

U.S. Army Defense Appellate Division

Vol. 10, No. 3
May-June 78

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THE ADVOCATE

Volume 10, Number 3

May-June 1978

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Cite as: 10 The Advocate [page] (1978)

TRANSITION

ADAMKEWICZ NEW CHIEF OF DAD AS CLARKE SHIFTS TO USATDS

As announced in the last issue of The Advocate, on 15 May 1978 a test of a separate defense structure was begun within the Army. On that date, the U.S. Army Trial Defense Services (USATDS) was organized. While we certainly welcome this test program, unfortunately this new organization will take from us the highly respected Chief of the Defense Appellate Division, Colonel Robert B. Clarke. Colonel Clarke has been Chief of DAD since January 1977, and has had a significant impact on the Division. He has improved internal DAD administration and created a word processing center, and, as a partial result, seen the backload of cases decline. Of more immediate impact to The Advocate, he has been instrumental in assisting the Editorial Board with its efforts to improve the quality and diversity of the articles, circulation procedures, and administration of the journal. All of this was accomplished without impinging in any way on the traditional independence and high morale of the individual DAD attorneys. We wish Colonel Clarke and USATDS the best.

On 1 May 1978, Colonel Edward S. Adamkewicz, Jr. assumed the position as Chief of DAD. Colonel Adamkewicz has an extensive criminal law background, to include assignment as Chief, Criminal Law Division, TJAGSA, and Executive Officer, Defense Appellate Division. Prior to his current assignment to DAD, he was Chief, Special Litigation Branch, Office of The Judge Advocate General. Colonel Adamkewicz attended the University of Illinois, received his law degree from DePaul University, and has a master's degree from Southern Illinois University. We welcome him on his return to DAD.

* * * * *

CIVILIAN ATTORNEY SYMPOSIUM PLANNED

As military counsel are well aware, the Uniform Code of Military Justice authorizes a servicemember charged with the commission of a court-martial offense to be defended by a civilian attorney at no expense to the United States government. This representation may be either with or without military associate defense counsel. A significant number of soldiers choose to exercise this right. This relatively frequent occurrence has led the Editors of The Advocate to plan a series of articles examining the role of the civilian attorney in the military justice system.

We have already solicited and received comments and suggestions on this subject from our civilian subscribers. If any military counsel have thoughts on the idea, we would be pleased to hear them. What topics should we examine? Should these articles be presented from both the military and civilian points-of-view? As always, the Editorial Board seeks your advice; please contact the project officer, Captain Larry C. Schafer (Autovon: 289-2247).

NEW VITALITY FOR THE CONVENING AUTHORITY

Major Benjamin A. Sims, JAGC*

It has been standard practice in many jurisdictions in recent years for convening authorities to personally detail court members, yet allow the staff judge advocate or others to appoint the military judge and counsel. Thus, in many cases, the convening authority may not have been aware which judge or counsel was placed on the convening order. In United States v. Newcomb, 5 MJ 4 (CMA 1978), this practice has now been declared to be contrary to the expressed dictates of Congress and the Uniform Code of Military Justice.

Newcomb, United States v. Ware, 5 MJ 24 (CMA 1978), and United States v. Ryan, 5 MJ 97 (CMA 1978), cases decided recently by the United States Court of Military Appeals, indicate that the convening authority's role in detailing the military judge, counsel, and court members is more than just ministerial; it is a jurisdictional requirement and cannot be delegated. 1/ This article will briefly analyze these cases, assess their impact, and suggest methods by which trial defense counsel can effectively use them.

*Presently the Executive Officer of Defense Appellate Division, Major Sims previously served with the 82d Airborne Division at Fort Bragg, North Carolina, as trial counsel, legal assistance officer, and deputy staff judge advocate. He has a B.A. and J.D. from the University of Arizona, is a graduate of the 74th JAG Basic Class and the Infantry Advanced Course, and has completed the JAG Advanced Course.

1. These decisions are based on Article 25(d)(2), Uniform Code of Military Justice (hereinafter UCMJ), which provides that "the convening authority shall detail" the members of the court-martial; Article 26, UCMJ, which directs that the convening authority shall detail a military judge, and Article 27(a), UCMJ, which states that "the authority convening the court shall detail trial counsel and defense counsel, and such assistants as he considers appropriate." The Judge Advocate General sent a message to SJAs in 1975 and 1978 informing them of these non-delegable functions. See messages DAJA-CL, 031453Z June 1975, and 081000Z May 1978.

Newcomb held that the convening authority could not delegate to others, such as the staff judge advocate, his power to detail the military judge and counsel to a court-martial. The Court held that failure of the convening authority to personally detail the military judge and counsel caused the court-martial to lack jurisdiction. 2/ The language of the decision leaves it somewhat uncertain whether there is also a jurisdictional defect when there is solely a failure to properly detail

2. In Newcomb, the convening authority was generally aware of the counsel who normally represented the parties in courts-martial, and was familiar with the military judges who were stationed within his command. The judiciary assigned the particular judges to each case.

It is the author's opinion, based on his experience, that the procedure used by Newcomb's convening authority was basically the same as that in practice in the vast majority of Army jurisdictions. The procedure was essentially as follows:

The appointment of counsel was delegated to the staff judge advocate by the convening authority, unless there was a question of the availability of counsel. Defense counsel was always detailed by the staff judge advocate from the jurisdiction to which defense counsel was "assigned." The military judge would be detailed automatically by the staff judge advocate's office when it was learned who had been appointed by the Chief Circuit Judge to handle the case. The convening authority merely referred the case to the most current existing order on which the members, military judge and counsel appeared, or vicing orders were prepared to reflect the personnel who would be present in court. See United States v. Newcomb, supra, note 1, at 5.

counsel. 3/ If such inaction is not jurisdictional, the error is required to be tested for prejudice to the accused. 4/ Until this issue is clarified, defense counsel can cite Newcomb to argue that failure to properly detail counsel is jurisdictional in nature. Counsel should also be prepared to show prejudice, if possible.

In Ware, supra, a military judge alone trial, the Court held that a proper authority must modify any convening order in writing prior to the completion of the trial proceedings. 5/ When Ware is read in conjunction with Newcomb, supra, it can be argued that the only proper authority to modify a convening order must be the convening authority.

United States v. Ryan, supra, reemphasized the convening authority's role in detailing jurors. The Court held that, although the convening authority personally selected both officer and enlisted personnel as jurors, it was impermissible

3. See, e.g., United States v. Wright, 2 MJ 9,10 (CMA 1976), which held that trial counsel are not an integral part of a court-martial and that the lack of a qualified trial counsel at a general court-martial did not constitute an error of jurisdictional magnitude. 2 MJ at 10. But see United States v. Carey, 23 USCMA 315, 49 CMR 605 (1975). It is not clear how much is left of Carey, which had held that it was a jurisdictional defect not to name counsel for the government, but that the error was cured by an affidavit from the convening authority while the case was on appellate review. Curiously, Carey was cited in United States v. Ware, supra, note 1, at 25, and Ware was subsequent to both United States v. Wright, supra, and United States v. Newcomb, supra, note 1. But see United States v. Ryan, 5 MJ 97, 101 at Fn. 5 (CMA 1978).

4. Id., at 10; accord Swaim v. United States, 165 U.S. 553, 561 (1897). Such an error must "materially [prejudice] the substantial rights of the accused." Article 59(a), UCMJ, §859(a) (1968).

5. See United States v. Ware, 5 MJ 24 (CMA 1978). In a per curiam opinion, with concurrence by Judge Cook, the Court determined that a signed modification to the convening order "executed by the proper authority" is necessary before a court-martial has jurisdiction to proceed. 5 MJ at 25. Judge Cook, however, stated the majority position to be "that the failure to confirm an oral order of substitution with a written order before completion of the trial proceedings is fatal error." 5 MJ at 26.

for someone other than the convening authority: (1) to divide the list of officers selected by the convening authority into two separate panels; (2) to decide which of two outstanding jury panels would hear a case; (3) to withdraw a case from a court to which it had been previously referred; (4) to re-refer a case to a new court after the 90 day term for the old court was ending; (5) to decide which officers to retain and excuse when drafting a new order for the purpose of adding enlisted men to the court; (6) to decide which enlisted men, from a list previously selected by the convening authority, would be added to preselected officer panels when an accused requested enlisted membership; and (7) to detail the military judge and counsel. It is significant that Ryan was tried by judge alone and that fact could not cure the failure of the convening authority to determine the precise membership of the court as regards jury members. The court reiterated that the convening authority must personally determine the composition of the court in the convening order under which the accused is tried. In other words, the convening authority should have specifically referred the accused's case to a specific court-martial convening order rather than just referring the case to trial by general or special court-martial.

Counsel Tactics

In light of Newcomb, Ware, and Ryan, it is necessary for trial defense counsel to specifically determine how the military judge, counsel, and members are selected for each trial. The law is now settled -- the convening authority must personally detail these individuals. It is not error for the convening authority to receive assistance in selecting them, but it must be the convening authority's personal decision, "regardless of who played what role in helping him to make that decision" 6/

The first step to determine if a detail problem exists is to read the pretrial advice and other allied papers from which the convening order may have been derived. Some jurisdictions advise the convening authority in the pretrial advice that they recommend the following named individuals be detailed as judge, counsel, and members, or that the accused's case be referred to a specific convening order. Other jurisdictions indicate in a separate document written before trial that the convening authority approved the selection of specified court

6. United States v. Newcomb, supra, note 1, at 7.

personnel for the trial of the accused. These practices appear to be legal, as long as the decision to detail is made by the convening authority. Defense counsel should be particularly alert to a potential problem where persons other than the convening authority sign the convening order, and there is no indication in the allied papers that the convening authority made the decision to detail. In some cases the convening authority may have been orally advised of the recommendations. Again this practice appears to be proper, as long as the convening authority has made the final decision personally and his decision is reduced to writing and made a part of the record of trial or there is testimony to that effect.

