, but why it should not be imposed. The Texas appellate courts allow a defendant to bring to the jury's attention whatever mitigating circumstances he can demonstrate.¹⁸ This procedure adequately insures that evidence of mitigating circumstances can be brought before the jury, and the statute therefore passes constitutional muster.

In Roberts v. Louisiana¹⁹ and Woodson v. North Carolina,²⁰ the Supreme Court struck down statutes which imposed mandatory death sentences for certain crimes. These statutes did not provide for individualized sentencing or the consideration of mitigating factors. In Lockett v. Ohio,²¹ the Ohio death penalty statute was held unconstitutional because it limited the range of circumstances to be considered in mitigation of a death sentence to one of three specified in the statute. In Coker v. Georgia,²² the Court held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."²³ The Court clearly indicated that the death penalty could never be imposed for rape itself, no matter what aggravating circumstances surrounded the crime.

The Code's Death Penalty

Although a considerable body of case law pertaining to capital punishment statutes has emerged since Furman, the precise impact of that decisional law on capital punishment provisions in the Uniform Code of Military Justice is a matter for speculation. When the Furman decision was announced, no person tried under the Uniform Code of Military Justice was pending a death sentence. However, in Justice Powell's dissenting opinion, in which Chief Justice Burger and Justice Blackmun and Justice Rehnquist joined, he stated:

18. Jurek v. State, 522 S.W.2d 934 (Tex. 1975).

19. 428 U.S. 325 (1976).

20. 428 U.S. 280 (1976).

21. 438 U.S. 586 (1978).

22. 433 U.S. 584 (1977).

23. Id.

Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, today's departure from established precedent invalidates a staggering number of state and federal laws. The capital punishment laws of no less than 39 States and the District of Columbia are nullified. In addition, numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided."²⁴

In Shick v. Reed,²⁵ the Supreme Court declined to address the constitutionality of a death sentence imposed by a court-martial because the accused's sentence had been commuted prior to Furman and he was not facing a possibly invalid death sentence when his case was before the Court. However, the United States Court of Appeals for the District of Columbia stated in dicta that Furman would have required the excision of a military death sentence.²⁶

Provisions for imposing a death sentence under the Code have remained virtually unchanged for thirty years. A general court-martial composed of officer or officer and enlisted members may impose a death sentence upon those persons convicted of an offense for which that punishment is authorized by the Code, if the convening authority has not directed that the offense be tried as non-capital.²⁷ A death sentence is authorized in time of war for desertion (Article 85); assaulting or disobeying a superior commissioned officer (Article 90); improperly using a countersign (Article 101); spying (mandatory death sentence per Article 106), and

24. Furman v. Georgia, supra note 1, at 417-18 (Powell, J., dissenting).

25. 419 U.S. 256 (1974).

26. 483 F.2d 1266 (D.C. Cir. 1973). See also United States v. Fountain, 2 M.J. 1202 (NCMR 1976), and United States v. Day, 1 M.J. 1167 (CGCMR 1975), cases in which Furman has been applied by military courts at the trial level.

27. Articles 18 and 52(b)(1), Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. 818 and 852(b)(1) (1976).

misbehavior of a sentinel (Article 113). Unless referred to trial as noncapital, a death penalty may be imposed at anytime for mutiny or sedition (Article 94); misbehavior before the enemy (Article 99); subordinate compelling surrender (Article 100); forcing a safeguard (Article 102); aiding the enemy (Article 104); willfully and wrongfully hazarding a vessel or suffering the same (Article 110(a)); premeditated murder or homicide committed while perpetrating or attempting to perpetrate burglary, sodomy, rape, robbery, or aggravated arson (Article 118 (1) and (4)); and forcible rape (Article 120(a)). Upon a finding of guilty, all capital offenses shall be punished by death or such other punishment as a court-martial may direct except Article 106, which mandates a death sentence for the offense of spying in time of war, and Article 118(1) and 118(4), which require a sentence of either death or confinement for life. The scope of authorized punishment following a court-martial conviction for most capital offenses therefore ranges from no sanction whatsoever to a death sentence. The only Code provision limiting the court-martial's sentencing discretion is Article 55, which prohibits cruel or unusual punishment.

If the Code's provisions do not contain the same inherent defects as the Furman-type statutes, an examination of the statistics pertaining to the implementation of those death penalty provisions should presumably disclose a pattern of consistent, non-discriminatory application. Military courts-martial have seldom adjudged a death sentence which was later approved by a convening authority. In the few cases in which an approved death sentence was forwarded for appellate review, the sentences were rarely executed. Thirty-seven soldiers have been sentenced to death for offenses committed under the Code.²⁸ Of these approved death sentences, 24 were adjudged for premeditated murder, eight were adjudged for murder committed during the perpetration or attempted perpetration of robbery or rape, and five were adjudged for rape. Only nine individuals have been executed for offenses tried under the Code: seven for premeditated murder (three of whom were convicted at a joint trial),²⁹ and one for a "felony" murder³⁰ and rape.³¹ The last death

28. Unless otherwise indicated, all statistics were obtained from records maintained in the Office of the Clerk of the United States Army Court of Military Review.

29. United States v. Thomas, 6 USCMA 92, 19 CMR 218 (1955); United States v. Ransom, 12 CMR 480 (ABR 1953); United States v. Edwards, 11 CMR 350 (ABR 1953); United States v. O'Brien, 9 CMR 201 (ABR 1952); United States v. Riggins, Settles and Beverly, 8 CMR 496 (ABR 1952).

30. United States v. Moore, 13 CMR 311 (ABR 1953).

31. United States v. Bennett, 7 USCMA 97, 21 CMR 223 (1956).

sentence which was carried out against a servicemember tried under the Code was adjudged on 8 February 1955. Private First Class John A. Bennett was convicted on that date for rape and attempted premeditated murder. He was executed on 13 April 1961.

Between 1 January 1955 and 31 December 1979, the Clerk of the United States Army Court of Military Review received 178 records of trial in which the accused was found guilty of premeditated murder or murder committed during the perpetration or attempted perpetration of a burglary, sodomy, rape, robbery, or aggravated arson.³² The ratio of convictions to death sentences adjudged and approved during this period was 178 to seven:³³ the ratio of convictions to death sentences executed during the same timeframe was 178 to zero. The absence of any appellate court ruling on Furman's impact on the Code's death sentence provisions may be attributed to the fact that for approximately seven years preceding Furman and eight years since that decision, no servicemember had standing to raise the issue before an appellate tribunal.³⁴

These statistics reveal that the death penalty has not been consistently imposed on servicemembers convicted for similar capital offenses. In addition to the lack of statutory guidelines, there are procedural aspects of court-martial sentencing which disclose an inherent inequity in the imposition of death sentences. Unlike civilian trials, which, when Furman was announced, uniformly required 12-person juries in death cases, a servicemember may be sentenced to death by a court-martial

32. The number of persons convicted of forcible rape during this period is considerably larger, but because of the greater likelihood of non-capital referral, no specific comparison is made between rape convictions by Army courts-martial and adjudged capital sentences. The Office of the Clerk of the Army Court of Military Review does not maintain any statistics which reflect the number of convictions by Army courts-martial for given offenses prior to 1 January 1955.

33. The precise significance of this statistic is obscured by the fact that no records reflect the number of cases in which premeditated murder or "felony-murder" was referred to trial as a noncapital offense. If a large number of these cases were referred as capital, the death penalty may be as infrequently imposed as the statistic implies.

34. The constitutionality of the death penalty is an issue currently pending before the United States Army Court of Military Review in United States v. Matthews, CM 439064.

composed of as few as five members.³⁵ Convening authorities establish general courts-martial composed of more than five members at their discretion. One servicemember may therefore be sentenced to death by the vote of a 5-member panel while a similarly situated military accused could have the benefit of a substantially larger court. This inherent potential for variance in the number of members of the court is particularly critical because a death sentence may only be adjudged by concurrence of all members present at the time the vote is taken;³⁶ obviously, the fewer the court members, the greater is the likelihood of unanimity.³⁷ Arguably, this procedure is inconsistent with the concept of equal protection.

Post-Furman Law and the Code

Four factors should be considered in determining whether the Code's death penalty is constitutional: whether it has been determined, in a manner deemed adequate for factual findings in capital cases, that the defendant falls within a category for which the legislature has prescribed execution as a just sentence; whether the sentencing decision was sufficiently controlled to avoid arbitrariness and discrimination; whether the judge or jury entrusted with discretion to determine the sentence was able to act consistently with society's sense of justice; and whether the sentencing body actually acted in accordance with prevailing notions of justice.³⁸ If these factors are not satisfied, the process by which the death sentence is imposed is unconstitutional.

The proper application of the first factor is illustrated in the statutes upheld in Gregg, Proffitt, and Jurek. In Gregg, Georgia prescribed ten aggravating circumstances, one of which had to be found to

35. Article 16, UCMJ.

36. Article 52(b)(1), UCMJ.

37. See Ballew v. Georgia, 435 U.S. 223 (1978), for a discussion of the merits of juries composed of a greater number of members. See also, Schafer, The Military and the Six Member Court - An Initial Look at Ballew, 10 The Advocate 67 (1978); Nolan, Ballew and Burch - Round Two, 11 The Advocate 117 (1979).

38. See Davis, The Death Penalty and the Current State of the Law, 14 Crim. L. Bull. 7 (1978). See also Note, Evolutions of The Eighth Amendment and Standards For the Imposition of The Death Penalty, 28 DePaul L. Rev. 351 (1979); Donnelly, A Theory of Justice, Judicial Methodology, and The Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility, 29 Syracuse L. Rev. 1109 (1978); Gardner, Capital Punishment: The Philosophers and The Court, 29 Syracuse L. Rev. 1175 (1978).

exist beyond a reasonable doubt before a defendant could be sentenced to death. In Proffitt, Florida prescribed aggravating circumstances and mitigating circumstances for the jury to consider. The jury rendered an advisory decision to the trial judge regarding the sentence, but he made the final decision on punishment. The trial judge must then state in writing what aggravating circumstances exist and that there are insufficient countervailing factors in mitigation. In Jurek, Texas required the jury to find beyond reasonable doubt that a murder was committed under one of five specified circumstances before it could impose the death penalty. Further, the jury must affirmatively answer three statutory questions, beyond a reasonable doubt, before it may impose a death sentence.

A comparison of the Code's death penalty provisions to these statutes reveals that a military court is given no statutory guidance to determine whether a particular defendant falls into a category for which the death sentence should be imposed. For example, Article 118 of the Code provides in pertinent part that:

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he -- (1) has a premeditated design to kill . . . or (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and . . . shall suffer death or imprisonment for life as a court-martial may direct.³⁹

The members are advised that, pursuant to this statute, the punishment for premeditated murder or "felony" murder is life imprisonment or death as the court may direct. The Code provides no guidance as to what category of defendant should be sentenced to death as opposed to life imprisonment, and in this respect it fails to meet the first prerequisite of a constitutional death penalty statute.

The second and third factors focus on whether the sentencing decision was sufficiently controlled to avoid arbitrariness and discrimination and whether the jury was able to act consistently with society's sense of justice. These factors are applicable after the court has determined that a defendant falls into one of the categories for which the

39. Article 118, UCMJ.

death penalty may be imposed. The Court in Gregg concluded that a bifurcated sentencing procedure was the best method of insuring that the sentencing body receives information concerning the circumstances of the offenses as well as the character of the offender. But the Court also noted that "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury."⁴⁰

To alleviate this problem, the Court directed that juries be informed of those factors relating to the crime and the defendant which the State deems particularly relevant to the sentencing decision. It is clear from the Court's language that more than the traditional jury instruction is required to direct sentencing deliberations. In Gregg, the Court found that Georgia's procedure, which required the fact-finder to conclude that the case involved "aggravating circumstances" enumerated in the statute before adjudging a death sentence, forced the jury to consider the character of the accused and the circumstances of the crime before adjudging a sentence. These clear and objective standards directed the jury's attention to society's interests in the sentencing decision. In a subsequent decision involving the Georgia statute, the Supreme Court held that the Georgia Supreme Court failed to sufficiently narrow the interpretation of the terms "outrageously or wantonly vile, horrible or inhuman" as one of the statutory grounds for imposing a death penalty.⁴¹ Thus, the Court reaffirmed its position that both the statute and the interpretation of the statute must effectively preclude the arbitrary and capricious imposition of a death penalty.

Although the military sentencing procedure allows the introduction of relevant information in extenuation and mitigation under relaxed evidentiary and procedural rules,⁴² and although the military judge is required to tailor his sentencing instructions to the evidence presented in extenuation and mitigation,⁴³ he is not required to instruct the members of the court on factors which society deems relevant to sentencing

40. Gregg v. Georgia, supra note 5, at 192

41. Godfrey v. Georgia, 446 U.S. 420 (1980).

42. Paragraph 75c, Manual for Courts-Martial, United States, 1969 (Revised edition).

43. See, e.g., United States v. Wheeler, 17 USCMA 274, 38 CMR 72 (1967).

decisions.⁴⁴ Similar instructions were held inadequate in Gregg, since they do not specifically direct the court's attention to the circumstances

44. The instructions state:

You are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which you have found the accused guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation (as well as those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) you have found him guilty of committing. You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. [A separate sentence must be adjudged for each accused.] [(Each separate sentence) (A single sentence) shall be adjudged for all the offenses of which the accused has been found guilty.]

You are further advised that you should consider all matters in extenuation and mitigation (as well as those in aggravation) (whether introduced before or after the findings). Thus, you should consider evidence admitted as to the [background and character of the accused, namely (specify relevant evidence)] (and) [the reputation and record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits which characterize a good soldier such as (specify relevant evidence)] (and) [the nature and duration of pretrial restraint, to wit: (indicate the nature and duration of restraint) (and) (_____)]. Department of Army Pamphlet 27-9, Military Judges' Guide, para. 8-2; 8-5 (C3, June 1971).

of the crime and the personal characteristics of the person who committed it. In addition, in the absence of precise statutory standards, there can be no guarantee that relevant information will be properly assessed. Whether the sentencing authority in a particular case has acted consistently with prevailing societal notions of justice is determined on an ad hoc basis. However, the available statistical data concerning the imposition of death sentences by Army courts-martial reveal that the sentence has not been imposed consistently for similar offenses.

A brief review of the appellate decisions involving federal death penalty statutes leads to the conclusion that the current codal provisions cannot withstand constitutional challenge. Any evaluation of the Code's death penalty provisions should account for United States v. Kaiser,⁴⁵ in which a federal murder statute was held to be unconstitutional. That decision is particularly relevant because of the similarity between the language of the statute and the Code's death penalty provisions.⁴⁶ In Kaiser, the defendant was tried for premeditated murder and sentenced to death. The Court of Appeals found that the statute reposed unfettered discretion in the sentencing authority, and noted that in United States v. Watson,⁴⁷ the government conceded that any death penalty imposed under the subject statute would be void. Finally, the Court observed that the legislative history of the Anti-hijacking Act of 1974 records Congress' understanding that Furman had invalidated the death penalty for the federal crimes of aircraft piracy, treason, kidnapping, murder, and assassination or kidnapping of a member of Congress.

45. 545 F.2d 467 (5th Cir. 1977).

46. 18 U.S.C. §111(b) (1976) provides:

Whoever is guilty of murder in the first degree shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment," in which event he shall be sentenced to imprisonment for life.

47. 496 F.2d 1125, 1126 n.3 (4th Cir. 1973).