Where investigation discloses a failure to detail properly judge, counsel, or members, defense counsel should move to dismiss due to a lack of jurisdiction. Although an objection will probably result in a re-referral, thus eliminating the error, defense counsel should not intentionally fail to raise this issue unless he or she has an arguable position that jurisdiction does exist. 7/ Additionally, in trials where the convening orders are oral, or where an oral order attempts to modify a written order, 8/ counsel should object to proceeding further because of a lack of jurisdiction. 9/

In addition to the jurisdictional aspects of proper detail, counsel may be able to ask the convening authority to replace a judge before trial, and possibly during trial when good cause exists to do so. This tactic may be helpful where a military judge should not sit on a case due to lack of impartiality or a conflict and the judge is expected to rule against counsel. The power of the convening authority to detail judges can act as a double-edged sword since the convening authority could conceivably detail judges to particular cases because of their sentencing or conviction records. Counsel must be alert to this possibility, although hopefully it will never arise. The belief that the convening authority has some discretion in detail stems from the fact that if the convening authority must personally detail the judge, then he or she may refuse to detail any particular judge. This interpretation does not conflict

7. See Code of Professional Responsibility (ABA), note 3, at 29 (1971).

8. See Article 22-29, UCMJ.

9. Cf. United States v. Ware, supra, note 1, at 25.

with Army Regulation 27-10, paragraph 9-7. 10/ Although it appears that the convening authority cannot detail an unqualified judge to a court-martial based on Article 26, UCMJ, the convening authority may not have to detail automatically a judge just because the judiciary has so informed him of his assignment to a case.

In any event, jurisdiction is never waived and can be raised at any time. 11/ Thus, the detail issue can be alleged for the first time by appellate counsel. At the appellate level, however, it appears that more is required than just a mere assertion of lack of jurisdiction. 12/ Therefore, where this jurisdictional problem comes to trial defense counsel's attention subsequent to trial, appellate counsel should be immediately notified and affidavits or other substantiating documents forwarded thereafter. Trial defense counsel should review all their cases still pending appellate review to determine if any of these errors exist. Additionally, for recently tried cases, counsel should raise such errors in the Goode review.

Most of the initial problems in this area will concern cases which have already been completed and those which are pending trial. Defense appellate attorneys are presently attempting to determine which jurisdictions had procedures that were violative of the Newcomb, Ware, or Ryan mandates. In this regard, a letter was sent to senior defense counsel in all general courts-martial jurisdictions asking for information concerning the procedure for detailing court-martial personnel. With this information, appellate defense counsel will be better able to pursue the issue when applicable. The attorney coordinating these activities in the Defense Appellate Division is Captain Kevin O'Brien (Autovon 289-1087 or commercial 202/756-1087).

Although it is not clear at present how many of the jurisdictions in the Army have had Newcomb, Ware, or Ryan problems, or still have these defects, trial defense counsel should be alert to these issues. The Court of Military Appeals' action is clear -- a convening authority must personally select the precise membership of each accused's court-martial. Counsel should be prepared to hold him to that responsibility.

10. See Army Regulation No. 27-10, Military Justice, Paragraph 9-7 (C17, 15 August 1977).

11. See United States v. Frye, 49 CMR 703,704 (ACMR 1975); Paragraph 68b(1), Manual for Courts-Martial, United States, 1969 (Revised edition).

12. See United States v. Frye, supra, note 11.

STANDING: THE AFTERMATH OF HARRIS

by Captain Larry D. Anderson, JAGC*

As a limitation upon the operation of the exclusionary rule, the requirement of standing precludes an individual from asserting vicariously the Fourth Amendment rights of another. Thus, while the "constable may blunder" in Justice Cardozo's memorable phrase,¹ it does not always follow that his prisoner will go free. It is not enough to show that the constable did, indeed, blunder; an accused must also demonstrate that he is a proper person to benefit from that blunder - that his constitutional rights have been violated. To put this requirement in the language of the United States Supreme Court, "one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960).

The purpose of this article is to review the "law of standing", as espoused in the very recent case of United States v. Harris, 5 MJ 44 (CMA 1978), in the context of related Supreme Court and Court of Military Appeals opinions.

At the outset, it appears necessary to establish the factual setting of Harris as a means to better comprehend the significance of the opinion. Harris, a service member, was a passenger in an automobile which sought to enter a military installation. The military policeman who was searching incoming vehicles asked the driver to pull off the road and have everyone alight from the car. As the passengers were exiting the vehicle, Harris dropped two bags of marijuana which formed the basis for the charge of possession at his subsequent court-martial. In a decision primarily concerned with the

* Captain Anderson graduated with a B.S. in Business Administration (1967) and J.D. (1970) from University of Nebraska, and attended the 58th Basic Course and 24th Advanced Course. He has served at Fort Dix as a defense counsel, and in Vietnam and Hawaii as a procurement attorney. Captain Anderson is presently a Branch Chief in DAD.

1. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

legality of gate searches,^{2/} the Court specifically concluded that Harris had the requisite standing to challenge the propriety of the search.

The Federal rules on standing to suppress illegally seized evidence stem from Jones v. United States, *supra*. There, Mr. Justice Frankfurter enunciated, for an unanimous court,^{3/} a two-fold test for standing. First, "anyone legitimately on [a] premise where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.*, 362 U.S. at 267. Secondly, anyone charged with an offense, where possession of the thing seized is an element of the crime, need not show any "interest in the premises searched or the property seized" in order to establish standing to challenge its admission. *Id.*, 362 U.S. 263-265. This newly established test was in sharp contrast to the law before Jones, which had austere standing to those individuals who could prove a proprietary interest in the place searched or properly seized. See United States v. Bass, 8 USCMA 299, 24 CMR 109 (1957).

In Harris, the Court of Military Appeals has aligned itself with most civilian jurisdictions by adopting the prevailing Jones test for standing. The Court stated: "[s]tanding may be shown from legitimate presence at the scene of the search; ownership of, or possessory interest in, the place or thing searched; or being charged with an offense having possession of the seized item at the time of the search as an essential element." United States v. Harris, *supra*, 5 MJ at 46. See also Paragraph 152, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

2. In many ways, United States v. Harris, *supra*, is similar to United States v. Simmons, 22 USCMA 288, 46 CMR 288 (1973). Both cases involved a search at the entrance to a military installation. Although Simmons occurred in Vietnam, the apparent distinction between the two cases turns upon the ownership of the vehicle. On the other hand, the dictum in Simmons suggests the holding in Harris. See United States v. Simmons, *supra*, 46 CMR at 292.

A question on standing not addressed by the court concerns the issue of "abandonment." If the individual has clearly abandoned contraband when police are on the verge of apprehending him, he loses his standing to challenge an illegal search or seizure. Abel v. United States, 362 U.S. 217 (1960); Lee v. United States, 221 F.2d 29 (D.C. Cir. 1954).

3. Mr. Justice Douglas joined in both the holding and the opinion of the Court on the question of standing, but dissented from the distinct and separate holding that the warrant application under review showed probable cause.

I. AUTOMATIC STANDING.

The pre-Jones restrictions on who had standing were especially harsh on individuals who were charged with a possession offense. Where an accused in order to assert standing had to prove a proprietary interest in the item he was charged with possessing, he was confronted with a Hobson's choice because such admission could then be used by the government at the trial on the merits to establish possession. Jones removed the accused from the horns of this dilemma by conferring "automatic standing" on one charged with a possession offense.

For the first time, the Court of Military Appeals in Harris has clearly adopted the concept of "automatic standing."^{4/} The manner of the Court's decision was somewhat surprising. To reach its holding, the Court, sub silentio, overruled the holding of United States v. Aloyian, 16 USCMA 333, 36 CMF 459 (1966), and adopted the dissenting opinion of Judge Ferguson therein.^{5/} The Court's adoption of the concept of "automatic standing" was, however, not without some limitation. First, the Court explained that "[t]he requirement of standing applies separately to each offense, so there would be no automatic standing as to a charge of conspiracy to possess drugs, but there would be automatic standing to a corresponding possession charge." United States v. Harris, supra, 5 MJ at 47. Secondly, the Court stated that "[a]cquittal of a possession charge divests one of any automatic standing (as to other offenses) which may have existed before the acquittal." Id.

Another disturbing feature about COMA's adoption of the "automatic standing" concept is its future longevity. Eight years after Jones, the Supreme Court cast some doubt on the need for such a standard with its decision in Simmons v. United States, 390 U.S. 377 (1968). There the Court held that an accused's testimony at the suppression hearing could not be used against him at trial. Because of Simmons, it can be argued

4. See generally Gilligan, "Expectation of Privacy: A Two-Edged Sword as to Standing", The Army Lawyer, DA Pamphlet 27-50-9, p. 4 (September 1973).

5. It is interesting to note, in passing, that the Court's majority opinion in Aloyian held that "automatic standing" was not "an absolute and independent basis of standing to object" Id., 36 CMR at 497.

that the reason which gave rise to the "automatic standing" rule no longer exists and, as a result, it should cease to exist. In fact, in Brown v. United States, 411 U.S. 223 (1973), the Supreme Court intimated that the Jones rule on automatic standing served no useful purpose. However, because neither Simmons nor Brown involved a possession offense, the Court expressly reserved for a future day the question of whether to overrule Jones. Id., 411 U.S. at 228.

II. ACTUAL STANDING

Although standing is automatic where possession of the item is an essential element of the offense, it is necessary in other situations to establish "actual standing" by a showing of presence at the scene of the search, or by claiming a proprietary interest in the premises searched or a possessory interest in the articles seized. United States v. Harris, supra, 5 MJ at 47. Further, the defense must establish actual standing at the time the objection to evidence is made. Id.

A. RELATIONSHIP TO THE SITUS OF THE SEARCH: POSSESSORY INTEREST OR LEGITIMATE PRESENCE.

In application of the traditional rules of standing, the Manual provides that the accused has standing to object to a search of his own person or property. Paragraph 152, MCM, 1969. The owner of a building, for example, always has a sufficient possessory interest in it for standing purposes. Alderman v. United States, 394 U.S. 165 (1969). Although the military appellate courts since Jones have not required the accused to show actual ownership as a prerequisite to standing, they still require some interest in the property to justify standing. Thus, for example, a bachelor who occasionally lived with a woman who rented an off-post apartment, and had complete access to the apartment, kept clothing, shaving equipment, and other personal items there, and periodically gave the woman small sums of money for necessities, was determined to have sufficient interest in the apartment to have standing. United States v. Mathis, 37 CMR 777 (AFBR 1966).

Where an accused could not establish standing by showing a possessory interest in the premises searched, Jones added another interest to be protected by the Fourth Amendment - that of being legitimately on the premises at the time of the search. The Manual has adopted this portion of Jones by stating that evidence obtained "as a result of an unlawful search of another's premises on which the accused was legitimately present" is inadmissible. Paragraph 152, MCM, 1969.

Generally, a trespasser lacks standing. The Jones test appears to compel this result, for a trespasser can scarcely be said to be legitimately on the premises. In application of the rule, the military courts have held that a guest in an on-post room at the time of the search has standing to object to the search of the room. See e.g. United States v. Weckner, 3 MJ 546 (ACMR 1977). Likewise, a rider in an automobile has standing to object to a search of an automobile in which he was an occupant. See e.g. United States v. Childress, 2 MJ 1292 (NCMR 1975).

B. RELATIONSHIP TO THE PROPERTY SEIZED.

The Manual also provides that the accused has standing to object to the seizure of his property "upon an unlawful search of anyone's property, unless the presence of the property of the accused was due to trespass." Paragraph 152, MCM, 1969. Standing is based upon the accused's interest in the property seized; it may be conferred without showing actual presence at the time of search or an interest in the place searched. For example, in United States v. Dingwell, 1 MJ 594 (ACMR 1975), an accused had standing to contest the search of his shaving kit on an Air Force medical evacuation flight.

The last proviso in this paragraph of the Manual, which established that presence of the property at the time of the seizure must not be trespassory, was the result of United States v. Aloyian, supra. There, the majority held that the accused had no standing to contest the legality of a search of a roommate's locker because they found the accused did not have permission to use the locker.

C. EXPECTATION OF PRIVACY.

Although Jones substantially modified the property concept of standing, other more gradual and evolutionary changes have occurred with the Supreme Court's adoption of an expanding right to privacy. The Court's decisions in Katz v. United States, 389 U.S. 347 (1967) and Mancusi v. DeForte, 392 U.S. 364 (1968) established the principle that the Fourth Amendment protects persons rather than property. In Katz, the Court held that the government's electronic surveillance of a telephone booth violated the privacy upon which the petitioner justifiably relied, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. DeForte, on the other hand, concerned the search of an office. Although DeForte was lawfully in the office during the search, the Court developed a

different rationale (i.e., not the "legitimately on the premises" rule) to support the conclusion that standing existed. Citing Katz for the proposition that Fourth Amendment protection "depends not upon the property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion," the Court reasoned that DeForte had a sufficient interest in a shared office to contest a search conducted by third parties. The Court explained that he could "reasonably have expected [that] only [office personnel] and their personal guests would enter the office, and that records would not be touched except with their permission" Mancusi v. DeForte, supra, 392 U.S. at 368-369. Compare, United States v. Weshenfelder, 20 USCMA 416, 43 CMR 256 (1971) (search of a Government desk).

The "expectation of privacy" concept recognized by Katz and DeForte has been applied by the military courts. For example, an accused had standing to contest a search of an air conditioning duct in his barracks room, where the duct was an integral part of his room, was accessible only from the room and not from any common areas, and the search was performed totally within the room. United States v. Miller, 50 CMR 303 (ACMR 1975), affirmed, 1 MJ 367 (CMA 1976).

The Court of Military Appeals in Harris intimates that one who has a reasonable expectation of privacy has standing. United States v. Harris, supra, 5 MJ at 46.6/ The question that is left open is whether the "expectation of privacy" concept supplements the existing standing rules, or provides an entirely new basis for standing. The former case appears likely. This conclusion is based upon the idea that standing should not be strictly related to an interest in property. In fact, the "expectation of privacy" concept may be a further amplification of the "legitimately on the premises" concept. Thus, an individual may have standing to contest a search conducted by a third party, but not where the actual occupant of a room has given consent to the authorities to search. United States v. Hernandez-Florez, 50 CMR 243 (ACMP 1975); Cf. United States v. Garcia, 3 MJ 1090 (NCOMR 1977) (consent from driver to search an automobile).

6. It is interesting to note that the cited opinion for this proposition, United States v. Nunn, 525 F.2d 958 (5th Cir. 1976), stands for the idea that an owner by his conduct may sacrifice his privacy interest in property, and therefore be denied standing.

III. THE CALIFORNIA RULF

Unlike the Federal courts, the California courts impose no standing requirement on those against whom allegedly illegally seized evidence is offered. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). The scope of the standing rule is determined by the rationale of the exclusionary rule. If the main purpose of the exclusionary rule is to deter police misconduct (United States v. Calendra, 414 U.S. 338 (1974)), then the rule should exclude all illegally seized evidence without inquiry into whose constitutional rights were violated. However, the Supreme Court has repeatedly refused to abolish standing requirements. See Alderman v. United States, *supra*. The Court of Military Appeals has concurred in this judgment, for it indicated in Harris that the fact of an illegal search was not enough to establish standing.

IV. CONCLUSION

The standing rule expresses the balance between the desire to deter police misconduct and the need to protect society by convicting wrongdoers. Although this compromise is subject to theoretical criticism, the Court of Military Appeals in Harris has committed itself to the prevailing civilian view on the standing rule.

For an appellant's conviction to be reversed because his Fourth Amendment rights have been violated, a court would need to come to the following conclusions: that appellant had "standing" to raise the claim; that there was in fact an illegal search and seizure; that the introduction of the illegally seized evidence at trial was error; and that such error was not harmless.

The Court of Military Appeals has actively questioned the propriety of military searches and seizures. See e.g. United States v. Thomas, 1 MJ 397 (CMA 1976); United States v. Roberts, 2 MJ 31 (CMA 1976); United States v. Ezell, Docket No. 31,304, petition granted, 23 December 1975 (neutral and detached magistrates) and United States v. Hood, Docket No. 35,211, petition granted, 15 February 1978 (oath or affirmation). With the legality of searches and seizures subject to review, the Government will increasingly consider foreclosing the issue by challenging the accused's standing to object. Trial defense counsel may anticipate litigation of the accused's standing to object to illegal searches and seizures and should be prepared to meet such a challenge.

JURISDICTION OVER OFF-POST OFFENSES: AN UPDATE

Captain Malcolm H. Squires, Jr., JAGC*

Recent judicial activity in subject matter jurisdiction over off-post offenses committed by servicemembers has centered on defining the two most bothersome Relford¹/criteria: a potential threat to the military post and the flouting of military authority. The latest cases dealing with "a threat to the military post" have focused on the use of particular language and the participation of a conduit between the buyer and seller of drugs. Additionally, the Court of Military Appeals has now provided more guidance in definition of "the flouting of military authority."

Jurisdiction "By Language"

With the restriction of military jurisdiction by the Court of Military Appeals in United States v. McCarthy²/ and its progeny, military law enforcement officials began the practice of attempting to bootstrap service connection by the use of certain language. When purchasing illicit drugs off-post, these officials told the seller that the purchased drugs would in some manner find their way back to the local installations for consumption. This perceived "threat to the military post" met with mixed reviews at the initial appellate level. United States v. Chambers, CM 436388 (ACMR 11 January 1978) (unpublished), pet. granted, CMA Docket Number 35,547 (15 May 1978), finding service connection; United States v. Accord, CM 436574 (ACMR 3 March 1978) (informing the seller after the sale that the drugs' destination was on-post did not confer jurisdiction); United States v. Heil, CM 436350

* Captain Squires is assigned to HQ, Trial Defense Service. He received his BA and JD degrees from Washington and Lee University and graduated from the 70th Basic Class. The author has previously served as a trial and defense counsel at Fort Jackson, South Carolina, and as board recorder at the U.S. Military Academy, West Point. This article is an update of Captain Squires' article, "In the Wake of Alef," The Advocate, Vol. 9, No. 6, P. 10 (1977).

1. Relford v. Commandant, 401 U.S. 355 (1971).
2. 2 MJ 26 (CMA 1976).

(ACMR 31 March 1978) (informing seller prior to purchase that the drugs were intended for members of purchaser's unit did not confer jurisdiction); United States v. Houston, 4 MJ 729 (AFCMR 1978) (informing the seller at the time of purchase that the marijuana was going to be sold on base was insufficient to sustain jurisdiction); United States v. Kline, CM 435092 MJ _____ (ACMR 24 March 1978), pet. for rev. filed, 5 MJ 120 (CMA 1978) (informing seller after the sale that the drugs would return to post conferred jurisdiction).

Despite this uncertainty, on 2 May 1978, the Court of Military Appeals addressed the problem in a sub silentio manner by summarily reversing the Army Court of Military Review and dismissing a specification involving the off-post sale of marijuana. United States v. Williams, 5 MJ 136 (CMA 1978). Although not a definitive action, this decision by the Court does indicate a direction that it probably will follow in future jurisdiction cases.

Staff Sergeant Williams was convicted of two specifications of sale of marijuana to undercover CID informants. In both instances, the purchaser was in the same company and was subordinate in rank to the seller, but was not under his supervision. Both undercover buyers, as instructed by the CID, tried to establish service connection by informing SSG Williams that the marijuana would eventually be resold on post. The accused even admitted his belief that the marijuana would return to the installation.

Negotiations surrounding the initial marijuana sale, subsequently dismissed by CMA, began while Williams and the purchaser-informant were driving from Fort Campbell to the accused's off-post residence. Marijuana was obtained, bagged, and distributed several days later, with all activity taking place off-post. After receiving marijuana from SSG Williams, the purchaser-informant, acting at CID directions, retained it overnight. The following day he was provided government funds which were then transferred to the accused on post in payment for the marijuana.

A few days after the initial sale, SSG Williams was again contacted by a CID operative, by telephone, while Williams was on post. Tentative negotiations for the sale of marijuana by Williams were begun. That evening, while at the accused's off-post residence, an agreement for the sale of marijuana was reached. Money and marijuana exchanged hands the next day at the accused's residence.

The Court's sustaining of jurisdiction in the later sale reaffirms the premise that on-post negotiations for the sale of drugs alone will sustain military jurisdiction. See, Squires, "In the Wake of Alef: A Return to McCarthyism", Advocate, Vol. 9, No. 6 (Nov-Dec 1977).^{3/} More importantly, the striking down of court-martial jurisdiction over the first sale, at least sub silentio, indicates the bootstrapping of court-martial jurisdiction by words will not be upheld on appeal. If any "threat to the military post" is discernable from the sale of drugs to a fellow serviceman, the impact on the military is apparently wanting where the off-post, off-duty negotiations and sale involve an informant who will not reintroduce the drugs into the military community. United States v. Alef, 4 MJ 414, 418, n. 12. (CMA 1977).

On the other hand, on-post activity leading to a final drug transaction can be viewed as a misuse and abuse of government time and resources in such a way as to threaten the installation's operational integrity. See, United States v. Gladue, 4 MJ 1 (CMA 1977). Thus, jurisdiction lies. However, post-drug transaction activity, such as the innocuous act of exchanging money, does not have the requisite service impact to sustain court-martial jurisdiction.

The Presence of a Conduit

With increasing frequency, another actor is being introduced into the scenario involving the off-post sale of drugs. In some cases, it is an informant who is contacted by the seller.