Conclusion

The statute under review in Kaiser was unconstitutional because it provided no "clearly defined channels of sentencing discretion focusing on the particularized circumstances of the crime and the offender."⁴⁸ Appellate courts have also held that the death penalties under the federal rape statute⁴⁹ and the federal air piracy statute⁵⁰ are unconstitutional. The Code's death penalty provisions are so similar to these federal statutes that they will likely encounter a similar fate. Notwithstanding United States v. Fountain and United States v. Day, military trial judges have generally declined to address the constitutionality of the death penalty when the issue is raised at the trial level. When defense counsel face the prospect of defending a court-martial charge which has been referred to trial as a capital offense, the death penalty's constitutionality should nevertheless be challenged. Referral of a case as capital, even if the death penalty is not adjudged or approved, limits an accused's choice as to forum and plea, and if the Code's death penalty is ultimately invalidated, counsel may argue that capital referral alone constitutes prejudicial error.

48. United States v. Kaiser, supra note 45, at 474. See United States v. Woods, 484 F.2d 127, 138 (4th Cir. 1973).

49. United States v. Quinones, 353 F. Supp. 1325 (D.P.R. 1973).

50. United States v. Bohle, 346 F. Supp. 577 (N.D.N.Y. 1972).

DEMONSTRATING PREJUDICE IN "SPEEDY TRIAL" CASES

By Major James F. Nagle*

Introduction

One of the most frequently litigated motions¹ in military jurisprudence urges the dismissal of criminal charges because of purportedly prejudicial governmental delays in prosecuting the accused. In order to prevail, the defense counsel must do more than join in a stipulated chronology of processing times and dates² and vaguely argue that the accused's Sixth Amendment right to a speedy trial has been violated:³ he must demonstrate that the delay prejudiced the accused. A voluminous amount of military commentary addresses the "speedy trial" issue,⁴ and defense counsel should refer to these sources for a general discussion of the subject. This article will focus on the element of prejudice in cases where the issue is raised.⁵

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1. The motion to dismiss for lack of a speedy trial is recognized in paragraph 215e, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].
2. For a criticism of this type of stipulation, see Holdaway, Litigating Speedy Trial, The Army Lawyer, July 1974, at 11.
3. See, e.g., United States v. Harness, 48 CMR 846 (NCMR 1974); United States v. Bates, 47 CMR 615 (NCMR 1973); United States v. Linton, 47 CMR 587 (NCMR 1973).
4. See, e.g., Gilligan, Speedy Trial, The Army Lawyer, October 1975, at 1; Tichenor, The Accused's Right to a Speedy Trial in Military Law, 52 Mil. L. Rev. 1 (1971); Torvestad, Speedy Trial in Military Law, 8 AF JAG L. Rev. (No. 3), 33 (May-June 1966); Ross, Avoiding the Speedy Trial Issue, 21 JAG J. 101 (1967); Comment, Right to a Speedy Trial - State of the Law, 18 JAG J. 290 (1964); Stubbs, Delays in Trial, 15 JAG J. 39 (1961).
5. For a general discussion of the subject see Comment, Constitutional Right to a Speedy Trial: The Element of Prejudice and the Burden of Proof, 44 Temple L. Q. 414 (1971).

The Standard

In resolving "speedy trial" issues, the court must determine "whether the Government proceeded with reasonable diligence and without deliberate oppression of the accused."⁶ The standard is therefore comprised of two elements, both of which must be satisfied: the government must show that it acted with reasonable dispatch under the circumstances and that the delay was not the result of malevolent intent or deliberate oppression. The government rarely encounters difficulty in sustaining the second element, and the current standard has been broadened to include a more realistic test. The government must show that it "has proceeded with reasonable diligence and without deliberate oppression of the appellant or a lack of concern for the requirement of expeditious prosecution."⁷ Thus, the government must show not only that it had no malevolent intent but also that it was attentive to the accused's right to a speedy disposition of the charges pending against him. These standards, however, provide no guidance on what is "reasonable" diligence or "expeditious" prosecution; those terms must be interpreted in light of Barker v. Wingo.⁸

The court in Barker stated that four factors must be analyzed in order to determine whether an accused's speedy trial right has been violated: (1) the length of delay; (2) the reasons for delay; (3) whether the accused asserted his right to a speedy trial; and (4) any resulting prejudice to the accused.⁹ The court emphasized that none of these factors is talismanic or dispositive. They must be considered in conjunction with other relevant circumstances so the judge may balance the prosecution's handling of the case against the accused's right to -- and the public's interest in -- a speedy trial.

6. United States v. Amundson, 23 USCMA 308, 49 CMR 598 (1975).

7. United States v. Hagler, 7 M.J. 944, 947 (NCOMR 1979) (emphasis added).

8. 407 U.S. 514 (1972).

9. These factors apply to the military. See United States v. Marshall, 22 USCMA 431, 47 CMR 409 (1973).

Requirement to Show Prejudice

Although prejudice is one of the four factors enumerated in Barker v. Wingo, the Supreme Court has announced that it need not be affirmatively demonstrated in all speedy trial cases.¹⁰ Under some circumstances, prejudice is irrelevant;¹¹ in other cases it may be presumed. Finally, there are situations in which a showing of specific prejudice must be made. The first category has been aptly described by the Fifth Circuit¹¹ as that "point of coalescence of the other three factors in a movant's favor" at which "prejudice -- either actual or presumed -- becomes totally irrelevant."¹² This situation arises when the government's handling of a case is flagrant and inexcusable. In such cases, courts will grant speedy trial motions in order to deter similar prosecutorial conduct in the future. The prosecution should not be allowed to avoid responsibility for lackadaisically trying a case merely because the accused cannot demonstrate something as elusive and intangible as prejudice, and "at some point the delay may be so offensive that a court must intervene regardless of whether the defendant has been incarcerated, subjected to public scorn and obloquy, or impaired in his ability to defend himself."¹³

In United States v. Smith,¹⁴ the Army Board of Review had dismissed the charges for lack of speedy trial because "delays in preferring charges were unreasonable and oppressive."¹⁵ The Judge Advocate General certified the question to the Court of Military Appeals in order to ascertain whether the Board could properly reach that result "without determining whether the accused was in fact prejudiced by the delay when the delay was not so inordinate as to permit a presumption of prejudice and trial

10. Moore v. Arizona, 414 U.S. 25 (1973).

11. Turner v. Estelle, 515 F.2d 853 (5th Cir. 1975); Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971).

12. Turner v. Estelle, supra note 11, at 858.

13. Id. at 859.

14. 17 USCMA 427, 38 CMR 225 (1968).

15. Id. at 450, 38 CMR at 228. Ninety-nine days elapsed between the accused's restriction to Fort Hood and the preferral of charges. Although neither the length of the delay nor the severity of the restriction seems particularly serious, the Board concluded that, in light of all the circumstances, the government acted unreasonably.

defense counsel specifically acknowledged the accused was not, in fact, prejudiced.¹⁶ The Court answered the question in the affirmative. If governmental actions are determined to be unreasonable and oppressive, prejudice is irrelevant. Therefore, if an examination of the first three factors compels the court to conclude that the government has not met the standard, an examination of prejudice is superfluous.

The second category includes cases in which prejudice is presumed because of the length of the delay, especially if the defendant was incarcerated.¹⁷ Prejudice is presumed in these cases because it is often difficult to prove pretrial anxiety, the dimming of a memory, or other aspects of specific prejudice. The leading military case dealing with presumptive prejudice is United States v. Burton,¹⁸ in which the Court said that pretrial confinement which is "so long as to be wholly unreasonable and inexplicable" constitutes prejudice per se.¹⁹ The Court also held that "in the absence of defense requests for continuance, a presumption of an Article 10, UCMJ, violation will exist when pretrial confinement exceeds three months."²⁰ This presumption places a "heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed."²¹ The presumption also obviates the need to demonstrate specific prejudice.²² Unlike those in the first category,

16. Id. at 449, 38 CMR at 227 (emphasis added).

17. See e.g., Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1969); Petition v. Provo, 17 F.R.D. 183 (Md. 1955), aff'd per curiam, 350 U.S. 857 (1955).

18. 21 USCMA 112, 44 CMR 166 (1971).

19. Id. at 116, 44 CMR at 170.

20. Id. at 118, 44 CMR at 172. Later cases held that the Burton presumption is triggered by pretrial confinement over 90 days in duration. United States v. Driver, 23 USCMA 243, 119 CMR 376 (1974). See Gilligan, supra, note 4, for a discussion of Burton's 90-day rule.

21. Id.

22. United States v. Walls, 9 M.J. 88 (CMA 1980).

these cases focus on the length of the delay. A prolonged delay, even if justified, will raise the presumption that the accused was prejudiced. The court will then analyze the remaining factors in order to determine whether the motion should be granted. If, after determining the reasons for the delay and whether the accused asserted his speedy trial right, the court concludes that the government utterly failed to carry its burden, the case would be dismissed even without a showing of prejudice.

In the third category, which includes cases where the first three factors are essentially neutral, a showing of actual prejudice is vital to a successful speedy trial motion.²³ The need to show prejudice is inversely proportionate to the delay in prosecuting the case. The length of delay is the "triggering mechanism", and if it is sufficiently extensive to be "presumptively" prejudicial, the court will analyze the remaining factors.²⁴ If it is not, a showing of prejudice is irrelevant. Thus, if the accused is apprehended and charged immediately after the crime allegedly occurred and the government manages to try the appellant 30 days later, the fact that the main defense witness suddenly dies the day before trial is inconsequential. Although there is clearly actual prejudice in such a case, any speedy trial motion will fail because the "delay" was obviously not unreasonable.²⁵ Therefore, prejudice is not a guarantee or the sine qua non of judicial relief in this area.²⁶

23. United States v. Henry, 615 F.2d 1223 (9th Cir. 1980).

24. United States v. Latimer, 511 F.2d 498 (10th Cir. 1975); see also Barker v. Wingo, supra note 8, at 530. The phrase "potentially prejudicial" is preferable to "presumptively prejudicial." If an accused is in pretrial confinement over 90 days, a presumption of prejudice arises under Burton. If he is only in pretrial confinement 89 days, the delay does not raise a presumption of prejudice, but it is clearly potentially prejudicial, and justifies analysis of the other factors enumerated in Barker.

25. See United States v. Anderson, 471 F.2d 201 (5th Cir. 1973).

26. Hoskins v. Wainwright, 485 F.2d 1186, 1188 (5th Cir. 1973).

Allocation of the Burden

Once the defense makes a speedy trial motion, the government bears the burden of showing the requisite diligence in prosecuting the accused. This burden never shifts to the defense. The Court of Military Appeals in United States v. Brown²⁷ ruled that it is reversible error to require the defense to show prejudice before the government presents evidence on the motion; the burden does not shift even if no Burton problem exists.²⁸ In Brown, the law officer required the defense to show prejudice before the government introduced any evidence on the issue. Later cases, however, stress that as long as the prosecution presented evidence to sustain its burden, it is not error to accord the defense an opportunity to show prejudice, which is normally vital to the motion's success.²⁹ Certainly the government is capable of presenting evidence on the length of and reasons for the delay, and any timely defense assertions of the speedy trial right. Prejudice, on the other hand, is an intangible element which is difficult to establish and often impossible to rebut.³⁰ Consequently, unless the government utterly fails to sustain its burden -- in which case prejudice is irrelevant -- the defense will assume what may be termed the burden of going forward, and should produce any available evidence of prejudice.³¹

27. 10 USCMA 498, 28 CMR 64 (1959).

28. United States v. Washington, 49 CMR 884 (AFCMR 1975).

29. United States v. Tibbs, 15 USCMA 350, 35 CMR 322 (1965); United States v. Lowery, 46 CMR 546 (ACMR 1972). See also Note, Whatever Happened to Speedy Trial, 2 The Advocate 1 (1970). This article discusses the relevant case law and the apparent shift of the burden to the defense and concludes that defense counsel should act as if they bear the burden.

30. See Pitts v. North Carolina, supra note 17, a case in which the court dismissed the charges because the government failed to show absence of prejudice.

31. See United States v. Sirles, 9 M.J. 773 (AFCMR 1980).

Types of Prejudice

In Barker, the Court said that prejudice should be assessed in terms of the interests which the speedy trial right is designed to protect: the prevention of oppressive pretrial incarceration; the minimization of the accused's anxiety and concern; and the limitation of possibilities that the defense will be impaired.³²

Oppressive Pretrial Incarceration

Courts afford this factor special treatment because it represents the joinder, in its most severe form, of the other types of prejudice. As the Court said in Barker:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means the loss of a job; it disrupts family life and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.³³

Moreover, the Court noted that pretrial confinement hinders the defendant's ability to gather evidence, contact witnesses, or otherwise prepare his defense.³⁴ The Court, however, was specifically speaking of "oppressive" pretrial incarceration as one of the "evils" the speedy trial right is designed to prevent. Oppressiveness, in this context, is comprised of two factors: the length of confinement and the conditions under which it was served. Of these two, length is clearly more important.³⁵ Thus, while defense counsel should focus on the length of any incarceration,

32. Barker v. Wingo, supra note 8, at 532. See also Ewell v. United States, 383 U.S. 116 (1966); United States v. Ware, 1 M.J. 645 (NCMR 1975).

33. Barker v. Wingo, supra note 8, at 532-33 (footnote omitted).

34. Id. See also Boller, Pretrial Restraint in the Military, 50 Mil. L. Rev. 71 (1970).

35. United States v. Burton, supra note 18; United States v. Latimer, supra note 24; confinement under especially severe circumstances may implicate the accused's due process rights.

they should also stress any particular conditions (such as size of the cell, assigned work details, and family separation) which exacerbated the situation.³⁶ The Court in Barker v. Wingo, as well as the lower federal courts, refused to set a specific time limit in such matters.³⁷ On the other hand, the Court of Military Appeals imposed a 90-day time limit in United States v. Burton.

The Burton rule, however, does not apply only to incarcerations: a restriction may be sufficiently severe to trigger the presumption of prejudice.³⁸ Defense counsel should therefore present evidence on the particular nature of the restriction including:

- (1) the size of the area of restriction;
- (2) the athletic, cultural, and academic facilities available within that area;
- (3) any requirement to periodically sign in;
- (4) any requirement to notify supervisory personnel of whereabouts;
- (5) whether the accused could leave the area of restriction for religious, medical, or legal visits only if accompanied by an escort, and whether the escorts were readily available or could only be obtained after a delay; and
- (6) whether the restrictions prohibited the accused from visiting any particular friends or participating in any specific function.

Although Courts rarely view restrictions as tantamount to confinement,³⁹ counsel should nevertheless elicit factors such as those listed above since they are relevant to an assessment of the other types of prejudice.

36. But see United States v. Broy, 14 USCMA 419, 34 CMR 199 (1964).

37. See e.g., United States v. Cooper, 504 F.2d 260, 263 (D.C. Cir. 1974). In the Speedy Trial Act of 1974, Congress did, however, impose a time limit, subject to excludable periods, of 100 days from arrest to trial. See Note, Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes, 10 Tex. Tech. L. Rev. 1043 (1979).