3. See also, United States v. Beckman, 4 MJ 814 (ACMR 1978); United States v. Dingess, CM 436369 (ACMR 31 January 1978) (unpublished), pet. granted, CMA Docket Number 35,582 (9 May 1978); Dingess, although involving the problem of jurisdiction by language, involved on-post negotiations for the drug sale. United States v. Sample, CM 436376 (ACMR 31 January 1978) (unpublished) pre-sale negotiations on-post. United States v. Conley, SPCM 12705 (ACMR 19 April 1978) (unpublished) detailed arrangements occurred on-post during duty hours at the place of duty. United States v. Ramsey, CM 433567 (ACMR 4 January 1978) (unpublished) upheld a conspiracy conviction where the scheme to purchase and distribute marijuana was formed on-post and transferee was engaged in the performance of military duties at time the agreement to transfer was reached.

Frequently, it is the informant who initiates the contact at the behest of his law enforcement control agent. This informant, acting as a conduit, arranges a meeting between the seller and law enforcement official/buyer who almost invariably poses as a civilian. On other occasions, the drama involves a friend of the drug seller who merely contacts potential buyers, advising them of the drugs' availability from a seller off-post.

United States v. Hunte, CM 436635 (ACMR 16 May 1978) (unpublished) presented the mere conduit situation in its purest form. The accused was convicted of selling LSD and marijuana under the theory she aided and abetted the seller. Although the Court found her activity posed a threat to Fort Knox, the conviction was reversed and charges dismissed because the solicitation of the buyers had occurred outside the military reservation.

In United States v. Felty, CM 434963 (ACMR 29 November 1977) (unpublished), reversed and dismissed, 5 MJ 136 (CMA 1978), the Court of Military Appeals summarily dismissed charges alleging the sale of LSD where the accused sold the illicit substance off-post to a CID operative, and immediately thereafter walked to an awaiting car and paid a soldier from whom the drug had been purchased earlier on credit. Again, all activity surrounding this sale, to include the initial introduction of buyer and seller, had transpired off-post.

Unlike the aforementioned cases, United States v. Kline, supra, and United States v. Elrod, CM 435515 (ACMR 26 May 1978) (unpublished) involve on-post activity, albeit tenuous in Kline, with differing results. Sergeant Kline's roommate approached the buyer/informant off-post concerning the purchase of drugs. After reporting this contact to the CID, the informant, using government money, purchased LSD from the accused at his off-post trailer. In upholding military jurisdiction, the majority found that the buyer had become associated with the seller on post through their unit assignment, that a "flouting of military authority" was involved because Sergeant Kline had a duty to prevent subordinates from violating rules and regulations designed to maintain discipline, even though the accused was not the direct supervisor of the buyer, and that a threat to the installation could be perceived from the buyer's statement he was returning to the installation after purchasing the drugs.

In Elrod, the accused was convicted of two sales of cocaine. An informant approached Elrod at his unit supply room inquiring about the purchase of marijuana. Elrod did not have the desired drug but responded that he had access to cocaine. That evening, the informant and a military police investigator, posing as a civilian restaurant worker, visited the accused's off-post residence where Elrod sold cocaine to the man he believed to be a civilian. The next day, at another on-post meeting between the informant and Specialist Four Elrod finalized arrangements for a second off-post sale that evening to the same "civilian." The Army Court of Military Review found no service connection even though part of the negotiations occurred on-post. The sales were found to have been consummated off-post to a man perceived to be a civilian with no facts to indicate the drugs would return to post.

The holdings in Hunte and Felty can be predicated solely on the fact that no on-post activity occurred during those transactions, and the fact that a conduit was involved is irrelevant to the ultimate disposition. It is submitted that Kline was erroneously decided. The pre-sale negotiations were precipitated by Kline's roommate, off-post, with no evidence to indicate such negotiations were at Sergeant Kline's instigation. To sustain jurisdiction on the majority's premise of an on-post acquaintance between the buyer and seller, "one [must be] willing to agree that all offenses, involving soldiers who first become acquainted on-post and discuss drugs, ipso facto arise from or are related to their military duties." (Cook, J. dissenting, Kline, supra, slip op at 5).^{4/}

United States v. Elrod opens a new avenue for defense exploration. Although on-post conversations between the eventual seller and buyer concerning the drug sale will establish service connection, such may not be the case when a third party intermediary is involved. If the facts in Kline had revealed the initial contact between Sergeant Kline's roommate and the informant/buyer had occurred on-post, it is contended that the conduct of this go-between roommate could not be attributed to Kline and thus service connection would be wanting. The perception of the seller as to the military or civilian status of the buyer

4. The other bases for the majority's holding, a potential threat to the installation by language and a flouting of military authority, are addressed infra.

in contrast to the seller's belief of the drug's ultimate distribution point, may also be crucial to the resolution of the jurisdiction question. Compare, United States v. Elrod, supra, with United States v. Beckman, supra, at 815, f.n. 3.

Flouting of Military Authority

In United States v. Whatley, 5 MJ 39 (CMA 1977), the Court addressed the "flouting of military authority" issue as it relates to service impact and, hence, court-martial jurisdiction. As was the case in United States v. Wright, 2 MJ 1086 (ACMR 1976), aff'd, 4 MJ 87 (CMA 1977), the accused was an off-duty, military police noncommissioned officer when he committed the offenses. Unlike Sergeant Wright, who was convicted of off-post drug sales, Sergeant Whatley was convicted of off-post larceny.

The Court agreed that the nexus between Whatley's military duties and the larceny offense (stealing from a subordinate's off-post residence) was sufficient, in conjunction with other Relford factors, to establish service impact, and thus jurisdiction. The majority concluded that Sergeant Whatley's "own status as a military policeman required that he perform as such off base as well as on; consequently, acting as a criminal constituted a direct flouting of military authority, even though he was, at the particular time, away from the geographical limits of the base." 5 MJ at 40.

Chief Judge Fletcher concurred, but did not agree with the conclusion expressed by the Court. The remaining question, then, is whether Judge Fletcher disassociated himself from the conclusion that a crime committed by a military policeman, because of his status, in and of itself constitutes a flouting of authority, or whether he disagrees with the conclusion that the status of a military policeman enables him to perform law enforcement activities off-post. Presumably, it is the second possibility in which the Chief Judge nonconcurred, as the authority and status of military policemen to act in the stead of the local constabulary is severely limited. However, as anyone in the military, regardless of duty assignment, can take advantage of a duty roster, as did Sergeant Whatley, to establish a time when the intended victim of a crime will be performing duty, and thus away from home, the teaching of Whatley may be limited. In that case, military police may not be relegated to a special category of those who flout military authority

when they commit a crime. Nevertheless, the words of Judge Felder, that a crime committed by a military policeman "who [is] also entrusted with the responsibility of law enforcement, is distinctively embarrassing to the United States Army and constitutes a flouting of military authority" must be heeded, United States v. Wright, supra, at 1087 (Footnote omitted).²

Any per se flouting of military authority has not been extended into the superior-subordinate arena. The fact that a ranking serviceman sells drugs to a subordinate, not under his direct supervision, or uses his position to consummate a crime against a junior servicemember does not per se vest court-martial jurisdiction: United States v. Eggleston, 2 MJ 1066 (ACMR 1976), rev'd and remanded, 4 MJ 88 (CMA 1977); United States v. Williams, supra. CF., United States v. McCarthy, 2 MJ 26 (CMA 1976). United States v. Kline, supra, f.n. 3.

Conclusion

While it can be argued that recent service-connecting decisions do little to define or refine what conduct constitutes impact on the military environment, they continue to mandate a careful analysis of the facts underlying the criminal enterprise. The conduct of any drug transaction must be closely scrutinized to determine the principal actors and what roles each takes in the play's final scene. Mouthing well rehearsed
(concluded on page 140)

5. But See, United States v. Floyd, CM 433911 (ACMR 16 January 1978) (unpublished), pet. denied, Daily Journal 78-86, 5 MJ ___ (CMA 1978). Private First Class Floyd, a military policeman, was convicted of multiple drug-related offenses involving both officers and enlisted members of his unit. The offenses occurred both off and on post. The majority of the Army Court of Military Review, sustaining service connection over all the offenses, found a thwarting of the police duties, a threat to the security of the post he was assigned to protect, and that "a greater flouting of military authority could hardly be imagined." Floyd, supra, slip op at 3. Judge Felder would not have sustained military jurisdiction over the off-post drug offenses relating to possession and use of marijuana, and sale of marijuana to a fellow soldier for personal consumption. Interestingly, neither the majority nor concurring opinion cited Wright, supra.

RECRUITING NEGLIGENCE: ANOTHER
CHALLENGE TO THE ENLISTMENT CONTRACT

Captain John M. Zoscak, Jr. JAGC*
and
Captain Charles A. Byler, JAGC**

The Court of Military Appeals has granted an issue which might have serious impact on court-martial in personam jurisdiction. In a Navy case, United States v. Valadez, Docket No. 34,827, petition granted 12 December 1977,*** the Court asked:

Whether gross and culpable negligence by recruitment personnel is sufficient under United States v. Russo, 23 USCMA 511, 50 CMR 650 (1975) to qualify as recruiter misconduct and to void an enlistment?

Stressing the following language of the Russo opinion, the defense contends that recruiting officials, having the responsibility of assuring that disqualified applicants are not brought into the armed services, are cloaked with a "fiduciary obligation," owed not only to the government, but to the prospective enlistees themselves:

. . . the various enlistment disqualifications evidence not only a desire to assure an effective fighting force for the country but also a commendable attempt to minimize future administration and disciplinary difficulties with recruits by qualitatively reducing the class of eligible enlistees. The latter objective is not solely for the benefit of the armed services. It is also a means of protecting

* Captain Zoscak, an appellate defense counsel in DAD, holds a B.A. from Washington and Jefferson College and a J.D. from Duquesne University. He formerly served with the 1st Cavalry Division at Fort Hood, Texas as Senior Defense Counsel and Chief of Legal Assistance.

** Captain Byler is a defense counsel at Fort Ord, California. He is a graduate of UCLA and the University of San Diego Law School.

*** The authors gratefully acknowledge the assistance of Lieutenant Lawrence W. Muschamp, Navy Defense Appellate, who is the appellate defense counsel in Valadez.

applicants who do not meet specified mental, physical and moral standards for enlistment by barring their access to an environment in which they may be incapable of functioning effectively. United States v. Russo at 23 USCMA 512, 50 CMR 651. (Citations omitted).

The argument follows that, when the fiduciary-recruiter breaches his position of trust by bringing about the enlistment of an individual who is truly unfit (disqualified) for military service, yet whose unfitness is not discovered by the recruiter as a result of the recruiter's own gross negligence, the enlistment is void.

The Issue Applied - Physician Negligence

A recently completed case exemplifies the defense thesis in Valadez. When the accused, Private T, had first sought to enter the Army, he informed his recruiter that he had been enrolled in a drug rehabilitation program. Later, when given his entrance physical, he told the examining doctors that he "was on heroin" and "smoked marijuana," and noted on his USAREC Form 300 (Screening Physical Examination for Army Recruitment) that he had been treated for serious medical problems within the previous five years. The physicians examined Private T's skin, concluded it was normal, and approved him for RA.

Prior to trial, Private T was examined by a Staff Surgeon to the United States Army Recruiting Command, who discovered bullet wounds, knife wounds, and needle tracks so numerous that "if you put a tourniquet on his arm, his veins would look like a road map." Characterizing the recruitment physical as a "horror story" of incompetence, the doctor concluded that Private T was totally disqualified for military duty at the time he was enlisted.

At trial, defense counsel argued that, had Private T's physical been as complete as it should have been, the accused would never have been permitted to enlist and would not have been subject to the pending court-martial. Specifically, the defense pointed out that USAREC Supplement 1 to AR 40-501 requires a detailed physical examination, including a close inspection of the skin to look for "tracks," of persons suspected of drug habituation or simple drug usage, a written history of drug involvement and rehabilitative efforts, and a neuropsychiatric consultation if either the history or physical indicates past habituation or addiction. These requirements were not followed by the physicians when Private T appeared before them. The military judge found favor with the defense assertions and ruled that the Army had no jurisdiction over the accused, because the physicians who had examined him were,

indeed, "grossly negligent" in failing to detect that he suffered from drug addiction, a nonwaivable disqualification.

Lightfoot - A New Standard From COMA?

After the Valadez petition was granted and Private T's case tried, an apparent obstacle to the arguments expounded therein arose with the Court of Military Appeals' opinion in United States v. Lightfoot, 4 M.J. 262 (CMA 1978). There, in footnote 3, the Court observed:

A failure to conform with applicable recruiting statutes and regulations in and of itself has long been held by the Supreme Court (In re Grimley (136 U.S. 147 (1890))), as a matter of public policy, not to void the original contract on grounds of illegality.

As long as the recruiter did not violate a criminal statute (even though he might have been slightly negligent), the Court concluded, the enlistment was binding.

If Lightfoot stands for the proposition that "mere" negligence on the part of the recruiter is not enough to void an accused's enlistment, counsel must be prepared to enhance the degree of negligence from "mere" to "gross." The opinion leaves room for this because it simply does not deal with the latter type of dereliction.

If Lightfoot holds that the recruiter's (in)activity must amount to actual misconduct in order to void the enlistment, counsel may argue that that misconduct is inherent in gross negligence itself. Article 92 of the Uniform Code of Military Justice punishes as a criminal act ("misconduct") the performance of one's duties in a culpably inefficient manner. In commenting on this concept of dereliction, Paragraph 171c of the Manual explains:

A person is derelict in the performance of his duties when he willfully or negligently fails to perform them, or when he performs them in a culpably inefficient manner . . . When the nonperformance is the result of lack of ordinary care, the omission is negligent. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse. Thus if it appears that the accused had the ability and opportunity to perform his duties efficiently, but performed them inefficiently nevertheless, he may be found guilty of this offense.

Accordingly, counsel must convince the trial judge that the gross negligence exhibited by an accused's recruiter is exactly the type of culpable inefficiency which the Code proscribes, and, ipso facto, is tantamount to misconduct in the Russo sense. In this manner, the defense adequately meets any burden of a demonstration of criminal activity on the recruiter's part which Lightfoot might impose.

Requiring the recruiter to fulfill his duty in accordance with applicable regulations (which, of course, are promulgated by the Government) is not an unbearable burden. In the long-run, expecting no less than scrupulous attention to recruiting duties will benefit the military and the potential enlistee, by weeding out possible administrative and disciplinary problems and by preventing unqualified individuals from entering a rigid environment within which they might be unable to cope.

* * * * *

(continued from page 136)

rhetoric to a peddler of controlled substances does nothing to further the impact of the crime on the military or broaden the military's interest in deterring such activity. The perception of the seller as to the status of the person with whom he is dealing appears to be taking on greater importance. Additionally, the act during which the seller is introduced into the drama can be said to be of increasing significance. On the other hand, a criminal venture instigated or enlarged by one charged with the responsibility of protecting a post from such activity can now be said with some assurance to impact on discipline and effectiveness and thus confer court-martial jurisdiction on the military.

EXCESS LEAVE "IN A NUTSHELL"

Captain Jacob J. Holeman, JAGC*

The United States Court of Military Appeals in United States v. Palenius, 2 MJ 86 (CMA 1977), emphasized that a trial defense counsel must remain attentive to the needs of his client after trial. Among those areas counsel should address are the options that will face a convicted servicemember who has received an unsuspended punitive discharge or dismissal, and whose sentence to confinement, if any, has been served or deferred. To that end, this article will discuss excess leave as it relates to the convicted servicemember eligible for such status. Before proceeding, however, it is important to note that excess leave is a creature of regulation, and as such it may be changed in whole or in part by the regulatory authority (Department of the Army) whenever deemed appropriate. Counsel should, therefore, consult the applicable regulation before making significant recommendations based on this article.

Excess Leave Defined

Army Regulation 630-5, paragraph 5-2 (C2, 18 March 1977), defines excess leave as leave that is granted in emergencies or unusual circumstances upon request of a servicemember. Normally, the aggregate of all leave granted 1/ can not exceed 60 days for any one period of absence. However, the regulation expressly allows a general court-martial convening authority to grant, for an indefinite term, excess leave to servicemembers who have been sentenced to dismissal or punitive discharge and whose cases are pending completion of appellate review.

* Captain Holeman graduated with a BA from Linfield College, received his J.D. from the University of Oregon School of Law, and attended the 71st Basic Course. He has served in the 3d Armored Division in Germany as a defense counsel, legal assistance officer, and claims officer. Captain Holeman is presently an appellate defense attorney in DAD.

1. All leave granted includes accrued plus advance (to include the unaccrued portion of advance leave previously granted) plus excess.

Significant Features of Excess Leave

Shortly after trial, a trial defense counsel should advise the servicemember who has received an unsuspended discharge or dismissal of the implications of a request for excess leave once confinement, if any, is served or deferred. The following is a review of the major facts that the counsel and his client should know about excess leave:

1. Excess leave is voluntary and will only be granted upon request of the servicemember. 2/
2. Any confinement adjudged must be served or deferred before a servicemember can request excess leave. A servicemember is not eligible for excess leave based on the suspension of an unserved sentence to confinement. 3/
3. Excess leave is without pay or allowances, and no leave time accrues during the time that the servicemember is on excess leave. An applicant's request must acknowledge that he is aware of these facts.
4. There is no "time lost" for a servicemember on excess leave. 4/ This means that the time spent on excess leave is running toward the completion of the servicemember's military obligation.
5. A servicemember on excess leave is entitled to identification cards for himself and his dependents. The

2. From time to time proposals have been made to make excess leave mandatory when punitive discharges have been adjudged, confinement has been served, and the appellate process is not complete. Recent attempts have also been made to force convicted officers at Fort Leavenworth to take excess leave after they have served their confinement and are under a sentence of dismissal. Those attempts have been successfully thwarted in Federal district courts.

3. AR 630-5; United States v. Brown, 4 MJ 654,656 (ACMR 1977).
4. AR 635-200, paragraph 2-3; 10 U.S.C. §921; 10 U.S.C. §972.

expiration dates vary due to local policy but are renewable as long as the appellate process has not been completed. 5/

6. A servicemember with an unsuspended discharge who remains on active duty and does not elect to request excess leave remains in a non-promotable status. 6/

7. Civilian employment is often difficult to achieve while on excess leave, as many employers require a DD 214 form which indicates that the servicemember has been separated from the service. As a servicemember on excess leave is still a member of the military, he will not have been issued a DD 214.

8. A servicemember on excess leave is not normally eligible for unemployment compensation. This occurs because he has voluntarily taken leave of his employment without pay and can terminate that status at any time. State statutes may vary, however, so the appropriate state unemployment agency should be contacted for their particular eligibility requirements. Local statutes may also bar welfare assistance to servicemembers on excess leave.

9. There is no prohibition against the termination of excess leave at any time before the appellate process is completed.

Termination of Excess Leave

There are three methods of terminating excess leave:

1. Return to the Departed Unit. If the "departed unit" is the personnel control facility (PCF) 7/ nearest the servicemember's home of record, the servicemember simply returns to

5. AR 606-5, paragraphs 22, 41, 43a. Although most benefits to a servicemember and his dependents accrue upon presentation of a valid identification card, the eligibility requirements for each benefit must also be met. For medical benefits, see AR 40-3 and AR 40-121; for commissary privileges, see United States Army Troop Support Agency-Commissary Operating Manual, paragraph 20-1; for exchange privileges, see AR 60-20; for military theaters, see AR 28-62.

6. AR 600-200, paragraph 7-6.

7. The six PCFs are located at Fort Ord, Fort Carson, Fort Knox, Fort Sill, Fort Dix, and Fort Bragg.

that unit at his own expense and terminates his excess leave in writing. If the "departed unit" is his regularly assigned unit, the servicemember again returns to that unit and terminates his excess leave status in writing. At this time his regularly assigned unit may keep the individual or request orders transferring him to the PCF nearest the servicemember's home of record (this situation normally occurs only when a servicemember in CONUS has been adjudged a punitive discharge and little or no confinement). 8/ Finally, if the servicemember requested excess leave directly from his place of confinement, e.g., Fort Leavenworth, he may return there and terminate his excess leave. In this event he will normally be assigned to the PCF nearest his home of record.

Terminating excess leave at the "departed unit" may prove costly to a servicemember if the "departed unit" is further from his excess leave address than the PCF nearest his home of record, because a servicemember normally travels at his own expense while on excess leave.

2. Request in Writing to Departed Unit to Terminate Excess Leave. If a servicemember requested excess leave from a place other than the PCF nearest his home of record, he may then accomplish the termination of his excess leave status by mail. Utilization of this method could save the servicemember a considerable amount of money. The servicemember simply states his desire to terminate excess leave in writing to the "departed unit," utilizing the following suggested format:

I (name of servicemember) desire to terminate my excess leave and return to active duty pending completion of the appellate review of my conviction by court-martial.
(Signed and dated by servicemember).