38. United States v. Schilf, 1 M.J. 251 (CMA 1976). See also United States v. Powell, 2 M.J. 6 (CMA 1976).

39. See United States v. Powell, supra note 38; United States v. Molina, 47 CMR 752 (ACMR 1973).

Impairment of the Defense

Counsel should seek evidence in support of the speedy trial motion with particular attention to the possibility that governmental delays hampered the preparation of the defense case, since this form of prejudice undermines the fairness of the entire legal system.⁴⁰ Any form of restriction may impair the defense in the same manner as imprisonment: the defendant is unable to contact witnesses or gather evidence, especially in overseas commands in which the alleged crime occurred off-post. Assume, for example, that the accused is involved in an off-post brawl in a German discotheque. He is immediately restricted to post. He claims self-defense and says there were several military and civilian witnesses who can verify that the "victim" attacked him. He is unable, however, to accurately describe these individuals and does not know their surnames. In such a scenario the defense counsel and his assistant have little chance of producing the prospective witnesses. Counsel should therefore elicit these facts at trial in order to support a showing of prejudice. The prosecution may respond that these mysterious witnesses were not mentioned until the trial began.⁴¹

To preserve this motion, defense counsel should immediately bring the matter to the attention of the trial counsel and the officer imposing the restriction. He should request that the accused be released from restriction so he may assist in locating these crucial witnesses. The request may later be introduced as an appellate exhibit in order to show that the government was alerted to this possible prejudice and that the defense had not procrastinated during the delay. In order to prevail, allegations that the accused was prejudiced by the absence of a witness (or other evidence) should be (a) specific and supportable by the evidence; (b) related to a substantial matter in issue and helpful to the defense; and (c) accompanied by a showing of diligence by the defense. Finally, of course, counsel must convince the court that he is unable to secure other proof of the matter about which the missing witness would have testified.

40. Barker v. Wingo, supra note 8, at 532.

41. See Braden v. Capps, 517 F.2d 221 (5th Cir. 1975).

It is axiomatic that the passage of time dims memories,⁴² and general allegations to that effect are insufficient to show prejudice.⁴³ Similarly, mere allegations that certain documents have been lost or destroyed or that witnesses died will not suffice: there must instead be a showing of the nature of the lost evidence, indicating that it would tend to be exculpatory.⁴⁴ Predictably, this showing is extremely difficult to make. As Justice Brennan has noted, "in a very real sense, the extent to which [the appellant] was prejudiced by the government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice."⁴⁵

Often the best method of showing prejudice is through the accused's testimony. He can present the factual background of the case and thereby specify the issues involved and demonstrate what the defense expects the evidence to show. Otherwise, the defense counsel's best opportunity to show prejudice is through exceptions to the hearsay rule. Military Rules of Evidence 804⁴⁶ and 1004 enable the use of other evidence if a witness is unavailable (including situations in which the witness' memory has failed) or if the original of a document has been destroyed. If the defense shows prejudice by secondary means, the prosecution can argue that, because the desired evidence is now before the court, any prejudice has been removed. Thus, by specifically demonstrating prejudice supportable by the evidence, the defense counsel will simultaneously be jeopardizing his ability to show that the evidence is otherwise unavailable. A possible solution to this quandary will be discussed later in this article.

42. *United States v. McKee*, 332 F. Supp. 823 (D. Wyo. 1974).

43. *United States v. Fitzpatrick*, 437 F.2d 542 (8th Cir. 1974); *United States v. Edwards*, 577 F.2d 883, 889 (5th Cir. 1978), cert. den. 439 U.S. 968 (1978). See Note, The Constitutional Guarantee of Speedy Trial, 8 *Indiana L. Rev.* 414 (1974).

44. *United States v. Edwards*, supra note 39; *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973); *United States v. Merrick*, 464 F.2d 1087 (10th Cir. 1972).

45. *Dickey v. Florida*, 398 U.S. 30, 52-56 (1970) (Brennan, J., concurring).

46. Mil.R.Evid. 804(b)(5) enables the admission of material, probative, and trustworthy evidence which would otherwise be inadmissible under any other exception. This provision is particularly important to the defense counsel attempting to show prejudice. See *United States v. Medico*, 557 F.2d 309 (2nd Cir. 1977).

The unavailable evidence must relate to a material fact in issue.⁴⁷ As one court noted, the loss of a character witness cannot be equated with the loss of an alibi witness whose testimony, if believed, provides an absolute defense.⁴⁸ Defense counsel should therefore show how the lost evidence is vital to the defense's case. Extenuation and mitigation witnesses and general character witnesses normally will not fall within this category. Some courts require not only that the evidence relate to a material fact, but also that it favorably impact on the verdict.⁴⁹ After voicing skepticism that an alleged alibi witness existed, the court in United States v. Jones⁵⁰ stated that "the overwhelming evidence against appellant belies any thought that the witness . . . could possibly have swayed the jury's verdict."⁵¹ However, in United States v. Macino,⁵² the court felt that the death of a co-defendant with first-hand knowledge of the events underlying the charges raised a strong possibility of prejudice even in the absence of a showing that the testimony would have been favorable to the appellant.

Judges are understandably skeptical when reviewing claims that a recently deceased witness was essential to the defense case.⁵³ Defense counsel should therefore build a record to show that the essential nature of the evidence was recognized early in the case. Second, the record should show that the defense tried to locate the evidence. Courts often mention the defense counsel's failure to look for this "essential" evidence in denying the motion.⁵⁴ Indeed, in one case the court ruled that

47. United States v. Edwards, supra note 43.

48. United States v. Brown, 354 F. Supp. 1000 (D.C. Pa. 1973).

49. See, e.g., United States v. Jones, 475 F.2d 322, 325 (D.C. Cir. 1972); see also United States v. Heinlein, supra note 44.

50. United States v. Jones, supra note 49.

51. Id. at 325.

52. 486 F.2d 750, 754 (1973). Cf. United States v. Anderson, supra note 25.

53. See, e.g., United States v. Edwards, supra note 43; Braden v. Capps, supra note 41.

54. See, e.g., United States v. Edwards, supra note 43; Smith v. United States, 379 A.2d 1166 (D.C. Ct. App. 1977); United States v. Palmer, 502 F.2d 1233 (5th Cir. 1974); United States v. Snook, 12 USCMA 613, 31 CMR 199 (1962).

the defendant should have deposed a witness who ultimately died after a serious illness.⁵⁵

In United States v. Mills,⁵⁶ the defense claimed that the accused's insanity defense was prejudiced by the long delay in trying him. The court disagreed because the evidence of the defendant's mental condition was well-documented and these records could be used as the basis of the defense. Similarly, in United States v. Davis,⁵⁷ the court ruled that even though a defense witness was missing because of the delay, no prejudice resulted since his testimony would have been cumulative. The facts in Mills illustrate the tactical dilemma which the defense counsel often faces. If he diligently prepares his case and preserves evidence by deposition or subpoena of records, he might obliterate any possibility of showing actual prejudice. On the other hand, if he does not act diligently, the court may be skeptical of his claim that the evidence is essential. The defense counsel should therefore attempt to preserve whatever evidence he can. He should also "build a record" to show that he is not waiving his right to the original document or live testimony but is forced to use this secondary -- and inferior -- method solely because of the government's delay.

For example, if defense witnesses are pending separation from the service, the defense should request that they be "flagged" or subpoenaed to ensure their presence at trial because they are essential to the defense case. If the government refuses to take such action to preserve critical defense evidence, the defense should ask that they be deposed as soon as possible. By making this latter request, the defense is not forsaking its primary request that the witnesses be personally present at trial. Depositions are poor substitutes for live testimony and the defense should reluctantly accept them only in the face of government intransigence on its primary request.⁵⁸ When such a request is later introduced as an appellate exhibit, it will show defense diligence and preserve the issue. Military counsel are especially aided by United States v. Dupree,⁵⁹ in which the Army Court of Military Review dismissed

55. United States v. Schwartz, 464 F.2d 499 (2nd Cir. 1972).

56. 434 F.2d 266 (8th Cir. 1971).

57. 487 F.2d 112 (5th Cir. 1973).

58. This suggested language should be contained in a formal request to the convening authority submitted through the trial counsel and staff judge advocate.

59. 42 CMR 681 (ACMR 1970).

on speedy trial grounds a case involving a 137-day delay because the court was thereby deprived of the personal testimony of key witnesses and had to rely on depositions. Defense attorneys have attempted to use the following facts to illustrate impairment of the defense: the death or loss of a witness;⁶⁰ the loss of records (including powers of attorney⁶¹ attendance records⁶², telephone records⁶³, police notes⁶⁴, and checks⁶⁵; pretrial publicity⁶⁶; delay in medical examination⁶⁷; destruction of physical evidence⁶⁸; death, separation, or reassignment of the accused's attorney.⁶⁹

Personal Prejudice

The third type of prejudice recognized by the Court in Barker stems from the anxiety and concern which attend a criminal accusation. In

60. See, e.g., Dickey v. Florida, supra note 45; United States v. Fay, 505 F.2d 1037 (1st Cir. 1974).

61. United States v. Palmer, supra note 54.

62. Id.

63. United States v. Villano, 529 F.2d 1046 (10th Cir. 1976).

64. Dickey v. Florida, supra note 45; United States v. Hines, 455 F.2d 1317 (D.C. Cir. 1972). In Hines, however, the court ruled that the notes were not releasable under the Jencks Act; therefore, the defense was not prejudiced by their destruction. The case represents an attempt to go beyond the normal Jencks Act sanction of striking the particular witness' testimony. It is a novel idea which should be explored by counsel, especially if they can show that the destroyed notes would have been exculpatory.

65. United States v. Judge, 425 F. Supp. 499 (D. Mass. 1976).

66. United States v. Ostrer, 481 F. Supp 407, 415 (S.D. N.Y. 1979). Such a tactic, however, will rarely succeed because such prejudice would normally be cured by a change of venue.

67. United States v. Jackson, 542 F.2d 403 (7th. Cir. 1976).

68. United States v. Burnett, 476 F.2d 726, 729 (5th Cir. 1973).

69. State v. Bishop, 493 S.W.2d 81 (Tenn. 1973).

United States v. Marion,⁷⁰ the Court noted that governmental delays in prosecuting an accused curtail his associations, "subject him to public obloquy and create anxiety in him, his family and his friends."⁷¹ One counsel alleged that his client was living under the "sword of Damocles" while the prosecutorial delay continued.⁷² This type of prejudice is clearly the least serious and the most difficult to prove.⁷³ As many courts have noted, anxiety and concern are expected of an accused.⁷⁴ The defense must show, therefore, that the accused's anxiety is abnormally great. In order to meet this burden, counsel should show that the government has not treated the accused in the same manner as other individuals in his position. The fact that the accused received "normal" treatment is often cited as a central factor in finding no undue anxiety or concern.⁷⁵ Considering these facts, it is highly unlikely that any speedy trial motion will be successful if it is based solely on allegations of this type of prejudice. Counsel should elicit evidence of personal prejudice, however, and present it in conjunction with evidence of other forms of prejudice.

70. 404 U.S. 307 (1971). See also Moore v. Arizona, supra note 10, at 27.

71. Id. at 320, citing Ewell v. United States, supra note 32, at 120.

72. United States v. Palmer, supra note 54.

73. In Bethea v. United States, 395 A.2d 787 (D.C. Ct. App. 1978), the court said that if there was a lengthy delay, the prosecution must show that the anxiety was minimal.

74. See, e.g., United States v. Black, 50 CMR 369 (NCMR 1975); United States v. Clark, 376 A.2d 434 (D.C. Ct. App. 1977).

75. United States v. Black, supra note 70. Black, an officer, was relieved of his duties after he acknowledged writing bad checks. The court said such a removal did not constitute an aggravating circumstance since it was normal and his new assignment did not demean his officer standing. See also United States v. Lowery, 46 CMR 546 (ACMR 1972).

The aspects of personal prejudice which have been stressed by defense counsel or emphasized by courts include:

(1) Psychological damage. In United States v. Dreyer,⁷⁶ the defendant suffered a severe mental disturbance because of the long delay in trying his case. Although he had consulted a psychiatrist and underwent intensive therapy, he was physically unable to work. He had attempted suicide and required hospitalization. The Court held that there was sufficient prejudice to justify dismissal of the charges.

(2) Loss of employment. While this is a common tactic used in civilian courts,⁷⁷ military defense counsel have a more difficult hurdle to overcome. Even if a soldier is relieved of his present duties pending trial, he still receives his pay. However, if the soldier loses promotion opportunities, security clearance, or a part-time civilian job as a result of the pending charges, the defense counsel should present this fact to the court.

(3) Loss of income. Although this factor is not used in the military, it is sometimes stressed in civilian courts.⁷⁸

(4) Family difficulty. Evidence that the pending trial precipitated a divorce⁷⁹ or separation⁸⁰ or in some other way impeded a marriage⁸¹ should be presented to the court.

(5) Public scorn. Many courts stress this element,⁸² but it is obviously intangible. Counsel should therefore try to particularize the factor by documenting its tangible manifestations such as loss of membership in clubs, teams, or associations.

76. 533 F.2d 112 (3rd Cir. 1976).

77. See, e.g., Moore v. Arizona, supra note 10; United States v. Palmer, supra note 54; United States v. Greene, 578 F.2d 648 (5th Cir. 1978).

78. See, e.g., United States v. Athens, 528 F.2d 1352 (5th Cir. 1976); United States v. Hay, 527 F.2d 990 (10th Cir. 1979); United States v. Greene, supra note 77.

79. United States v. Palmer, supra note 54.

80. Id. See United States v. Johnson, 579 F.2d 122 (1st Cir. 1978).

81. United States v. Dysen, 469 F.2d 735 (5th Cir. 1972).

82. See, e.g., Moore v. Arizona, supra note 10; United States v. Marion, supra note 66; United States v. Greene, supra note 77.

(6) Embarrassment. This is especially significant in the close, relatively isolated military society. If an officer or senior noncommissioned officer is relieved of his duties pending trial and is assigned menial tasks far below those normally assigned a person of his rank, counsel should emphasize this fact.

(7) Consecutive sentencing. An unusual type of prejudice was successfully alleged in McCarty v. Heard.⁸³ The accused was serving time in a Tennessee prison when he was charged with additional offenses. The Texas authorities delayed his trial until after he served his sentence. In responding to a habeas corpus petition, the court stated that this delay negated the possibility that the sentence might be served concurrently with the initial sentence.⁸⁴

(8) Retention after separation date. If the servicemember is held past his expiration of term of service (ETS) date, this should be stressed. Although it is not, standing alone, an aggravating circumstance,⁸⁵ it can be combined with other facts, especially if the delay caused a loss of employment or enrollment in school.

(9) Deterioration of physical condition.⁸⁶ The accused may also be prejudiced if the delay aggravated an injury or illness.

Applicability of Sixth Amendment Protections

In Marion, the Court announced that the Sixth Amendment right to a speedy trial did not apply until the defendant was arrested or indicted. The Court recognized, however, that the passage of time prior to arrest or indictment could also prejudice the defense. In fact, the government conceded that if the preindictment delay substantially prejudiced the appellant's right to a fair trial and the delay was intentionally used to gain a tactical advantage over the appellant, the Fifth Amendment's due process clause would require dismissal of the charges.⁸⁷ Although the Court did not determine the circumstances under which prejudice resulting

83. 381 F. Supp. 1290 (S.D. Texas 1974).

84. Id. at 1293.

85. See United States v. Amundson, supra note 6.

86. United States v. Johnson, supra note 80; United States v. Broy, supra note 36.

87. United States v. Marion, supra note 70, at 324.

from preindictment delays would require that remedy, it did note⁸⁸ that several circuits,⁸⁹ recognized that prejudice in the prearrest indictment period constitute a proper basis for a due process motion for dismissal.

In United States v. Kama,⁹⁰ the Navy Court of Military Review rejected the appellant's due process motion because there was no showing that the delay in preferring charges was "deliberately achieved to harass or otherwise oppress the appellant or that prejudice was suffered by the latter" as a consequence of the delays.⁹¹ Consequently counsel should attempt to particularize examples of prejudice occurring prior to preferal. This is especially important in drug cases. Often the police will refrain from immediately arresting an individual in order to preserve the anonymity of a confidential informant. If the officers do not arrest the suspect until months later, counsel should stress the loss of any witnesses or evidence which occurred during that period. Although the motion is based on the Fifth Amendment, it may be combined with a speedy trial motion to emphasize the prejudicial aspects of the delay.

Attributing Prejudice to the Delay

Counsel must not only show that the accused has been prejudiced, but also that the prejudice was caused by the delay and not because of other factors such as the defense's failure to preserve previously available evidence.⁹² For example, if the government tries the accused 15 months after arrest but the main defense witness dies two weeks after

88. Id. at 324 n.17. See also United States v. Lovasco, 431 U.S. 783 (1976).

89. See United States v. Harbin, 377 F.2d 78 (4th Cir. 1967); United States v. Lee, 413 F.2d 910 (7th Cir. 1969); Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968) (delay in arresting defendant rendered it impossible for him to remember his whereabouts during the crime); Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963).

90. 47 CMR 838 (NCOMR 1973).

91. Id. at 846

92. See Wynn v. United States, 386 A.2d 695, 697 n.8 (D.C. Ct. App. 1978); Smith v. United States, supra note 54.

the arrest, the lengthy delay has no prejudicial effect.⁹³ Similarly, courts have rejected a showing of prejudice based on a loss of records when the records were probably unavailable either before or shortly after the arrest.⁹⁴ Defense counsel frequently allege that the accused was prejudiced by the delay because he was relieved of his duties and assigned other tasks. This contention, however, is inaccurate. Relief from duty is caused by the imposition of charges rather than the delay, and is often required by regulation.⁹⁵ The delay obviously lengthens the time spent at these other duties, but the accused is by no means assured that he may return to his former job after the trial. Counsel should therefore show a clear causal connection between the delay and prejudice.

Tendering the Motion

Speedy trial motions are normally submitted prior to trial.⁹⁶ In United States v. McDonald,⁹⁷ the Supreme Court noted that the extent of prejudice can often be most accurately determined after trial, when it is clear what evidence has been destroyed or forgotten. Other courts have accepted this approach.⁹⁸ In United States v. Walls,⁹⁹ the military judge permitted counsel to tender the motion during the sentencing portion

93. See United States v. Anderson, supra note 25.

94. United States v. Palmer, supra note 54.

95. See, e.g., Army Reg. No. 195-3, Acceptance and Accreditation of Criminal Investigative Personnel (11 Jul. 1977); Army Reg. No. 140-192, Organization, Training, Assignment, and Retention Criteria for Military Intelligence, Signal Intelligence, Electronic Warfare and Signal Security Units (15 Apr. 1980).

96. Paragraph 67d, 68a, i, MCM, 1969.

97. 435 U.S. 850 (1978).

98. See e.g., United States v. Meinster, 475 F. Supp. 1093 (S.D. Fla. 1979); Day v. United States, 390 A.2d 957 (D.C. Ct. App. 1978).

99. 9 M.J. 88 (CMA 1980).

of the trial. Thus, defense counsel should be prepared to renew their speedy trial motion if additional evidence of prejudice is uncovered during the trial.

Conclusion

Military and federal cases are normally tried as expeditiously as possible. Consequently, comparatively few defendants suffer the egregious delays which warrant automatic dismissal or a presumption of prejudice. Because the government can usually articulate some justification for the delay, a showing of actual prejudice is vital; as the Court of Military Appeals stated, an "apparently satisfactory explanation for a particular delay might be revealed as unreasonable in light of the specific harm to the accused occasioned by the delay."¹⁰⁰ Defense counsel should therefore be industrious and ingenious in discovering, preserving, and presenting evidence of actual prejudice. When it is introduced before a court-martial or appellate court, that evidence helps insure that the accused's right to a speedy trial will be vindicated.

100. *United States v. Parish*, 17 USCMA 411, 416, 38 CMR 209, 214 (1968).

SEARCH AND SEIZURE: A PRIMER

Part Three - The "Automobile" Exception

Government agents may search movable vehicles without a warrant if they have probable cause to believe that the area to be searched contains evidence of a crime and there are exigent circumstances.¹ While courts are reluctant to apply this rationale to searches of fixed premises,² there is little hesitancy to extend it to all forms of conveyances, including many types of "quasi-premises."³ In justifying these searches, reviewing tribunals cite the vehicle's mobility (which renders the acquisition of a warrant impractical), the attenuated privacy expectations in a vehicle, and the existence of probable cause.

1. United States v. Carroll, 267 U.S. 132 (1925). For the purposes of Fourth Amendment analysis, there is no distinction between an "instrumentality" of crime and "mere evidence" of crime. See Warden v. Hayden, 387 U.S. 294 (1967). In Schmerber v. California, 384 U.S. 757 (1966), the Court upheld the warrantless extraction of a blood sample because the arresting officer had probable cause to believe the accused had been driving while intoxicated, and "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant . . . threatened the 'destruction of evidence.'" The Court utilized language similar to that in Carroll, but cited Preston v. United States, 376 U.S. 364 (1964), a case in which the "search incident to apprehension" exception was held inapplicable. See also Cupp v. Murphy, 412 U.S. 291 (1973). For an analysis of the constitutionality of the police techniques employed in Schmerber, compare Rochin v. California, 342 U.S. 165 (1952), with cases catalogued in United States v. Cain, 5 M.J. 844 (ACMR 1978).

2. See, e.g., 2 W. LaFare, Search and Seizure §6.5. (1978). Cf. Zap v. United States, 328 U.S. 624, 628 (1946); United States v. Garcia, 3 M.J. 1090 (NCMR 1977); United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); Warden v. Hayden, supra note 1; Chapman v. United States, 365 U.S. 610 (1961); United States v. Johnson, 333 U.S. 10 (1948).

3. See, e.g., United States v. Sigal, 500 F.2d 1118 (10th Cir. 1974) (airplanes); United States v. Maspero, 496 F.2d 1354 (5th Cir. 1974) (tractor-trailer combinations); United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974) (trucks); United States v. Miller, 460 F.2d 582 (10th Cir. 1972) (mobile homes); Atkins v. State, 159 Ind. App. 387, 307 N.E.2d 73 (1974) (trailers attached to automobiles); State v. Marconi, 113 N.H. 426, 309 A.2d 505 (1973) (boats). See also United States v. Hackett, 28 Crim. L. Rptr. (BNA) 2140 (9th Cir. 15 Sep 1980).

The Carroll Doctrine: Probable Cause Plus Exigent Circumstances

In United States v. Carroll, the Supreme Court found that federal prohibition agents had probable cause to believe that an automobile travelling along a known bootlegging route contained illegal liquor, and upheld the warrantless search and seizure of the vehicle and its contents. Citing the distinction between the "necessity for a search warrant [for contraband] concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach" of a warrant, the Court concluded that the governmental intrusion was reasonable under the Fourth Amendment.⁴

The Principle of Continuing Exigency

In Chambers v. Maroney,⁵ police stopped a station wagon matching the description of an automobile spotted at the scene of a recent robbery and apprehended its occupants. The officers drove the vehicle to the station house and searched it without a warrant; the government subsequently introduced the fruits of this search at the defendant's trial for robbery. The Court upheld the search because probable cause and exigent circumstances existed during the initial seizure. For constitutional purposes, the Court found "no difference between on the one hand seizing and holding a car before presenting the probable cause to a magistrate and on the other hand carrying out an immediate search without a warrant," and concluded that, "[g]iven probable cause to search, either course is reasonable under the Fourth Amendment."⁶ The opinion clearly indicates that the search was not justified by the "search incident to a lawful arrest" exception to the warrant requirement: indeed, the bases for that doctrine no longer apply once the accused and the vehicle are securely within police custody. Instead, Chambers held that "[o]nce the right to search a movable vehicle vests due to the existence of probable cause and exigent circumstances, the actual search may take place at the station house at a later point in time."⁷

4. United States v. Carroll, supra note 1, at 151. The Court was quoting the Act of July 31, 1789, 1 Stat 29, 43.

5. 399 U.S. 42 (1970).

6. Id. at 51.

7. Whitebread, Constitutional Criminal Procedure, 126 (1978).

Diminished Expectation of Privacy

In United States v. Chadwick,⁸ the Court emphasized that the Carroll exception rests not only on probable cause and the exigencies attending mobility, but also on the diminished expectation of privacy in an automobile. Federal investigators in Chadwick had probable cause to believe a footlocker in the trunk of an automobile contained drugs. They arrested the owners of the footlocker, seized it, and searched it at the police station without a warrant or consent. Observing that the diminished expectation of privacy in vehicles does not extend to luggage, the Court invalidated the search. It also noted that exigent circumstances disappeared⁹ once the police took the footlocker to the police station.¹⁰ Following the same reasoning in Arkansas v. Sanders,¹¹ the Court refused to apply the "automobile" exception to luggage removed from a vehicle. In that case, a reliable informant told law enforcement agents that the defendant would arrive at an airline baggage claim area and pick up a green suitcase containing marijuana. The terminal was placed under surveillance and the defendant was observed retrieving the bag and placing it in the trunk of a taxi. The police stopped the taxi a few blocks away, and the driver consented to a search of the vehicle's trunk. The officers then searched the suitcase without the defendant's consent and discovered marijuana. Again the Court noted that exigencies

8. 433 U.S. 1 (1977).

9. Cf. Texas v. White, 423 U.S. 67 (1975), where the Court held that if probable cause plus exigent circumstances exist at the time of the stop, the automobile search may be conducted later and at another place, so long as probable cause still exists, even absent a showing of justification for the delay. See also United States v. Benson, 28 Crim. L. Rptr. (BNA) 2062 (8th Cir. 15 Sep 1980).

10. See Coolidge v. New Hampshire, 403 U.S. 443 (1971), where the search was not incident to a lawful arrest because it was not conducted at the same place as the arrest, nor under the "probable cause plus exigent circumstances" exception. Exigent circumstances are neither assumed nor automatically provided merely because the object of the search is an automobile. But see Cardwell v. Lewis, 417 U.S. 583 (1974), where the Court upheld the seizure of an automobile from a public parking lot. The Court, in a plurality decision, distinguished Coolidge primarily on the basis that the search was merely an examination of the vehicle, which had been seized from a public place.

11. 442 U.S. 753 (1979).

vanished once the police seized the suitcase; further, luggage usually contains personal effects and is thus "inevitably associated with the expectation of privacy."¹²

Alternative Justifications for Vehicle Searches

Warrantless vehicle searches which cannot be justified by a valid preceding arrest or the "automobile" exception may nevertheless be lawful for other reasons. The government may intrude upon privacy expectations if the automobile is seized as evidence of a crime¹³ or impounded for safekeeping,¹⁴ illegal parking,¹⁵ or as an unsafe vehicle.¹⁶ In impoundment cases, courts balance the need for the inventory against the

12. Id. at 762.

13. In *Coolidge v. New Hampshire*, the Court dealt with the seizure of a vehicle which was itself evidence of a crime. Justice Stewart, in a portion of the opinion joined by three other Justices, stated "it is apparent that the 'plain view' exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew of the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves." *Coolidge v. New Hampshire*, supra note 10, at 472 (footnote omitted). See also *United States v. Mills*, 40 CMR 630 (ACMR 1972); *State v. Hayburn*, 171 N.J. Super. 390, 409 A.2d 802 (1979).

14. See generally *Lafave*, supra note 2, at §7.3.

15. The Court upheld impoundment of an illegally parked car in *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976), noting that the "authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." In *Cady v. Dombrowski*, 413 U.S. 433, 443-447 (1973), the Court concluded that it was appropriate for the police to exercise a "form of custody or control" over the respondents' automobile, which was "disabled as a result of an accident and constituted a nuisance along the highway." In both cases, the evidence sought to be suppressed was discovered during an inventory by police officers, which as the *Opperman* Court noted, is deemed to be a "benign, non-criminal context." But see *Shum v. State*, 28 Crim. L. Rptr. (BNA) 2482 (Nev. Sup. Ct. 20 Jan 1981).

16. See generally *State v. Singleton*, 9 Wash. App. 327, 511 P.2d 1396 (1973).

individual's expectation of privacy by examining the basis for the impoundment, the procedures employed in the inventory, the time of the inventory and its scope, and whether it was conducted in good faith.¹⁷

Conclusion

Warrantless automobile searches may be justified by the "border search" rationale;¹⁸ a lawful preceding arrest;¹⁹ the consent of one of the occupants;²⁰ the lawful stop and frisk of the occupants;²¹ the hot pursuit of a fleeing felon;²² under the "plain view" doctrine,²³ or pursuant to an inventory if the vehicle is impounded.²⁴ In addition,

17. Cf. Note, The Inventory Search of an Impounded Vehicle, 48 Chi-Kent L.R. 48 (1971); Stroud, The Inventory Search and the Fourth Amendment, 4 Ind. L. F. 471 (1971). For an example of a subterfuge inventory, see United States v. Talbert, 10 M.J. 539 (ACMR 1980). See also Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (1974). But see Delaware v. Prouse, 440 U.S. 648 (1979), where the court held that a random stop for the purpose of checking licenses without probable cause violated the Fourth Amendment. See also State v. Houser, 28 Crim. L. Rptr. 1074 (BNA) (Wash. S.Ct. 31 Dec 1980).

18. See Note, Search and Seizure: a Primer, Part Two - Border and Overseas Gate Searches, 13 The Advocate 43 (1981). See also Almieda-Sanchez v. United States, 413 U.S. 266 (1973); but see United States v. Cortez, 28 Crim. L. Rptr. 3051 (BNA) (21 Jan 1981) where the Supreme Court analyzed a border stop on the basis of a "stop and frisk."

19. Chimel v. California, 395 U.S. 752 (1969). Searches of passengers present special problems. See United States v. Di Re, 332 U.S. 581, 587 (1948), as applied in Ybarra v. Illinois, 444 U.S. 85 (1979).

20. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See Note, Search and Seizure: A Primer, Part One - Consent, 12 The Advocate 353 (1980).

21. Delaware v. Prouse, supra note 17.

22. Warden v. Hayden, supra note 1.

23. See, e.g., United States v. Sanders, 27 Crim. L. Rptr. (BNA) 2529 (8th Cir. 15 Aug 1980).

24. South Dakota v. Opperman, supra note 15.

under Carroll the vehicle may be searched without a warrant if there is probable cause and if exigent circumstances make the securing of a warrant inadvisable. These circumstances do not exist if the police have time to obtain a warrant.²⁵ The government's right to conduct a warrantless search may "vest". Thus, if the "automobile" exception applies at the initial stop, the actual search may be conducted later and in a different location. However, despite its "vested" right to search, the government's exclusive control of the subject property may vitiate any exigency.²⁶

25. See United States v. Mota Aros, 8 M.J. 121 (CMA 1979), where none of the exceptions was extant.

26. Defense counsel should realize that courts differ in interpreting the relationship between police control over the subject property and the existence of "exigent circumstances" sufficient to trigger the "automobile" exception. Compare Chambers v. Maroney, supra note 5, with Arkansas v. Sanders, supra note 11.

PROPOSED INSTRUCTIONS

ENTRAPMENT

The defense of entrapment is "rooted in the concept that Government officers cannot instigate the commission of a crime by one who would otherwise remain law abiding"; the defense consequently focuses "not upon the Government agent but upon the accused, and the essential inquiry is upon [his] 'intent or predisposition . . . to commit the crime.'" United States v. Garcia, 1 M.J. 26, 29 (CMA 1975), quoting United States v. Russell, 411 U.S. 423, 429 (1973); see United States v. Sorrells, 287 U.S. 435 (1930); United States v. Hebert, 1 M.J. 84 (CMA 1975); Gallaway, Due Process: Objective Entrapment's Trojan Horse, 88 Mil. L. Rev. 103 (1980). To insure that the court members properly understand the doctrine, the defense counsel should consider proposing the following instruction:

The [accused] asserts that he was a victim of entrapment as to the offense charged [against him].