The request is mailed to the "departed unit" which will normally publish orders within 30 days assigning the servicemember to the PCF nearest his home of record. 9/ The orders are sent to the servicemember by certified mail and the soldier is normally given ten more days to report. Under this method, the

8. Officers are not assigned to PCF units and normally request excess leave from either their place or confinement or their regularly assigned unit.

9. This procedure is not followed in the case of officers; they are simply assigned to a convenient unit.

servicemember can be reimbursed for travel expenses to his newly assigned unit from the "departed unit" or his leave address, whichever is closer.

3. Report to Nearest Military Installation and Request Termination of Excess Leave. Occasionally, a servicemember can simply report to the nearest military installation and request termination of excess leave status. IF THAT UNIT DESIRES, it can coordinate with the "departed unit" and terminate the servicemember's excess leave status. Then the servicemember will normally be assigned to the PCF nearest his home of record. Occasionally, in extreme hardship cases, the servicemember will be assigned to the unit that picked him up or an even more convenient unit. Because this method is not a recognized method of terminating a servicemember's excess leave, the servicemember should not be encouraged to attempt this method. Most units will not cooperate in the attempted termination unless the servicemember is already assigned to them.

In choosing the method of termination, a client should be aware that transportation requests (TR's) are normally available at the nearest military installation for a servicemember who can not afford the cost of travel to return to his "departed unit" or his newly assigned unit. However, when the servicemember reports back to his "departed unit," he will be required to reimburse the government for the cost of the TR.

Additionally, it is important to note that once excess leave is terminated, there is no regulatory impediment to returning to that status. The servicemember simply requests excess leave again through his commander to the general courts-martial convening authority.

Entitlement to Pay and Allowances

A servicemember restored to duty following a non-pay status, such as excess leave, is again entitled to pay against which forfeitures, fines, and detentions of pay may apply. 10/ However, a servicemember is no longer subject to the unexecuted portion of a sentence to forfeiture, fine, or detention of pay, when it has been remitted or suspended (generally, forfeitures are remitted upon the completion of confinement). 11/

10. DOD Entitlements Manual, §70507f.

11. Id., §70508f.

If a servicemember is in confinement when his enlistment expires, pay and allowances end on the date the enlistment expires. Pay and allowances will not accrue again until the date he is restored to a full duty status. Restoration to a full duty status (as distinguished from the clemency terms "restored to duty" or "returned to duty") occurs when a member is assigned useful and productive duties which are considered by his commander to be consistent with his grade and years of service. ^{12/} The PCFs have interpreted this provision differently. For example, a PCF at one post indicated that if a servicemember is present for duty, he will be paid regardless of the duties he performs. On the other hand, a PCF at another post indicated that payment is in the discretion of the PCF commander. This policy encourages the servicemember to volunteer to be attached to a regular unit, for failure to do so may result in the servicemember not being paid.

A servicemember under sentence to dishonorable or bad conduct discharge, total forfeiture, and confinement, who is released from confinement and restored to duty is entitled to pay and allowances from the date he is restored to duty; the forfeitures become inoperative thereafter. A restoration to duty to serve out an incomplete enlistment, from which the soldier has received a sentence of a dishonorable or bad conduct discharge, revives partial unsatisfied forfeitures or detentions of pay only if they have not been remitted or suspended. ^{13/}

Conclusion

There are numerous factors to be taken into account before a servicemember can intelligently determine whether he should request excess leave. Generally, a trial defense counsel should dissuade his client from requesting excess leave until he has been sent to the PCF nearest his home of record. This will not only provide the servicemember an opportunity to return closer to his local civilian community and seek civilian employment, but it will also provide an even greater opportunity for the servicemember to weigh all the factors involved before requesting excess leave. In any case, the PCF will be closer to his home of record so that if he desires to terminate his excess leave status, it will be easier, quicker, and less costly.

12. Id., §10316b(2).

13. Id., §70508d.

It must be emphasized that remaining on active duty increases the client's opportunities for avoiding the punitive discharge. However, there may be circumstances in which counsel recommends that the servicemember request immediate excess leave. One of the major factors leading to this recommendation is the soldier's inclination and ability to perform his military duties and avoid further acts of misconduct.

In the final analysis the decision whether to go on excess leave or terminate excess leave is for the client to make. But that decision should only be made after he has been thoroughly advised of the implications of his options by his counsel - an attorney who is aware of his duties under Palenius and properly executes them.

* * * * *

(continued from page 164)

The above instructions have been recently attacked as being inadequate to fully inform the court members as to their responsibilities under the MCM, 1969. The gist of the argument is that without more specific advice from the military judge, as to the relative severity of sentences, individual accused run the risk of being sentenced to a greater punishment because of improper ranking.

While the Court of Military Appeals has yet to decide the issue, trial defense counsel nevertheless might, in an appropriate case, submit their own requested instruction (perhaps even tailored to the sentencing desires of the accused) as to the ranking of the sentences.

CASE NOTES

EDITOR'S NOTE: Due to the improved distribution of Court of Military Appeals' decisions, The Advocate will no longer regularly publish synopses of COMA cases. It is the policy of The Advocate to publish decisions of interest that might otherwise go without notice and those more significant decisions of the Army Court of Military Review that will not be published. Additionally, beginning with this edition of The Advocate, where applicable, the case notes will include the name of the DAD action attorney. He or she may be contacted for further information or assistance.

FEDERAL DECISIONS

APPEAL OF INTERLOCUTORY ORDERS - SPEEDY TRIAL.

United States v. MacDonald, ___ U.S. ___, 46 U.S.L.W. 4389, 23 Cr.L. 3015 (May 1, 1978).

MacDonald, a captain in the Medical Corps, was charged with the 1970 murder of his wife and two daughters at Fort Bragg, North Carolina. The Article 32 investigating officer recommended that charges be dismissed and after the convening authority dismissed the charges, MacDonald was honorably discharged.

Despite MacDonald's discharge, the CID continued the investigation. In early 1975, a federal grand jury indicted MacDonald for the murders. The accused's pretrial motion to dismiss based on a denial of a Sixth Amendment right to a speedy trial was denied and the case was set for trial. In the meantime, the accused appealed the District Court judge's ruling to the Court of Appeals. That Court, recognizing the unique facts behind MacDonald's case, permitted an interlocutory appeal, and ruled that MacDonald had been denied a speedy trial. The Supreme Court reversed and remanded the case for further proceedings. The Court decided that permitting an accused to appeal pretrial motions would unduly prolong trials, possibly to the prejudice of the government and society. The Court remarked that ". . . this Court has emphasized that one of the principle reasons for its strict adherence to the doctrine

of finality in criminal cases is that '[t]he Sixth Amendment guarantees a speedy trial.' . . . fulfillment of this guarantee would be impossible if every pretrial order were appealable." United States v. MacDonald, 23 Cr.L. at 3018.

EXCLUSIONARY RULE MODIFIED

United States v. Ceccolini, ___ U.S. ___, 22 Cr.L. 3070,
46 U.S.L.W. 1146 (March 21, 1978).

Ceccolini was charged with perjury before a grand jury. At trial, his employee was called to prove the falsity of the defendant's statements. The defense moved to suppress the live testimony of the employee since her availability as a government witness was obtained as a result of an illegal search. The District Court suppressed the evidence and the Court of Appeals affirmed.

The Supreme Court reversed the lower courts. While specifically reaffirming the holding in Wong Sun v. United States, 371 U.S. 471 (1963), the Court limited the extent of the exclusionary rule's application to testimony of live witnesses, especially in circumstances involving testimony of persons who are not defendants. The Court concluded that there are several factors to be considered in determining whether or not a live witness' testimony is to be excluded. They include the degree of free will exercised by the witness, and the fact that exclusion would perpetually disable the witness from testifying about relevant and material facts regardless of how unrelated the testimony was to the original search. In Ceccolini, even though the seized evidence could be directly traced to the illegal search, the Court refused to exclude the witness' testimony because she had previously been known to the government. Additionally, the Court determined that the application of the exclusionary rule would have little deterrent effect on the government official in this case because the seizing of the evidence was purely coincidental. In conclusion, the Court stated that "[t]he cost of permanently silencing [the witness] is too great for an even-handed system of law enforcement to bear in order to secure such a speculative and very negligible deterrent effect."

MULTIPLE REPRESENTATION - CONFLICT OF INTEREST

Holloway v. Arkansas, ___ U.S. ___, 46 U.S.L.W. 4289
(April 3, 1978).

At a joint trial, the three petitioners' attorney informed the court that because of information received from each of the co-defendants, he faced the risk of a conflict of interest. The attorney asked the trial court to provide separate counsel for each defendant. The motion was denied. After the jury was impaneled, the attorney again asked that separate counsel be appointed since there was a possibility that one or more of the accused would testify. Counsel explained that he could not effectively conduct direct examination of that accused and also cross-examine the same accused on behalf of his co-defendants. The motion was again denied by the trial judge. After the prosecutor rested, the defense counsel announced that based on the evidence presented, all three accused would testify. He also advised the judge that the conflict of interest would probably surface. As predicted, the conflict did arise when the defense counsel indicated that each witness was to tell his version of the facts without benefit of counsel.

The Supreme Court held that the failure of the trial judge to appoint separate counsel or to take steps to determine the remoteness of the conflict was reversible error when the court was repeatedly presented with the representations of an officer of the court that a conflict existed. The Court further held that prejudice to the accused is presumed and reversal is automatic, because the right to effective assistance of counsel is basic to a fair trial and can never be treated as harmless error.

The decisions of the Court of Military Appeals and the Army Court of Military Review are to the same effect. See W. Finch, "Actions Which Deny An Accused's Right To Counsel," The Advocate, Vol. 9, No. 6, p. 19.

SEARCH AND SEIZURE
WARRANTLESS FELONY ARRESTS IN ACCUSED'S HOME
ILLEGAL WITHOUT EXIGENT CIRCUMSTANCES

United States v. Reed, ___ F.2d ___, 23 Cr.L. 2097
(2d Cir. April 11, 1978).

While recognizing that the Supreme Court had never ruled on the issue, the Second Circuit Court of Appeals ruled that

several cases offer "important signals" as to how the issue of a warrantless arrests in a suspect's home should be handled.