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from the suspected person.

If, then, the [court] should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the [accused] was ready and willing to commit crimes such as are charged [against him] whenever opportunity was afforded, and that government officers

or their agents did no more than offer the opportunity, then the [court] should find that the [accused] is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the [accused] had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty. The burden is on the government to prove beyond reasonable doubt that the [accused] was not entrapped.

The instruction, extracted from Devitt and Blackmar, Federal Jury Practice and Instructions (3rd ed. 1977), was cited with approval in United States v. Szycher, 585 F.2d 443, 450 (10th Cir. 1978); United States v. Shaw, 570 F.2d 770, 771-772 (8th Cir. 1978); Joyner v. United States, 547 F.2d 1199, 1201 (4th Cir. 1977); Willis v. United States, 530 F.2d 308, 310-311 (8th Cir.), cert. denied, 429 U.S. 838 (1976); United States v. Gardner, 516 F.2d 334, 348 (7th Cir.), cert. denied, 423 U.S. 861 (1975). See also United States v. Johnson, 590 F.2d 250, 251, on rehearing, 605 F.2d 1025, 1027 (7th Cir. 1979) (en banc).

The proposed instruction's succinctness is one of its major advantages: the standard instruction from Department of Army, Pamphlet No. 27-9, Military Judges' Guide (1969), is twice as long and may confuse the members. The use of the phrase "innocent person" in the standard instruction's definition of entrapment is also potentially misleading, since in most cases the defense is only raised once the accused admits committing the otherwise criminal act. Additionally, an entrapped accused could be denied the defense under the standard instruction merely by a prosecutorial showing that its dogged pursuit was based on a reasonable suspicion that he was already involved in criminal activity. This danger is substantially lessened by the proposed instruction. Finally, paragraph four of the proposed instruction gives the creative advocate a potentially significant foothold: in appropriate cases, he may argue that the government failed to present any evidence indicating that the accused was "ready and willing" to commit a crime prior to the agent's request.

SIDE BAR

A Compilation of Suggested Defense Strategies

"Paid Informant" Instructions

Especially in courts-martial for drug-related offenses, the principal prosecution witness is frequently a "paid informant" who testifies in consideration for a cash payment or a promise of leniency in the disposition of charges pending against him. When the government presents witnesses who are compensated for their testimony, defense counsel should request that the military judge recite a "paid informant" instruction. The federal courts generally require such an instruction, reasoning that a paid informant, like an accomplice, has a strong motive to lie, and that only a special instruction on the witness' unreliability can insure a fair trial. In United States v. Kinnard, 465 F. 560, 570 (D.C. Cir. 1972), the court stated that although the "credibility of a paid informant is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest."

The military appellate courts have not addressed the issue of whether "paid informant" instructions must be presented in appropriate cases. The circumstances under which an accomplice instruction must be presented in a courts-martial are identical to the factors requiring that instruction under federal law.¹ The "paid informant" instruction sanctioned by federal courts is nearly identical to the "accomplice" instruction in Department of Army Pamphlet No. 27-9, Military Judges' Guide, paragraph 9-22 (1979), and since both instructions are designed to achieve the same purpose, counsel should argue that the military judge must abide by federal law pertaining to "paid informant" instructions. When there is a question of fact as to whether the informant was paid, the issue should be submitted to the members for their determination.² Counsel should challenge

1. In United States v. Lell, 16 USQMA 161, 36 CMR 317 (1966), the Court held that a military judge must present, sua sponte, a special accomplice instruction where an accomplice provides the only evidence of the appellant's wrongdoing. See United States v. Moore, 8 M.J. 738 (AFCMR 1980); United States v. Moore, 2 M.J. 749 (AFCMR 1977).

2. In United States v. Harrison, 5 M.J. 693 (AFCMR 1978), the court noted that controverted evidence as to whether a witness was an accomplice should be submitted to the court, along with accomplice instructions.

any attempt to substitute a general credibility instruction for a specific "paid informant" instruction; in addressing the analogous issue of accomplice instructions, the Court of Military Appeals has noted that such a substitution is inadequate. United States v. Winborn, 14 USCMA 272, 34 CMR 57 (1963).

Preserving Testimony of Witnesses Invoking Privilege
Against Self-Incrimination

Frequently, when government or defense witnesses invoke the Fifth Amendment or Article 31 during cross-examination, the examining counsel moves to strike the entire testimony. In other situations, the military judge refuses to require a witness to testify after opposing counsel discloses that a prospective witness intends to invoke the right against self-incrimination. Generally, the exercise of this right prejudices the accused: both prosecution and defense witnesses may be withholding favorable defense evidence. In United States v. Rivas, 3 M.J. 282, 285 (CMA 1977), the Court of Military Appeals established a general rule enabling a government witness' direct testimony to be stricken upon defense request if the witness invoked the Fifth Amendment as to questions other than those bearing on credibility.³

While Rivas does not address the issue of whether the government has a corresponding right to strike testimony, some military judges extend

3. In United States v. Colon-Atienza, 22 USCMA 399, 47 CMR 337 (1973), the Court held that the military judge erred by denying a defense motion to strike the direct testimony of a witness who invoked the privilege after testifying that he purchased heroin from the accused in exchange for a marked twenty-dollar bill. The defense counsel asked the witness whether he was knowledgeable of the local "drug scene," whether he was addicted to heroin, and whether he purchased heroin shortly before the offense allegedly occurred. The Court determined that while these questions bear on credibility, they were also "crucial to the merits" since one defense theory was that the heroin actually belonged to the witness.

that remedy to the prosecution.⁴ The defense thereby loses favorable and often critical evidence from its own witnesses because of their fear of prosecution for misconduct. Counsel should not assume that an Article 31 or Fifth Amendment claim automatically results in the exclusion of direct testimony, and should instead urge the court to question witnesses invoking the right in order to ascertain the validity of their claim. In Hoffman v. United States, 341 U.S. 479, 486 (1951), the Supreme Court said that although the privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," its protection

must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself. It is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken.

Federal courts require witnesses to substantiate their refusal to answer questions. If they fail to do so, the judge conducts an inquiry to establish the reasonableness of their claim. United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980).

In United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975), the court stated that in some instances this requirement can be satisfied by examining the implications of the posed question. Even if the question

4. Neither Mil. R. Evid. 301(f), which discusses the effect of claiming the privilege, nor the corresponding Analysis distinguishes cases in which the prosecution, rather than the defense, moves to strike direct testimony. The provision allows either party to seek that remedy "unless the matters to which the witness refuses to testify are purely collateral." Mil. R. Evid. 301(f)(2). This undifferentiated treatment of the issue ignores the fact that the Sixth Amendment extends to the accused the right to confront and cross-examine adverse witnesses and present evidence in his defense. Cf. Webb v. Texas, 409 U.S. 95 (1972) (defendant denied due process where judicial admonition about perjury precluded sole defense witness from freely and voluntarily deciding whether to testify).

seems unlikely to elicit an incriminatory response, courts recognize that an explanation of why the questions cannot be answered might be prejudicial. United States v. Hoffman, *supra*. Accordingly, defense counsel should move for an *in camera* proceeding in order to ascertain the basis of a witness' refusal to testify. United States v. Gomez-Rojas, *supra*; United States v. Goodwin, *supra*; United States v. Melchore Moreno, 536 F.2d 1042 (5th Cir. 1976). If the military judge rules that the privilege is properly invoked, the defense counsel should submit all questions to which he desires answers. In Melchore v. Moreno, *supra* at 1049, the court stated that "only as to genuinely threatening questions should [the witness'] silence [be] sustained," since "a witness may not withhold all of the evidence demanded of him merely because some of it is protected from disclosure by the Fifth Amendment." If a witness waives the right by testifying about a particular incident in which he was involved, he cannot later assert it as to matters which are personally inculpatory. Klein v. Harris, 28 Crim. L. Rptr. (BNA) 2156 (E.D.N.Y. 12 Nov. 1980). Finally, a witness' refusal to answer questions pertaining to general credibility does not warrant exclusion of his entire testimony.⁵

Recently, in United States v. Phaneuf, SPCM 14973, ___ M.J. ___ (ACMR 27 Feb. 1981), the court held that a trial judge erred by striking a defense witness' testimony when she invoked her Fifth Amendment rights on cross-examination, reasoning that the defendant's right to confront and cross-examine his accusers and to call witnesses in his behalf is

5. Mil. R. Evid. 301(f)(2); United States v. LaRiche et al., 549 F.2d 1088 (6th Cir. 1977), *cert. denied*, 430 U.S. 987 (1977); United States v. DiGiovanni, 544 F.2d 642 (2d Cir. 1976); United States v. Gould, 536 F.2d 216 (8th Cir. 1976); United States v. Norman, 402 F.2d 73 (9th Cir. 1968), *cert. denied*, 397 U.S. 938 (1970); United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 822 (1963); Margolis v. United States, 375 U.S. 822 (1963); United States v. White, 4 M.J. 628 (AFCMR 1977), *affirmed*, 6 M.J. 12 (CMA 1978); United States v. Terrell, 4 M.J. 720 (AFCMR 1977), *affirmed*, 6 M.J. 13 (CMA 1978); United States v. Glenn, 4 M.J. 706 (NCFMR 1977), *pet. denied* 4 M.J. 357 (CMA 1978). Accord, United States v. Anderson, 4 M.J. 664 (ACMR 1977); United States v. McFarland, 371 F.2d 702 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); Hett v. United States, 353 F.2d 761 (9th Cir. 1966), *cert. denied*, 384 U.S. 905 (1966); *see* McCormick, *Evidence*, §219 (2d ed. 1972).

not shared by the prosecution. Therefore, the trial judge "does not have the same discretion to strike the testimony of a non-party defense witness as it does to strike the testimony of a witness for the prosecution or of the defendant himself when the witness refuses to answer material questions on cross-examination." United States v. Phaneuf, supra, quoting State v. Brown, 549 S.W.2d 336, 346 (Mo. 1977). The accused's right to a fair trial, in sum, overrides the government's interest in securing a conviction, and provides a basis for challenging prosecutorial efforts to strike the direct testimony of a non-party defense witness in appropriate cases.

Excluding Voluntary Confessions

Counsel often attempt to exclude confessions by arguing that they were obtained in violation of Article 31, UCMJ. A violation of an accused's Fourth Amendment right against unreasonable seizure may provide an alternative basis for excluding even properly warned and voluntary confessions. See United States v. Mendenhall, 48 U.S.L.W. 4575 (Sup. Ct. 1980); Brown v. Texas, 443 U.S. 47 (1980); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975); Davis v. Mississippi, 394 U.S. 721 (1969). In Dunaway v. New York, supra at 217, the Court stated:

If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted[.] Arrests made without warrant or probable cause, for questioning or 'investigation', would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.

Thus, in appropriate cases, Fourth Amendment violations may trigger the the exclusionary rule.

To assert a Fourth Amendment violation, counsel must establish that investigative officials seized the accused without probable cause prior to the confession. An accused has been "seized within the meaning of the Fourth Amendment [if] in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." United States v. Mendenhall, supra at 4578. Such a belief, the Court notes, can be engendered by physical force or a display of

authority. While an inoffensive touching by a police officer is not constitutionally cognizable, extensive touching, the use of a weapon, stern vocal intonations, or the threatening presence of several officers may constitute a seizure. United States v. Mendenhall, supra at 4578.⁶

Just as the Court does not require a formal apprehension to effect a seizure, it does not require a formal pronouncement that a person is free to leave in order to find that no restraint was exercised over a suspect. In determining whether the accused could reasonably believe he was free to leave, the Court examines factors including the language police officers use in detaining him or in requesting that he accompany them; the amount of freedom he is permitted if he accompanies the officers; the absence of force or threats by authorities; and any solicitations of the accused's consent.⁷ If a suspect is seized, the government must establish at least an articulable suspicion that he was engaged in criminal activity.⁸ Thus, in United States v. Mendenhall, supra at 4577,

6. In Dunaway v. New York, supra, the evidence established that the accused was seized when police picked him up at a friend's home, questioned him there, transported him to the police station, placed him in an interrogation room, and would have restrained him had he attempted to leave, even though this fact was not communicated to him.

7. In United States v. Mendenhall, supra, the Court found that the accused was not seized; she was asked, rather than ordered, to accompany the drug enforcement agents to their office, and she was repeatedly advised of her right to leave and to refuse to cooperate. Five weeks after the Mendenhall decision, the Supreme Court, on remarkably similar facts, concluded that the drug agents acted unlawfully in stopping a suspect who fit portions of the drug profile. Reid v. Georgia, 48 U.S.L.W. 3847 (Sup. Ct. 1980). See also Morales v. New York, 42 N.Y.2d 129, 366 N.E.2d 248 (1977).

8. In Dunaway v. New York, supra, the Supreme Court specifically stated that Terry v. Ohio, 392 U.S. 1 (1969), and Sibron v. New York, 392 U.S. 40 (1969) do not justify custodial interrogations conducted without probable cause. The Court, citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975), an immigration case in which a Terry stop was conducted, concluded that while "the officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances," any "further detention or search must be based on consent or probable cause." The Court also noted that the prosecution bears the burden of establishing the absence of any causal connection between the illegal detention and the confession.

the Court stated that "the Fourth Amendment's requirement that searches and seizures be founded upon an objective justification governs all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." See United States v. Brignoni-Ponce, 422 U.S. 873, 875 (1975); Davis v. Mississippi, *supra*; Terry v. Ohio, *supra* note 8. In United States v. Spencer, SPCM 14953, __ M.J. __ (ACMR 27 Feb. 1981), the court upheld the introduction of a properly warned confession after finding that the accused voluntarily accompanied the police officers to the station house and was free to leave at any time. In appropriate cases, defense counsel should therefore marshal all available evidence indicating that the accused was "seized" within the meaning of the Fourth Amendment, and, for example, merely submitted to the color of authority of law enforcement personnel or passively assented to accompany them to the station house.

After-Hours Answering Service

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USCMA WATCH

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

A broad spectrum of issues is pending before the Court of Military Appeals, including questions pertaining to waiver clauses in pretrial agreements, the applicability of Article 31 to the court-martial's presentencing phase, and the accused's right to present witnesses on his own behalf. Congress' classification of cocaine as a habit-forming narcotic underlies the granted issues in several cases. The Court also had occasion to express its concern over the manner in which post-trial responsibilities are discharged in some cases: during oral argument in United States v. Robinson, pet. granted, 9 M.J. 120 (CMA 1980), the Court questioned the continued usefulness of United States v. Goode, 1 M.J. 3 (CMA 1975), and Judge Fletcher suggested that the decision established artificial rules and was an example of judicial legislation.

GRANTED ISSUES

SENTENCING: Applicability of Article 31, UCMJ

To what extent do the protections embodied in Article 31, UCMJ, apply to inculpatory pretrial statements introduced by the prosecution to rebut defense evidence in extenuation and mitigation? In United States v. Donnelly, AFMCR 22668, pet. granted, 10 M.J. ___ (CMA 1981), the accused pled guilty to several drug-related offenses. During the presentencing stage of the court-martial, the defense presented a noncommissioned officer who testified about the accused's past duty performance and rehabilitative potential. In rebuttal, the trial counsel relied upon the accused's pretrial confession, a document which admitted culpability not only for the charged offenses, but also for several similar acts of misconduct. The defense counsel unsuccessfully objected to the prosecution's use of the confession to impeach the witness. The prosecution did not establish the voluntariness of the confession, and proffered no evidence that the accused was apprised of his rights under Article 31, UCMJ, before making the statement. Other decisions by the Court suggest that Article 31 may be inapplicable to sentencing proceedings. See United States v. Mathews, 6 M.J. 357 (CMA 1979); United States v. Barlow, 9 M.J. 214 (CMA 1980).

PRETRIAL AGREEMENT: Waiver Clause

The Court has consistently discountenanced pretrial agreements which purport to orchestrate court-martial proceedings. See United States v. Schmeltz, 1 M.J. 8 (CMA 1975); United States v. Troglin, 21 USCMA 183, 44 CMR 237 (1972); United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968). In light of its most recent affirmation of this stance in United States v. Dawson, 10 M.J. 142 (CMA 1981), it seems unlikely that the Court will sanction a pretrial agreement which is conditioned upon the accused's waiver of his right to a pretrial hearing under Article 32, UCMJ. The Court will confront that issue in United States v. Schaffer, NCMR 80-0263, pet. granted, 10 M.J. 282 (CMA 1981). The facts of the case reveal that the offer to plead guilty, as well as the offer to waive the Article 32 investigation, originated with the defense; the Army Court of Military Review considers this a significant factor in assessing the propriety of the pretrial agreement. Compare United States v. Walls, 8 M.J. 666 (ACMR 1979) with United States v. Chinn, 2 M.J. 962 (ACMR 1976). However, if the convening authority would not have entered the agreement but for the waiver, and if the defense knew this, the origin of the waiver clause itself may be deemed immaterial.

WITNESS: Compulsory Process

Although American citizens residing in foreign countries cannot be subpoenaed to testify at courts-martial conducted outside the United States,¹ the Court has implied that the government can subpoena witnesses residing in the United States for that purpose. See United States v. Hodge, 20 USCMA 412, 43 CMR 252 (1971); United States v. Sears, 20 USCMA 380, 43 CMR 220 (1971). The Court will directly address the issue in United States v. Bennett, AFCMR 22664, pet. granted, 10 M.J. 251 (CMA 1981). In Bennett, the military judge determined that a defense-requested witness was material. The witness, however, refused -- even at government expense -- to depart the United States and travel to the situs of the trial in the Philippines. Assuming that the witness' attendance could not be compelled,² the defense counsel alternatively moved for a change of venue to the United States or an abatement of the proceedings. The Court will determine whether the military judge erred by

1. United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974); United States v. Burrow, 16 USCMA 94, 36 CMR 250 (1966).

2. See United States v. Tippit, 7 M.J. 908 (AFCMR 1979); United States v. Boone, 49 CMR 709 (ACMR 1975). Recently, the Court noted that Daniels, supra note 1, does not justify service courts of military review decisions that a court-martial cannot subpoena a witness in the United States to appear at a court-martial in a foreign country. United States v. Roberts, 10 M.J. 308, 314 N.7 (1981).

denying the requested change of venue, which would have rendered the defense witness amenable to subpoena.

OFFENSES: Classification of Cocaine as Habit-Forming Narcotic

The Court continues to grant petitions for review of cases in which cocaine's status as a habit-forming narcotic is challenged at trial. In United States v. Cruzaldo-Rodriguez, 9 M.J. 908 (AFCMR 1980), pet. granted, 10 M.J. 281 (CMA 1981), the Court will review a military judge's refusal to allow a pharmacist to testify that, in his opinion, cocaine is a nonnarcotic stimulant. The issue granted in United States v. Curry, 10 M.J. 514 (AFCMR 1980), pet. granted, 10 M.J. 297 (CMA 1981), pertains to the propriety of a military judge's ruling that, based on congressional classification, cocaine is a habit-forming narcotic as a matter of law. A similar issue is pending before the Court in United States v. Ettleson, AFCMR 22480, pet. granted, 8 M.J. 179 (CMA 1979); the Court heard oral argument in that case in November, 1980. The Court will review similar issues in, e.g., United States v. Wood, AFCMR 22621, pet. granted, 10 M.J. ___ (CMA 1981), United States v. Smith, AFCMR 22706, pet. granted, 10 M.J. ___ (CMA 1981), and United States v. Coe, ACMR 439642, pet. granted, 10 M.J. ___ (CMA 1981).

INSTRUCTIONS: Reasonable Doubt

The Court repeatedly indicates its willingness to review for prejudice cases in which the military judge refused to present reasonable doubt instructions proposed by the defense counsel and instead recited the standard instruction criticized in United States v. Salley, 9 M.J. 193 (CMA 1980). Citing its decision in United States v. Cotton, 10 M.J. 260 (CMA 1981), the Court found that the military judge erred by declining to present proposed instructions in United States v. Moss, 10 M.J. ___ (CMA 1981); and United States v. Wodrum, 10 M.J. ___ (CMA 1981). An application of the standard of review enunciated in Jackson v. Virginia, 443 U.S. 307 (1979) and In Re Winship, 397 U.S. 358 (1970) to the facts in these cases, however, convinced the Court that the error was harmless; Judge Cook concurred in the result, citing his separate opinions in Salley and Cotton.

INSTRUCTIONS: Curative

A witness' unresponsive answer referred to an incriminating pretrial statement allegedly made by the accused in United States v. Morris, ACMR 15125, pet. granted, 10 M.J. 334 (CMA 1981). The prosecutor readily conceded that the alleged statement was inadmissible, and the military judge immediately instructed the members to disregard the objectionable testimony. Later in the trial, he repeated the substance of the inadmissible

testimony as well as his instruction to disregard it. The defense counsel then moved for a mistrial, contending that the military judge compounded the initial error by reiterating the witness' testimony. The military judge denied the motion. The case presents the difficult problem of reconciling the possibly ineradicable prejudicial impact of testimony presented in open court, and the need to develop a judicial system sufficiently stable to withstand mistrials or reversals predicated on a witness' inadvertent misstatements.

TRIAL: Selection of Members

Various subordinate commanders at Fort Lewis, Washington, periodically routed court member nomination lists to the Office of the Staff Judge Advocate at that installation. The chief and subordinate trial counsel would then "cull" the lists of nominees and devise a recommended schedule of general and special court-martial panels, which the convening authority routinely approved. The prosecution "team" at the Staff Judge Advocate's Office also excused court-members and proposed replacements. In United States v. Cherry, ACMR 14212, pet. granted, 10 M.J. 326 (CMA 1981), the Court will determine whether a court-martial panel composed in that manner is improperly constituted. The procedure arguably accords the prosecution a virtually unlimited number of administrative preemptory challenges in addition to the one allowed at trial. The practice of allowing members of the prosecution "team" to extensively participate in decisions affecting the composition of court-martial panels before which they will be trying cases also creates the appearance of evil.

SENTENCING: Consideration of Accused's Perjury

In United States v. Grayson, 438 U.S. 41 (1978), the Supreme Court held that the sentencing judge may consider the perceived falsity of the accused's testimony on the merits as an aggravating matter in the imposition of punishment. The Court stated that the consideration of that factor does not violate due process or impermissibly chill the accused's exercise of his right to testify in his own behalf. The Court pointed out that a defendant's truthfulness or mendacity while testifying is probative of his attitude toward society and his prospects for rehabilitation. The Court of Military Appeals has granted review to consider whether Grayson should be applied to a court-martial composed of court members in United States v. Warren, 10 M.J. 603 (AFCMR 1981), pet. granted, 10 M.J. ____ (CMA 1981). The issue arose when the trial counsel, in his sentencing argument, urged the court members to consider not only the offenses for which the accused was convicted, but also the fact that their verdict reflected a finding that the accused had lied while testifying on the merits. The defense counsel did not object and the military judge presented no curative instruction. Appellate defense counsel will

urge that Grayson should not be applied to a court-martial composed of members. Alternatively, the court should be instructed not to impose a sentence which reflects punishment for perjury to the exclusion of other more relevant factors. For an excellent in-depth discussion of the issue see United States v. Warren, 10 M.J. 603, 604 (AFCMR 1981) (Kastl, J., concurring).

REPORTED ARGUMENTS

GUILTY PLEA: Providency

In the absence of a lawful apprehension, may a servicemember ignore a military policeman's request that he accompany the officer while the latter ascertains his leave status? In United States v. Glaze, ACFM 13965, pet. granted, 8 M.J. 177 (CMA 1979), argued 17 March 1981, a military policeman confronted the appellant, who was off post in Korea, and asked him to produce his identification card and pass. The appellant did not have a pass, and he agreed to accompany the military policeman to a nearby phone booth in order to contact his unit. He followed the officer momentarily and then fled, ignoring an order to halt. Because the appellant was not required to possess a pass, the Court must determine whether these facts disclose inconsistencies which render improvident his plea of guilty to resisting apprehension in violation of Article 95, UCMJ.

If specific intent is an element of a particular crime, "one cannot be convicted as a principal in the second degree to that offense unless he entertains the specific intent." United States v. Jackson, 6 USQMA 193, 19 CMR 319, 333 (1955). Appellate defense counsel in United States v. Crouch, ACFM 438503, pet. granted, 9 M.J. 176 (CMA 1980), argued 18 March 1981, relied on that principle in attacking the providency of the appellant's plea of guilty to larceny and housebreaking. During a colloquy with the military judge, the appellant stated that his roommate and a friend broke into the unit's motor pool and began to steal tools while he performed guard duty there. The appellant did nothing to frustrate their endeavor, and refrained from informing an investigating military policeman of the ongoing criminal activity. The military judge asked the appellant whether he understood that an individual serving as a guard has a duty to prevent crime, and is as guilty as the actual perpetrators if he stands by and does nothing while criminal acts are committed in his presence. The judge did not inform the appellant, however, that he was not culpable unless he shared the principals' criminal intent.

The appellate defense counsel contended that this omission renders the guilty plea improvident, and that while the military judge was not

required to fully acquaint the appellant with the doctrine of vicarious criminal liability, he should nevertheless have ascertained, through specific questions, whether the appellant shared the requisite intent. The Court questioned the government counsel's assertion that United States v. Care, 18 USMA 535, 40 CMR 247 (1969), is satisfied as long as there is sufficient evidence of record to support the findings; Judge Cook, indeed, stated that the government was, in effect, urging the Court to overrule that decision. In his rebuttal, appellate defense counsel argued that Care insures that guilty pleas are knowingly and intelligently entered in compliance with Article 45 of the Code.

TRIAL COUNSEL: Misconduct

An accused's due process rights dictate certain limitations on the trial counsel's responsibility to conduct pretrial investigations of cases pending courts-martial: at some point, the overly zealous performance of that responsibility may transgress ethical standards³ or violate Article 31, UCMJ. Appellate defense counsel contend that the prosecutor's conduct reached that point in United States v. Clark, NCMR 790373, pet. granted, 9 M.J. 141 (CMA 1980). The trial counsel allegedly directed Naval Investigative Service agents to interview prospective witnesses -- who were also suspects -- without first advising them of their rights under Article 31, UCMJ. In addition, he coerced a witness into changing his testimony and obtained grants of testimonial immunity which he failed to deliver to the witness until trial and disclosed to the defense counsel only in response to a motion at that proceeding. The opposing appellate attorney disputed this interpretation of the facts and contended that the prosecutor merely discharged his affirmative duty to aggressively represent the government. The Court will determine whether the prosecutor was disqualified from trying the case because of his actions.

The Court will review another allegation of prosecutorial misconduct in United States v. Fuentes, 8 M.J. 830 (ACMR 1980), pet. granted, 9 M.J. 36 (CMA 1980). The government's chief witness in that case had previously been convicted as an aider and abettor for his role in the assault offenses pending against the appellant. At that earlier court-martial, the trial counsel characterized his testimony as "improbable, contradictory and . . . fabricated." He was immunized following his conviction and directed to testify against the appellant. His testimony at the second proceeding was substantially identical to the statements he made in his

³. See, e.g., ABA Standards Relating to the Prosecution Function and the Defense Function §§3-1 and 3-2.

own behalf at his court-martial. At the appellant's trial, the prosecutor did not allege that the government witness was an accomplice, and the defense counsel affirmatively declined an instruction on the credibility of accomplice testimony. Neither party mentioned the witness' prior conviction or the government's characterization of his testimony at the initial court-martial. The Army Court of Military Review found that the trial counsel's conduct constituted prosecutorial misconduct, but affirmed the findings and sentence because of a lack of prejudice. United States v. Fuentes, 8 M.J. 830 (ACMR 1980). The appellate defense counsel argued, however, that reversal is required if the misconduct could have made any difference in the result. The government appellate attorney countered that the lower tribunal's conclusion that the error was harmless is unavoidable in light of the evidence of the appellant's guilt.

The Court's questions focused on the witness' grant of immunity and the admissibility of his prior conviction as impeachment evidence. The Chief Judge challenged the government counsel's contention that the prosecutor's actions were justified because the members of the first court-martial, by convicting the witness of a lesser-included offense, indicated they believed his testimony. Judge Fletcher pointedly asked whether the trial counsel was attempting to hide the truth from the members in contravention of the Manual, and expressed concern over the government's argument that the trial judge had no duty to sua sponte instruct the members on the grant of immunity even though he was aware of that fact.

TRIAL: Court Members' Misconduct

It is axiomatic that a jury verdict cannot be impeached by evidence of intrinsic influences on juror deliberations. See Stein v. New York, 346 U.S. 156 (1952). Will this principle bar the Court from considering juror affidavits alleging that several members had been awakened during the alleged incident by police activity in connection with the charged offense, and had visited the crime scene during the court-martial? That is the government's contention in United States v. Bishop, AFMCR 22505, pet. granted, 9 M.J. 7 (CMA 1980), argued 25 February 1981. The appellate defense counsel maintained that the facts recited in the affidavit warrant a new trial; he argued that the court members' personal knowledge of noise on the night in question would cause them to doubt the appellant, who lived next door to the victim and testified, with his wife, that he heard nothing that night.

JURISDICTION: Standard of Proof

In United States v. Buckingham, 9 M.J. 514 (AFCMR 1980), pet. granted, 9 M.J. 241 (CMA 1980), argued 24 February 1980, the Court will determine the standard of proof which the military judge must apply when ruling on a motion to dismiss for lack of in personam jurisdiction. May an accused's susceptibility to the Code be characterized as an element of every offense charged under that statute, such that he is entitled to have it determined beyond a reasonable doubt by the trier of fact, or is the validity of an accused's enlistment an interlocutory matter which the military judge may resolve by applying a "preponderance of the evidence" standard? The appellant testified that his Air Force recruiter instructed him not to list several unresolved juvenile charges on his enlistment application. The recruiter acknowledged that the charges would have barred the appellant's enlistment, but stated that the latter never mentioned his criminal record. The military judge found that the government had presented "clear and convincing evidence" sufficient to defeat the motion. The Court's questions focused on the effect of the recent amendments to Article 2 of the Code. According to defense appellate counsel, the retroactive application of the amendments would violate the constitutional ban against ex post facto laws, since they broaden the class of individuals subject to court-martial jurisdiction, and in that sense render criminal various acts which were not punishable under the Code when they were committed. Opposing counsel contend that the amendments clarify, rather than alter, prior law and that they can therefore be applied retroactively.