The Court held that a reasonable expectation of privacy in the home is entitled to a unique sensitivity from the courts. In this case, Reed was arrested as she answered the door in response to the arresting officer's knock. Other officers rushed past her and seized a telephone book in the kitchen. Even though the officers had probable cause to apprehend, the Court held that "in the absence of a warrant to arrest a suspect at home, and in the absence of exigent circumstances, federal law enforcement officers are prohibited by the Fourth Amendment from entering the home of a suspect to effect a felony arrest . . ." United States v. Reed, 23 Cr.L. at 2098. The requirement to obtain a warrant was a reasonable burden on the government. In doing so, the Court embraced the District of Columbia Circuit's holding in United States v. Jarvis, 560 F.2d 494 (D.C. Cir. 1977).

The Second Circuit's decision is also consistent with two state supreme court rulings. See Commonwealth v. Forde, 329 N.E.2d 717 (Mass. 1975); People v. Ramsey, ___ Cal. ___, 545 P.2d 1333 (1976).

COURT OF MILITARY REVIEW DECISIONS

BOOKER INQUIRY

United States v. Matthews, ___ MJ ___ (ACMR 17 May 1978) (ADC: CPT O'Brien); United States v. Gordon, ___ MJ ___ (ACMR 28 April 1978) (ADC: CPT Carroll); United States v. Garcia, SFCM 13195 (ACMR 19 May 1978) (unpublished) (ADC: CPT Parwulski)

In attempting to comply with the Court of Military Appeals requirements set forth in United States v. Booker, 3 MJ 443 (CMA 1977), the military judge in each of the three cases questioned the accused as to the advice they received prior to deciding to accept nonjudicial punishment. In Gordon, the Court of Military Review held that the military judge was not required to make the inquiry, but if he did do so, the Fifth Amendment and Paragraph 53h, Manual for Courts-Martial, United States, 1969 (Revised edition), required the judge to advise the accused of his right to remain silent. The error, however, was found to be nonprejudicial in each of the cases for two reasons: (1) the judge was not required to make the inquiry; and, (2) the Article 15's in question had no aggravating effect upon the sentence.

DISCOVERY OF CO-ACCUSED'S TESTIMONY

United States v. Matfield, ___ MJ ___ (ACMR 17 February 1978)
(ADC: CPT Curtis).

The appellant and a co-accused were charged with aggravated assault. The co-accused was tried first, testified at his own trial, and was scheduled to testify as a government witness against the appellant. Prior to appellant's trial, his defense counsel asked for a copy of the co-accused's testimony if the co-accused was to be called to testify against the appellant. The trial counsel responded that the co-accused's record was undergoing transcription by a civilian contractor and was not available. At trial, the defense counsel moved, pursuant to 18 U.S.C. §3500 [The Jencks Act] for production of the tapes. The military judge denied this request, partially because the defense counsel's clerk was present at the co-accused's trial and had taken notes of that proceeding.

While holding that the Jencks Act does not apply to a transcription of testimony in a prior trial, the Army Court of Military Review nevertheless held that "military due process demands, where the requested matter appears relevant, as here, that the defense be afforded access to such matter by some means." (Emphasis added). The Court then stated that the military judge could "easily and quite properly have granted a continuance and required the trial counsel to obtain a verbatim extract of the [co-accused's] testimony." The failure of the judge to do so was an abuse of discretion. However, since the co-accused's testimony was not helpful to the defense, i.e., there was nothing in his testimony that could have given the defense ammunition to attack the co-accused's credibility, and since the co-accused's testimony was favorable to the appellant, the Court ruled that there was no prejudice to the appellant from the judge's ruling. The Court further concluded that the evidence of guilt was so overwhelming as to make the judge's action non-prejudicial.

EXTRAORDINARY WRITS - COURT OF MILITARY REVIEW

Barnett v. Persons, ___ MJ ___ (ACMR 10 March 1978).

In one of very few petitions for extraordinary relief to be filed before the Army Court of Military Review, the Court held that it had no jurisdiction to hear the particular petition.

Petitioner was convicted by a special court-martial not empowered to adjudge a bad conduct discharge and sentenced to be reduced to the grade of Sergeant First Class. After the conviction was final, the petitioner twice brought an Article 69 appeal alleging prejudicial error. Both applications for relief were denied by The Judge Advocate General of the Army. The instant extraordinary relief sought a writ of mandamus from the Court to order The Judge Advocate General to vacate his conviction.

In holding that the Court lacked jurisdiction, the Court noted that it had authority under the "All Writs Act," 28 U.S.C. §1651, to provide relief over a case which it would "potentially" have appellate jurisdiction. [See also, Silk v. Lurker, 4 MJ 583 (ACMR 1977)]. However, reasoned the Court, in a regular special court-martial the only avenue of appeal for an accused is under the provisions of Article 69, UCMJ. The Court questioned the validity of the Court of Military Appeals' decision in United States v. McPhail, 1 MJ 457 (CMA 1976), but nevertheless held that it, as an inferior court to the Court of Military Appeals, did not have a broad mandate to supervise the military justice system. The "McPhail Doctrine" as it applies to nonjudicial punishment is presently being considered by the Court of Military Appeals in Barnett v. Scott, Misc. Docket No. 77-80, and Stewart v. Stevens, Misc. Docket No. 77-134.

JURISDICTION - OFF POST

United States v. Sovey, CM 435551 (ACMR 3 March 1978)
(unpublished) (ADC: CPT Boucher)

Accused was convicted of possession and distribution of marijuana and cocaine. The accused was a "big-time drug dealer" who boasted of having an organization of pushers who sold to both military and civilian personnel. The informant, posing as a civilian ex-Marine and recent arrival to the area, met the appellant for the first time in an on-post barracks. The accused later called from an off-post phone to the informant, who was on post. The actual possession and distribution occurred off post. The government tried to establish service connection on two bases: (1) the on-post connection in the case as part of the accused's overall extensive drug dealing with soldiers; and (2) the serious adverse impact on discipline and readiness from drug users. The Army Court of Military Review ruled that there was no military jurisdiction over the

incident, and set aside the findings and sentence and dismissed the charges. The Court's decision was based on United States v. Williams, 2 MJ 1041 (ACMR 1976); United States v. Edmundson, 2 MJ 553 (ACMR 1976); and United States v. McCarthy, 2 MJ 26 (CMA 1976).

PRETRIAL CONFINEMENT

United States v. Vodopich, SPCM 13196 (ACMR 29 March 1978)
(unpublished) (ADC: CPT Parwulski).

Appellant was convicted of assault on an officer and communicating a threat to injure an officer. Shortly after the assault, the victim placed the appellant in "somewhat stringent restriction." The officer then sought authority to place the appellant in pretrial confinement. The brigade commander recommended to the convening authority that the accused be placed in confinement and, contrary to the advice of the staff judge advocate, the accused was confined. The magistrate ordered his release, whereupon he was again restricted by the same officer and under the same stringent conditions. While rejecting the appellant's contention that the court lacked jurisdiction based on the disqualification of the convening authority, the Army Court of Military Review held that the convening authority abused his discretion in ordering the appellant into pretrial confinement. The court concluded that the trial judge's action in giving sentence relief was appropriate to cure the error.

RECEIVING STOLEN PROPERTY

United States v. Blatch, SPCM 13097 (ACMR 10 February 1978)
(unpublished) (ADC: CPT Carden).

During the military judge's guilty plea providency inquiry into a receiving stolen property charge, the judge did not explain to the accused the elements of larceny. The Court held this omission to be reversible error.

WITNESS FOR SENTENCING

United States v. Mathis, SPCM 12972 (ACMR 30 March 1978)
(unpublished) (ADC: CPT Caulking).

The accused asked that his mother be brought to his trial to testify in extenuation and mitigation. The trial counsel

made all of the necessary arrangements, but the mother became ill. The defense counsel moved for a four week continuance but was unable to represent definitively to the court that the mother would be able to attend the trial at that time. The Court held that the trial judge's denial of a continuance "on the facts of this case amounted to an abuse of discretion and was prejudicial to the substantial rights of the appellant" (emphasis added).

STATE DECISIONS

PRIVILEGED COMMUNICATION - CHILD-PARENT

New York v. Doe, 46 U.S.L.W. 2495 (March 28, 1978).

In an apparent case of first impression, the New York Supreme Court, Appellate Division, 4th Department, has held that confidential admissions by a child to his or her parent are constitutionally protected by the right to privacy.

PROBABLE CAUSE - SMELL OF MARIJUANA

State v. Schoendaller, ___ Mont ___, ___ P.2d ___,
23 Cr.L. 2185 (1978).

In Schoendaller, the Montana Supreme Court held that the mere smelling of marijuana by a policeman did not give rise to a reasonable belief that there was illegal contraband in an automobile. The Court relied heavily upon the testimony of the arresting policeman, who could not state whether the odor emanated from burning marijuana or was the lingering smell from prior usage. Thus, there were no exigent circumstances to permit a warrantless search. The dissent would have upheld the conviction based on People v. Bock Leung Chew, 142 Cal.App. 2d 400, 298 P.2d 118 (1956); State v. Zamora, 114 Ariz. 75, 559 P.2d 195 (1977); and two prior (but somewhat distinguishable) Montana decisions.

The United States Court of Military Appeals recently addressed a similar issue. In United States v. Hessler, 4 MJ 303 (CMA 1978), the Court found that there was justification for a commissioned officer to make a warrantless entry into a barracks room where he smelled marijuana outside the room, knocked, and heard a window being opened. The Court's decision

was founded on these exigent circumstances. COMA has not addressed the narrower issue of whether an odor of marijuana would be sufficient to establish probable cause, absent exigent circumstances.

SEARCH AND SEIZURE - PLAIN VIEW SEARCH
ILLEGAL WITHOUT EXIGENT CIRCUMSTANCES

State v. Parker, ___ So.2d ___, 23 Cr.L. 2078 (La. March 6, 1978).

The Louisiana Supreme Court reaffirmed its earlier decision of State v. Hargiss, 288 So.2d 633, 14 Cr.L. 2382 (1974) that a police officer could not seize contraband in plain view if there was either no warrant or no exigent circumstances.

The facts of the case are very similar to a common scenario in the military. A police officer saw a van parked outside an electronics store during the early morning hours. He used his flashlight to look inside the van, spotted what appeared to be a bag of marijuana in the driver's seat, opened the door, seized the bag and left for the police station. Another officer remained at the van.

Citing Coolidge v. New Hampshire, 389 U.S. 347 (1967), the Court noted that unless one of the well delineated exceptions to the warrant requirement are present, a warrantless search is per se unreasonable. "Plain view," stated the Court, is not an exception to the warrant requirement, but serves to provide a means of securing probable cause. At the time of the entry into the van, the police officer had no exigent circumstances. The Court noted the police officer could, without undue hardship, have obtained a warrant while leaving another officer at the van to prevent its removal. The accused was thereby denied his right to have a magistrate, "unaffected by on-the-street pressures of law enforcement, determine whether probable cause to search or seize existed." State v. Parker, 23 Cr.L. at 2079. See also United States v. Reed, ___ F.2d ___, 23 Cr.L. 2097 (2d Cir. April 11, 1978).