EVIDENCE: Admissibility During Sentencing

Under Army Regulation 640-2-1, Personnel Qualification Records (18 November 1976), record custodians may enter notations of civilian convictions on an accused's Department of the Army Form 2-1. The form itself notes that any confinement resulting from such an offense should be listed in the "time lost" block on the document, and that an explanation of this entry should be provided elsewhere on the form. In United States v. Krewson, 8 M.J. 663 (ACMR 1979), pet. granted, 9 M.J. 36 (CMA 1980), argued 19 March 1980, the appellant's DA Form 2-1 reflected no lost time; however, the document did contain a notation of a prior civilian conviction of an offense committed after the charge for which he was court-martialed, and it was admitted into evidence, over defense objection, during sentencing. The Court will determine whether the absence of any "time lost" entry on the form barred the notation of the appellant's previous conviction, since that notation, according to the defense, may properly be included only in explanation of a completed "time lost" entry.

CHARGES AND SPECIFICATION: Sufficiency

The rigorous common law rules of criminal pleading have yielded, in modern military and civilian practice, to a pragmatic test under which specifications will be deemed sufficient if they enumerate the elements of the charged offense and apprise the accused of what he must be prepared to meet. In addition, the record must accurately reflect the extent to which an accused may plead former jeopardy in the event that further proceedings are taken against him for a similar offense. United States v. Sell, 3 USOMA 202, 11 CMR 202 (1953). See Hagner v. United States, 285 U.S. 427 (1932). Appellate defense counsel in United States v. Mayo, ACOMR 438554, pet. granted, 9 M.J. 142 (CMA 1980), argued 16 March 1981, contended that this test for sufficiency requires dismissal of a specification which fails to allege the jurisdictional basis for an incorporated federal statute. The specification alleged that the appellant communicated a bomb threat in violation of 18 U.S.C. §844(e) (1970), but failed to aver that he did so through an "instrument of commerce." The appellate defense counsel also argued that the conviction could not be sustained under Clauses 1 or 2 of Article 134, because the appellant did not learn that he had to defend against allegations that his conduct was prejudicial to good order and discipline or discrediting to the armed services until the military judge presented instructions on findings.

Government counsel maintained that the federal statute's reference to interstate commerce was not an essential element of the offense, and instead served only to vest federal courts with jurisdiction. Even if the omitted language is regarded as an essential element, the government counsel argued that by referring to the statute in the specification, the government incorporated the jurisdictional predicate by necessary implication; the trial defense counsel's motion to dismiss the specification can be characterized as a motion for a bill of particulars, which was satisfactorily answered by the trial counsel's offer of proof that the appellant used a telephone to communicate the threat. Finally, the government appellate attorney argued that the potential for harm to good order and discipline and the service's image is inherent in all violations of federal statutes, and therefore specific allegations to that effect are superfluous. During the argument before the Court, the Chief Judge posed a question which will undoubtedly remain insoluble regardless of the outcome of the case: in defending an offense charged under Article 134, how does a defense counsel effectively rebut allegations that his client's conduct is prejudicial to good order and discipline or discrediting to the service?

POST-TRIAL REVIEW: Service

Has United States v. Goode, 1 M.J. 3 (CMA 1975), outlived its usefulness? That was the question the judges raised in United States v.

Robinson, ACOMR 438276, pet. granted, 9 M.J. 120 (CMA 1980), argued 17 March 1981. The appellant was charged with selling heroin. He had excused his detailed military counsel before trial and was represented by a civilian attorney. A confidential informant, who admitted he had used and sold the drug, testified that he purchased heroin from the accused. The accused denied the sale. The testimony of defense witnesses contrasted the informant's unsavoriness with the reliability and honesty of the accused, who was not a drug user. The trial judge presented the standard instruction on witness credibility but did not sua sponte inform the members of the accused's trait for truthfulness. Affidavits filed before the military appellate courts indicate that the Staff Judge Advocate's Office encountered difficulties in serving the post-trial review on the civilian counsel and instead served the detailed military counsel, who had never established an attorney-client relationship with the accused. Five days later, the civilian counsel allegedly instructed a legal clerk in the Staff Judge Advocate's Office to serve military counsel. The civilian counsel did not recall this conversation and stated that he was not in his office when the call was allegedly made, but that the legal clerk may have spoken to one of his associates. The Army Court of Military Review found that the government made a good-faith effort to serve civilian counsel. But see United States v. Price, 7 M.J. 644 (ACMR 1979).

Noting that one of Goode's purposes is to reduce claims of error that can be corrected at the trial level, Judge Fletcher asked why any attorney couldn't identify errors of law, irrespective of an attorney-client relationship, just as appellate courts do. In apparent recognition of the many cases involving the issue of the proper service of the post-trial review, Chief Judge Everett questioned why the government was having problems performing that duty. The Chief Judge noted that in civilian practice it is unusual for a lawyer who has never spoken to an accused to act for the latter, and inquired whether an attorney who had not appeared at the trial would hesitate about representing a person without first contacting the civilian counsel or prospective client. The Chief Judge asked why the review was not mailed or delivered from the SJA's Office in Kaiserslautern to the civilian counsel in nearby Frankfurt. Pursuing the point, Judge Fletcher queried whether an attorney who had no previous connection with a case could adequately review the record and prepare a Goode response within one day as this counsel did. With regard to the military judge's failure to instruct specifically on the accused's truth and veracity, the Court seemed to agree that the accused was not entitled to introduce evidence of his good character for truth and veracity, since a witness' character must be attacked before it can be bolstered. However, the question remained whether this evidence later became relevant because both sides addressed it during questioning

and oral argument. Appellate defense counsel could cite no authority requiring a sua sponte judicial instruction on honesty and veracity.

The Court's close questioning reflected a marked dissatisfaction with the manner in which the defense bar and the government have been fulfilling their post-trial responsibilities under Goode. If a defense counsel is required to act for an individual who is not his client, he should clearly indicate that he never entered into an attorney-client relationship with the servicemember, and he should contest the government's failure to serve the counsel who represented the accused at trial. In Robinson, the Army appellate court found that the Staff Judge Advocate was unaware that the detailed military counsel had not entered into an attorney-client relationship with the accused. Further, civilian attorneys routinely serve documents on opposing counsel who may be hundreds of miles away; accordingly, substitute military defense counsel should highlight any failure to make reasonable efforts to serve, personally or by mail, the actual trial defense counsel.

Sixth Annual Homer Ferguson Conference

The Court of Military Appeals, in conjunction with the Military Law Institute, will sponsor the Sixth Annual Homer Ferguson Conference on Appellate Advocacy, on 21 and 22 May 1981, at The American University, Washington, D.C. The Honorable William H. Cook, Judge, U.S. Court of Military Appeals, and the Honorable Tim Murphy, Judge, Superior Court, District of Columbia, will deliver opening remarks on behalf of the Court and the Institute, respectively. Featured speakers at the Conference will include Professor Samuel Dash, Georgetown University Law Center; L. Clair Nelson, Member, ABA Commission on Evaluation of Professional Standards; the Honorable Robert M. Quinn, Judge, S.D., Ohio, and formerly Chief Judge, U.S. Court of Military Appeals; BG Wayne E. Alley, Judge Advocate, HQ, USAREUR and Seventh Army; Professor Eugene Gressman, University of North Carolina; and LCDR Ronald J. Beachy, Instructor, U.S. Naval Justice School, Newport, Rhode Island. They will address such topics as "Trends in Criminal Law Administration"; "Appellate Advocacy - A Trial Judge's View"; "Advocacy on Behalf of a Major Command"; "Changing Rules of the Appellate Advocate"; and "Recent Trends in Article 31 Rights of An Accused". The conference will conclude with a presentation entitled, "Case Flow Management", by the Court's legal staff. The registration fee is \$20.00. If you desire to register for the conference or would like additional information, contact James T. Harper, Conference Director, U.S. Court of Military Appeals, 450 E. Street, N.W., Washington, D.C. 20442.

CASE NOTES

Synopses of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

PRETRIAL AGREEMENT: Waiver of Rights

United States v. Krautheim, NCM 80-2887, ___ M.J. ___ (NCMR 6 Feb. 1981).
(ADC: LCDR Fayle, USN)

The accused entered into a pretrial agreement whereby he waived his right to have character witnesses residing outside of Japan personally appear at his trial in that country. Citing dictum in United States v. Hanna, 4 M.J. 938 (NCMR 1978), the Navy Court of Military Review held that this waiver was not contrary to public policy. But see United States v. Dawson, 10 M.J. 142 (CMA 1981).

POST-TRIAL REVIEW: Delay in Taking Final Action

United States v. Brock, NCM 80-1828 (NCMR 21 Nov. 1980) (unpub.).
(ADC: LT Howard, USNR)

The accused was tried on 9 March and 16 May 1979. The military judge authenticated the 76-page record of trial on 24 June 1979 and it was acted upon by the convening authority on 24 July 1979. For unexplained reasons, the supervisory authority did not act on the record until 3 June 1980. The Navy Court of Military Review described the delay as "deplorable," but held that dismissal was not warranted "under the present state of the law," and affirmed the findings and sentence. See United States v. Banks, 7 M.J. 92 (CMA 1979).

TRIAL: Continuance

United States v. Allison, CM 439297 (ACMR 30 Jan. 1981) (unpub.).
(ADC: CPT Walinsky)

After discharging his civilian counsel, the accused retained another civilian attorney one week before his court-martial. When the trial convened, the retained counsel's associate moved for a continuance because the accused's attorney was in court elsewhere. The associate furnished a list of available trial dates, but the military judge denied the motion. The accused, then released his military counsel and proceeded to trial pro se. The Army Court of Military Review held that the military judge abused his discretion in denying the continuance. See United States v. Lewis, 8 M.J. 838 (ACMR 1980). The court set aside the findings and sentence and authorized a rehearing.

PRETRIAL PROCEEDING: Investigation of Charges

United States v. Davis, CM 439157 (ACMR 24 Feb. 1981) (unpub.).

(ADC: MAJ Nagle)

During the Article 32 investigation of an AWOL charge, the accused unsuccessfully moved for a continuance until his request for individual counsel could be acted upon. At trial, the defense alternatively moved to dismiss or sever the AWOL charge, without prejudice, and have that charge reinvestigated. The military judge denied the motion because the more serious offenses at trial had been thoroughly investigated and an AWOL charge is normally a "two or three document-type of case as far as presentation of evidence for the investigation." The Army Court of Military Review held that the judge's denial erroneously abridged a substantial pretrial right. The court set aside the finding of guilty as to the AWOL charge, dismissed it, and reassessed the sentence accordingly.

TRIAL: Striking of Testimony

United States v. Phaneuf, SPCM 14973, ___ M.J. ___ (ACMR 27 Feb. 1981).

(ADC: CPT Gray)

The appellant was convicted of indecent assault. In extenuation and mitigation, a female soldier testified about the victim's flirtatious behavior and provocative demeanor towards the appellant prior to the offense. On cross-examination, the trial counsel asked the witness whether she and the appellant were "drug buddies." The military judge overruled the defense counsel's objection, but the witness refused to answer the question. The trial counsel successfully moved to strike the witness' testimony, and the judge directed the court members to disregard it. The Army appellate court held that the military judge erred. Relying upon State v. Brown, 549 S.W.2d 336 (Mo. 1977), the court held, in essence, that an accused's constitutional right to call witnesses in his behalf outweighs the government's cross-examination right. The court found that the prosecution's question to the witness was not germane to her direct testimony and that striking her testimony constituted error of constitutional dimension. See Washington v. Texas, 388 U.S. 14, 19 (1967). See also Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Because there was a reasonable possibility that the adjudged sentence would have been less severe had the error not occurred, the court, noting that the appellant had served his sentence to confinement and was beyond his adjusted ETS, reduced the adjudged forfeitures and did not affirm the bad-conduct discharge, which had previously been suspended.

OFFENSES: Escape from Correctional Custody
United States v. McKenzie, SPCM 15255 (ACMR 26 Feb. 1981) (unpub.).
(ADC: MAJ Rhodes)

The appellant pled guilty to escape from correctional custody, in violation of Article 134, Uniform Code of Military Justice [hereinafter UCMJ]. An accused is not guilty of that offense unless he escapes from physical restraint imposed upon him. However, Army Regulation 190-34 provides that only moral restraint will be imposed in Army correctional custody facilities. The Army appellate court therefore found that the appellant providently pled guilty only to a breach of correctional custody, an offense which requires that an accused break any form of moral or physical restraint. See paragraph 213f(13), Manual.

OFFENSES: Disrespect to Noncommissioned Officer
United States v. Aguayo, NCM 80-3037, ___ M.J. ___ (NCMR 27 Feb. 1981).
(ADC: LCDR Davidson, USN)

The Navy appellate court noted that disrespectful language always consists of unsolicited, spontaneous, and voluntary statements which are independent of the subject matter of any interrogation and therefore held that disrespectful remarks uttered during police questioning are admissible as evidence of the disrespect regardless of whether rights warnings were issued. This decision departs from United States v. Lewis, 9 M.J. 936 (NCMR 1980), in which another panel held that statements obtained in violation of Article 31, UCMJ, which constitute a separate crime may be inadmissible as proof of that separate crime. See also United States v. Thompson, 47 CMR 565 (NCMR 1973).

GUILTY PLEA: Providence Inquiry
United States v. Hoaglin, NCM 80-0897, ___ M.J. ___ (NCMR 27 Feb. 1981)
(en banc).
(ADC: CPT Burnette, USMC)

In this case the Navy appellate court concluded that military judges must adhere to the 7-step procedure established in United States v. Williams, 4 M.J. 708 (NCMR 1977), in order to insure their compliance with the strict mandate of United States v. King, 3 M.J. 458 (CMA 1977), when conducting plea bargain inquiries. A military judge's failure to follow the obligatory procedure, which becomes applicable 60 days from the date of Hoaglin, will constitute error "that may well result in a prejudicial misunderstanding" on the part of the accused and warrant reversal.

OFFENSES: Communication of a Threat

United States v. Cannon, SPCM 14986 (ACMR 27 Feb. 1981) (unpub.).
(ADC: CPT Russelburg)

The accused was convicted, inter alia, of communicating a threat. He uttered the "threat" as he and a companion were returning from a pizza parlor where they had been involved in an affray with other soldiers. Both individuals were highly agitated, and the appellant was intoxicated. During an argument, the appellant asked the other soldier if he "wanted to get cut." At trial, the appellant's companion testified that, at the time the words were spoken, he and the appellant were friends, and that he knew the appellant did not have a knife and never believed he would cut him. The Army appellate court found this evidence insufficient to establish a threat, and characterized the language as "drunken braggadocio" falling within the category of "idle banter." See United States v. Gilluly, 13 USCMA 458, 461, 32 CMR 458, 461 (1963). The court dismissed the specification and reassessed the sentence.

GUILTY PLEA: Providence Inquiry

United States v. Williams, SPCM 15012 (ACMR 27 Feb. 1981) (unpub.).
(ADC: CPT Lukjanowicz)

The accused pled guilty to escape from confinement. During the providence inquiry, the military judge informed him of the elements of breach of arrest, a different offense under Article 95, UCMJ. The Army appellate court determined that the facts elicited from the accused during the inquiry supported the charged offense, and that the accused never thought he was under any form of restraint other than confinement. Utilizing the test of providency set out in United States v. Davenport, 9 M.J. 364 (CMA 1980), the court found no error.

CONFESSIONS: Voluntariness

United States v. Catt, CM 440112 (ACMR 27 Feb. 1981) (unpub.).
(ADC: MAJ Ganstine)

The accused contended that a law enforcement agent unlawfully induced a pretrial statement from him. He was advised of his right to counsel and his right against self-incrimination prior to the interrogation, waived those rights, and consented to a polygraph examination. The agent advised the accused that polygraph results were probably inadmissible at trial before conducting the examination. Later, the agent again interviewed the accused and informed him that the polygraph indicated he was lying. When the accused repeated his denial, the agent advised him to

"get it off his chest." He later confessed, and was escorted to the office of another agent who had attended the polygraph examination; that agent reminded the accused of his rights, but did not recite them in their entirety. The accused then signed a written confession. The Army appellate court held that the agent's actions were permissible, see United States v. McKay, 9 USCMA 527, 26 CMR 307 (1958), and did not amount to unlawful inducement. See United States v. Handsome, 21 USCMA 330, 45 CMR 104 (1972).

SENTENCE: Maximum Punishment

United States v. Lamoureux, CM 440300 (ACMR 27 Feb. 1981) (unpub.).
(ADC: CPT McCarty)

The appellant pled guilty, inter alia, to possessing a switchblade knife in violation of a general regulation. During the providence inquiry, the military judge advised him of the maximum permissible sentence under Article 92, UCMJ. The Army appellate court found this to be error, and held that the appellant, even if charged with violating a lawful general regulation, was only subject to the maximum punishment prescribed for carrying a concealed weapon in violation of Article 134, UCMJ. See footnote 5, paragraph 127c, Manual; United States v. Lowe, 4 USCMA 654, 16 CMR 228 (1954).

OFFENSES: Arson and Disorderly Conduct

United States v. Evans, SPCM 14837, ___ M.J. ___ (ACMR 27 Feb. 1981).
(ADC: MAJ Nagle)

The appellant was tried for arson under Article 126, UCMJ. The charge alleged that he "willfully and maliciously set fire to the commode seat" in the latrine of his barracks room. The military judge found the appellant guilty of disorderly conduct in violation of Article 134, UCMJ. On appeal, the appellant argued that disorderly conduct is not a lesser-included offense of arson. The Army appellate court disagreed. The court held that the elements of the Article 134 violation are fairly included within the Article 126 offense. The only distinction between the two offenses, both of which alleged the setting of a fire, was the substitution of the word "disorderly" for "willful and malicious." The court found that the act contravened "good order" and affected the "tranquility, security, and good government of the military service." See United States v. Snyder, 1 USCMA 423, 426, 4 CMR 15, 18 (1952).

OFFENSES: Malingering

United States v. Lawrence, CM 439789, ___ M.J. ___ (ACMR 26 Feb. 1981).
(ADC: CPT McAtamney)

The appellant was charged and convicted, inter alia, of intentionally allowing himself to be injured in order to avoid military duty. He was the subject of an investigation into the larceny of organizational property. In an effort to stop the investigation, the appellant and a companion concocted a plan whereby the latter would shoot the appellant with a shotgun. The appellant would then report that he was assaulted in an attempt to recover his property from the "true" perpetrator of the larceny, and would request that the investigation be halted in order to avoid further injury to himself or his family. The soldiers consulted medical books to determine the safest means of inflicting this injury. In addition, the appellant wore a heavy coat and stood behind a tree to protect his spine. A portion of the powder was removed from the shotgun shell and the appellant's companion fired at an angle to lessen the impact of the blast. The appellant remained in the hospital for five days and was thereafter placed on convalescent leave. The Army Court of Military Review was not convinced that these facts established that the appellant's purpose in injuring himself was to avoid "work, duty or service." See Article 115, UCMJ. The avoidance of duty was the unintended and unanticipated consequence of his attempt to halt an investigation. The court set aside the finding of guilty of malingering.

SEARCH AND SEIZURE: Articulate Suspicion

United States v. Foster, CM 439191, ___ M.J. ___ (ACMR 17 Mar. 1981).
(ADC: MAJ Johnson)

At the train station in Mainz, Germany, a law enforcement agent was questioning American soldiers arriving from Frankfurt late on a payday. The agent asked disembarking servicemembers about their knowledge of illegal drug activity in Frankfurt, a suspected "source city" of contraband. The agent observed the accused exit an inbound train from Frankfurt, pause momentarily, repeatedly glance over his shoulder in the agent's direction, and quicken his pace as he entered the main station. The agent stopped him, identified himself, and asked the accused for his military identification card, explaining that he was talking to people departing trains from Frankfurt and checking for soldiers carrying drugs. The accused stiffened slightly and said that he had only escorted his girlfriend to the Frankfurt train. Continuing his questioning, the agent concluded that the accused had recently used heroin and he apprehended him. Two packets of heroin fell from the accused's sleeve as the agent led him away. A subsequent search uncovered a small amount of marijuana. Advised of his rights, the accused admitted possessing the drugs. The

Army appellate court, with Chief Judge Rector dissenting, held that the initial stop was unlawful in view of the circumstances then known by the agent. The court found that the stop did constitute a seizure, see Brown v. Texas, 443 U.S. 47 (1979) and Terry v. Ohio, 392 U.S. 1 (1968), but concluded that it was not based on "reasonable suspicion" as required by the Fourth Amendment. See United States v. Cortez, 101 S.Ct. 690 (1981); Reid v. Georgia, 100 S.Ct. 2752 (1980) (per curiam); United States v. Mendenhall, 446 U.S. 544 (1980). The court held that the seized evidence was inadmissible, see Wong Sun v. United States, 371 U.S. 471 (1963), and set aside the findings and sentence.

OFFENSES: Disobedience of Noncommissioned Officer

United States v. Biccum, SPCM 15324 (ACMR 20 Mar. 1981) (unpub.).
(ADC: CPT Castle)

The appellant was convicted, inter alia, of disobeying his superior noncommissioned officer. He alleged that he did obey the order, albeit not immediately after it was issued. The evidence established that after the appellant was ordered to move trash to a collection site, he approached a second noncommissioned officer, stated that he would not obey the order, and proceeded to verbally abuse and threaten him before complying with the order. Because the order clearly required immediate compliance, the appellant's unreasonable delay in obeying it subjected him to conviction for failure to obey. See United States v. Woodley, 20 USCMA 357, 43 CMR 197 (1971); United States v. Squire, 47 CMR 214 (NCMR 1973). See also United States v. Vasant, 3 USCMA 30, 11 CMR 33 (1953) (order requiring time for preparation); United States v. Stout, 1 USCMA 639, 5 CMR 67 (1952) (order to be obeyed in future).

VERDICT AND FINDINGS: Finality

United States v. Wright, CM 439728 (ACMR 20 Mar. 1981) (unpub.).
(ADC: MAJ Ganstine)

After the government presented its case-in-chief, the military judge granted a defense motion for a finding of not guilty as to one of the charges. Prior to his argument on findings, the trial counsel contended that the evidence raised one of the dismissed charge's lesser-included offenses. The military judge withdrew his prior ruling and found that the evidence was sufficient to place the lesser-included offense in issue. He subsequently convicted the appellant of the lesser-included offense. The Army appellate court held that the military judge erred by withdrawing his initial decision to grant the motion to dismiss. The judge granted the motion without reservation or exception and his finding was final and irrevocable regardless of its correctness. See United States v. Hitchcock, 6 M.J. 188, 189 (CMA 1979). Only when a judge incorrectly recites the finding of the court, see United States v. Boswell,

8 USCMA 145, 149, 23 CMR 369, 373 (1957), or when the finding of not guilty is clearly intended to apply only to the greater offense charged, see United States v. Humbert, 14 CMR 520 (NBR 1953), may a finding of not guilty, or a ruling having that effect, be amended after announcement in open court.

OFFENSES: Unauthorized Absence

United States v. Wargo, NCM 80-2111, ___ M.J. ___ (NCOMR 17 Mar. 1981).
(ADC: LCDR Warden, Jr., USN)

Pursuant to his pleas, the accused was found guilty of unauthorized absence from his unit. During the providence inquiry, he stated that throughout the first month of his absence, he remained on the military installation and avoided detection. The military judge accepted the accused's guilty plea, finding that "casual presence" on post was not inconsistent with unauthorized absence. The Navy appellate court disagreed. Because the accused was present in his unit when the offense allegedly commenced, he could not be found guilty of that unauthorized absence. The court noted that the military judge could have found the accused guilty of absence from his assigned place of duty or dereliction in performing his duties, but he was not charged with either offense and they are not lesser-included offenses of unauthorized absence from one's unit. See generally United States v. Sears, 22 CMR 477 (CGBR 1956); United States v. Bieganowski, 12 CMR 815 (AFBR 1953).

FEDERAL COURT DECISION

EVIDENCE: Admissibility of Co-Accused's Confession

United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981).

The United States Court of Appeals for the Fifth Circuit held that an accused's custodial confession which implicates a co-accused cannot be introduced against the latter. The court found that the confession was not sufficiently reliable or trustworthy to qualify as an exception to the hearsay rule under Fed.R.Evid. 804(b)(3) [see Mil. R. Evid. 804(b)(3)]. Under that provision, declarations against penal or pecuniary interest may be admitted except that a statement "tending to expose the declarant to criminal liability and offered to exculpate the accused" is inadmissible unless corroborating circumstances "clearly" indicate the statement's trustworthiness. Noting that the rule's language does not specifically address the admissibility of a statement offered to inculcate an accused, the court found that, under appropriate circumstances, it contemplates the admission of such statements against the declarant's

penal interest. Utilizing the test in United States v. Alvarez, 584 F.2d 694 (2d Cir. 1978), and rejecting the "expansive" interpretation of the "against-interest" requirement found in United States v. Thomas, 571 F.2d 285, 288 (5th Cir. 1978), the court determined that because the confession was made in a custodial (and potentially coercive) setting, it lacked "indicia of reliability" and was inherently untrustworthy in "the eyes of the Sixth Amendment" insofar as it inculpated the accused. See Ohio v. Roberts, 100 S.Ct. 253 (1980); Dutton v. Evans, 400 U.S. 74 (1970); Douglas v. Alabama, 380 U.S. 415 (1965).

STATE COURT DECISION

MENTAL CAPACITY: Competence to Stand Trial
Morrow v. State, 423 A.2d 251 (Md.App. 1980).

During a hearing to determine his competence to stand trial, the accused alleged that he suffered amnesia and could not remember the details of the charged offense. The trial court held that amnesia did not render the appellant incompetent to stand trial. The appellate court agreed, and stated that competence to stand trial depends upon whether an accused can understand the nature of the proceedings or assist in his defense. The accused's inability to remember the circumstances of the charged offense did not prevent him from thoroughly understanding and participating in trial proceedings, discussing the charge with counsel, or making decisions in his case; it only denied him "the ability to testify personally to certain facts," a disability "shared in greater or lesser degree by all defendants." See Note, Amnesia: A Case Study in the Limits of Particular Justice, 71 Yale L.J. 109 (1961). See, e.g., United States v. Swanson, 572 F.2d 523 (5th Cir. 1978), cert. denied, 439 U.S. 849 (1978); United States ex. rel. Parson v. Anderson, 481 F.2d 94 (3d Cir. 1973), cert. denied, 414 U.S. 1072 (1973); United States v. Stevens, 461 F.2d 317 (7th Cir. 1972), cert. denied, 409 U.S. 948 (1972). See also paragraph 122d, Manual; United States v. Dunaway, 39 CMR 908 (AFBR 1968), pet. denied, 18 USCMA 293, 39 CMR 293 (1968); United States v. Watson, 18 CMR 391 (NBR 1954); United States v. Burton, 12 CMR 302 (ABR 1953). See generally United States v. Wisener, 46 CMR 1100 (CGOMR 1973); United States v. Schlomann, 36 CMR 622, 654-56 (ACMR 1966), aff'd, 16 USCMA 414, 37 CMR 34 (1966).

FIELD FORUM

Defense Appellate Division Responses to Readers' Inquiries

Servicemembers convicted by courts-martial frequently ask how long the military appellate courts take to complete their review.

The Clerk of Court's Office initially processes records of trial forwarded to the United States Army Court of Military Review (ACMR) pursuant to Article 66, UCMJ. This processing is normally completed in two days, and the record of trial and allied papers are then delivered to the Defense Appellate Division (DAD), where each case is assigned to an action attorney. Most defense briefs are filed within 30 days. Contested cases which pose numerous appellate issues or require affidavits may not be briefed within this period, but, in virtually all cases, defense counsel file assignments of error within 100 days. During 1980, the average period from receipt of the record at DAD to the filing of defense pleadings was 23 days and 33 days for guilty and not-guilty plea cases, respectively. Of the 2,089 cases briefed at DAD, only 18 required more than 100 days to file. The Government Appellate Division (GAD) has 30 days to file its answer in cases in which DAD raises assignments of error. Normally, GAD requests two or three 30-day enlargements, or extensions of time in which to file its answer before the ACMR. If DAD raises no issues and the record of trial is submitted on its merits, GAD files its answer within one week. During 1980, cases were pending, after the filing of briefs, before ACMR for an average of 26.28 days before that tribunal rendered its decision. The distribution of the ACMR decision and the general court-martial convening authority's responsibility to serve the decision on the accused is discussed in Army Reg. No. 27-10, Legal Services, Chapter 15 (C 20, 15 Aug. 1980). These actions may take 30-60 days.

After he is notified of the ACMR decision, the accused may file a petition for grant of review before the Court of Military Appeals (CMA) within 30 days. Appellate defense counsel typically respond to that Court's order for a brief in support of the petition within 20 days, and the government's answer is generally filed 20 days thereafter. Under Article 66(c), UCMJ, the Court must then act upon the petition for grant of review within 30 days. If CMA denies the petition, the appellate process is complete. If, on the other hand, CMA grants the petition, the appellant must file a final brief within 20 days. The same timetable applies to the submission of the government's response. The appellant may then file a reply within 10 days. Many variables affect the length of time during which a granted case is under review before CMA, although that tribunal usually announces its decision within four months. The Clerk of Court's Office surveyed cases with an initial filing date after 1 January 1981, and reports that the average period from CMA's receipt

of a petition for grant of review until the announcement of its decision to grant or deny the petition is 70 days in cases submitted on their merits, and 77 days in cases raising errors. The average interval between CMA's decision to grant review and the publication of its opinion is 331 days.

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

DC: It is my understanding . . . in talking to the prosecutor, that [the accused] would be released from confinement.

MJ: Well, is that a sub rosa agreement?

DC: That's what I have believed it to be.

DC: Why did you go AWOL?

ACC: I just wanted out of the Army.

DC: Well, why?

ACC: I am used to working for a living.

(Accused, in extenuation and mitigation, after being convicted of 27 of 37 specifications of larceny from collections at chapel services).

Q: What were your plans for the future prior to committing this offense?

A: I had already started paperwork for OCS. I have been encouraged by Chaplain C _____. I have been encouraged by several chaplains to go to OCS, so I had taken a test and had passed the test and prepared the paperwork for OCS. I had also planned on, after getting out, going to school to complete a Masters and coming back in as a General Officer. But because of the ordeal and what has happened, this has put a tarnish upon those plans.

MJ: Does the defense have any objection to the court members getting the [flyer with the word] marihuana spelled with an "h"?

DC: No, Your Honor. Perhaps they won't know what it is that way.

(Trial counsel argument on sentencing).

TC: For all these reasons, Your Honor, the Government argues for the maximum punishment imposable by law and this court.

MJ: Hundred and forty years?

TC: Hundred and forty years, sir.

TC: Can I have a brief recess, Your Honor?

MJ: Are you going--are you figuring on more cross-examination?

TC: I am.

MJ: How much more?

TC: I don't know. I want to talk to my psychiatrist.

MJ: You want to talk to your psychiatrist? Do you need a psychiatrist? Well, we'll recess for ten minutes.

MJ: Okay, Private M _____, I want to ask you, do you desire to testify here today?

WIT: As long as it doesn't incriminate me.

DC: With regards to challenge of the military judge, there is one matter I would like to put on the record. As you may note, the accused's hair is rather long . . .

MJ: It seems about the same length as yours.

DC: Yes, my hair is rather long too. However, I'm not the one that's going to be sentenced today.