SOME SAMPLE INSTRUCTIONS: PART 3

Editors Note: This is the third in a continuing series of suggested sample instructions that is being published in The Advocate. As discussed in the first installment (Volume 10, Number 1, January-February 1978), the purpose of this series is to assist trial defense counsel with the development of their own requested instructions. The series has already prompted some trial defense counsel to forward to us certain instructions that they have used or attempted to use in the past at trial. We encourage such contributions from counsel, and hope to publish them at a later date.

In this issue: Circumstantial Evidence
Weight of Evidence/Witness Credibility
Interested Witnesses

Circumstantial Evidence

Circumstantial evidence justified a conviction only when it is inconsistent with any reasonable theory of innocence, and you should be so convinced by it that each would be willing to act on the decision in the matter of the highest concern to himself.

Reference: Hand v. State, 26 Ala App 317,
159 S 275, 280 (1935)

* * * *

When the evidence relied on for a conviction is circumstantial, the chain of circumstances must be complete and of such character as to convince beyond a reasonable doubt, and, if the circumstances as proved fail to so convince you beyond a reasonable doubt that the defendant is guilty, then you should return a verdict of not guilty.

Reference: James v. State, 22 Ala App 183,
113 S 648 (1927)

* * * *

Where a conviction for a criminal offense is sought upon circumstantial evidence alone, the state must not only show, by preponderance of the evidence and beyond a reasonable doubt,

that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused.

Reference: Dutton v. State, 25 Ala App 472,
148 S 876, 878 (1933)

* * * *

In order to warrant a conviction for crime on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else committed the offense charged; and it is the invariable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and as cannot, upon any reasonable theory, be true, and the party charged be innocent; and in this case, of all the facts and circumstances relied upon by the state to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit the defendant.

References: Dutton v. State, 25 Ala App 472,
148 S 876 (1933)
Marzen v. People, 173 Ill 43, 50
NE 249 (1898)
Everett v. People, 216 Ill 478, 75
NE 188 (1905)

* * * *

The court instructs the jury that the guilt of defendant cannot be presumed, but must be proven beyond a reasonable doubt either by direct or circumstantial evidence, and the court instructs you that there is no direct evidence of the guilt of the defendant in this case. Before you can convict the defendant on circumstantial evidence alone, the facts and circumstances must all form a complete chain, and all point to his guilt, and must be irreconcilable with any reasonable theory of his innocence, and before the jury can convict the defendant on circumstantial evidence alone, the circumstances must not only be consistent with his guilt and point directly thereto, but must be absolutely inconsistent with any reasonable theory of his innocence.

Reference: State v. Drake, 298 SW 2d
374 (Mo. 1957)

* * * *

To warrant a conviction on circumstantial evidence, each fact in the chain of circumstances necessary to be established to prove the guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and all the facts and circumstances necessary to prove guilt must be connected with each other and with the main fact sought to be proved, and all the circumstances taken together must produce a moral certainty that the crime charged was committed and that the accused committed it. It is not sufficient that they coincide with and render probable the guilt of accused, but they must exclude every other reasonable hypothesis of innocence.

Reference: State v. Trudell, 49 SD 532,
207 NW 465 (1926)

* * * *

Weight of Evidence/Witness Credibility

You are the sole judges of the credibility of the witnesses and the weight that should be given their testimony. With that the court has nothing to do. You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the defendant, or any circumstance tending to shed light upon the truth or falsity of such testimony; and it is for you at last to say what weight you will give to the testimony of any and all witnesses. If you believe that any witness has wilfully sworn falsely to any material fact in this case, you are at liberty to disbelieve the testimony of that witness in whole or in part, and believe it in part and disbelieve it in part, taking into consideration all the facts and circumstances of the case.

Reference: Snyder v. State, 86 Ark 456
11 SW 465 (1908)

* * * *

Where the testimony is directly conflicting and both versions, as given to you, cannot be true, and there is reasonable doubt as to which story is true, it is your duty to accept that version which is consistent with the innocence of the defendant.

Reference: People v. Crofoot, 254 Mich 167,
235 NW 883 (1931)

* * * *

You are the sole judges of the truth of the testimony. You are the sole judges of the facts of the case. But, in endeavoring to sift out where the truth lies, it is reasonable and right that all of the testimony of all of the witnesses be compared. In passing upon the truthfulness of any witness or of all the witnesses, the stories that they tell are naturally to be considered. The way in which those stories are told is also to be considered. The intrinsic probability or improbability of what they say, of the stories as they tell them, is to be considered and the way in which the testimony of the witnesses accords with the probabilities and human experience and agrees with the other evidence in the case and with the testimony of other witnesses, are also matters to be considered. The interest which any witness has, and this applies to the officers in the case, to the witnesses and to the defendants, the interest which any witness has in the outcome of the case is to be considered as bearing upon the probability of his telling the truth or not telling the truth.

Reference: People v. Todaro, 253 Mich 367,
235 NW 185 (1931)

* * * *

In judging of the weight you will give the testimony of each witness you may very properly take into consideration the interest the witness had in the outcome of the proceedings, if any, the relationship the witness bears to a party in the case. You may take into consideration the manner or demeanor of the witness while on the stand. The witness' frankness or lack of frankness, his bias or prejudice, whether or not the witness is laboring under influence. You may take into consideration the intelligence or lack of intelligence of the witness to be a dependent reporter to you of the facts about which this witness testified, and you may take into consideration the position of the witness to have dependable knowledge with respect to the facts about which such witness has testified. You may take into consideration whether or not the witness' testimony has been corroborated by other dependable evidence or admitted facts.

Reference: Lesnick v. State, 48 OH App 517,
194 NE 443 (1934)

* * * *

If you believe from the evidence in this case that the witness or witnesses before testifying in this case have made any statement out of court concerning any of the material matters materially different and at variance with what they have stated on the witness-stand, then the jury are instructed by the court that these facts may tend to impeach either the recollection or the truthfulness of the witness or witnesses, and the jury may consider these facts in estimating the weight, if any, which ought to be given to their testimony. And any statements made by any witness or witnesses out of court in accord with their testimony here may be considered by you in determining the truthfulness of the evidence of such witness or witnesses.

References: State v. Arbogast, Criminal Court, Marion County, Indiana, No. 43568 See, Liechty v. State, 202 Ind 66, 169 NE 466 (1930)

* * * *

Interested Witnesses

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighted by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against the defendant.

References: On Lee v. United States, 343 US 747, 757 (1952)
United States v. Ott, 489 F.2d 872 (7th Cir. 1973)
United States v. Gonzalez, 491 F.2d 1202 (5th Cir. 1973), reh. denied, 494 F.2d 1296 (1974) and United States v. Smith, 464 F.2d 221 (8th Cir. 1972). Where informant is also claimed to be an accomplice.
Bush v. United States, 375 F.2d 602 (D.C. Cir. 1967) and Golliher v. United States, 362 F.2d 594, 604 (8th Cir. 1966) deal with the reliability of testimony of police officers and undercover agents.

United States v. Wasko, 473 F.2d
1282 (7th Cir. 1973). Where the
witness may not be a true informant
in the strictest sense but is more
like a volunteer helping the govern-
ment for his own motivations and
purposes, the danger of false testimony
is more the less present and a caution-
ary instruction required.
Instruction taken from Federal Jury
Practice and Instructions by Dewitt
and Blackman (West Publishing Company,
1970).

* * * *

In weighing the testimony of police officers, greater care should be used than in weighing the testimony of ordinary witnesses because of the natural and unavoidable tendency of police officers to procure and remember with partiality such evidence as would be against defendant.

Reference: Smith v. State, 114 Neb 445,
208 NW 126, 128 (1926)

* * * *

I instruct you in this case as to the testimony of Mr. T., government's witness, that it is your duty to scrutinize his testimony with caution and care, in the light of his interest and bias, if any you find; but if after you do that, you believe beyond a reasonable doubt that he is telling the truth, and you are satisfied from his testimony and beyond a reasonable doubt of the defendant's guilt, it would be your duty to so find, that is, return a verdict of guilty.

Reference: State v. Hunt, 246 NC 454,
98 SE 2d 337 (1957)

"SIDE-BAR"

or

Points to Ponder

1. Written Instructions in the Deliberation Room. For the last three issues (Vol. 10, Nos. 1-3), The Advocate has published a series of articles on suggested sample instructions. When trial defense counsel are reflecting on the use of instructions at trial, they might consider requesting that the military judge permit the written instructions be submitted to the court members.

There is authority for such a request. Paragraph 73d, MCM, 1969 states that: "[n]ormally, written instructions are not taken into closed session by the court, but any copy which is taken into closed session must be appended to the record of trial as an appellant exhibit" (emphasis added). The implication of the above is obvious - there is no prohibition in the military to having written instructions submitted to the court members for findings or sentencing. Military case law supports this view. United States v. Sanders, 30 CMR 521 (ABR 1960). See also United States v. Caldwell, 11 USCMA 257, 29 CMR 73 (1960); United States v. Chaney, 35 CMR 692 (CGBR 1965); United States v. Hamill, 23 CMR 827 (AFBR 1957); United States v. Hillman, 21 CMR 834 (AFBR 1956); United States v. Helm, 21 CMR 357 (ABR 1956).

Thus in the appropriate case (perhaps one involving complicated issues of fact and law, such as self-defense), trial defense counsel should consider requesting that written instructions be presented to the court members. The granting of this request, it can be argued, will be a significant aid to the court members' decision-making process. As it appears that the granting of such a request is within the discretion of the military judge, United States v. Sanders, supra, the denial would be reviewable on appeal for an abuse of discretion.

2. "Klinger" Charge Dismissed. The U.S. Army Court of Military Review in United States v. Landsperger, SPCM 13213 (ACMR 25 May 1978) (unpublished), dismissed a charge under Article 134, UCMJ for "wrongfully appearing at a formation in a turquoise

dress." The accused, upon a dare, appeared at a morning physical training formation wearing a turquoise dress over the prescribed uniform of fatigues and boots. Several fellow soldiers were aware of the accused's planned appearance and had cameras at the ready.

The evidence at trial showed that there was some disturbance at the formation, but the evidence was at variance as to how much of a disturbance was created and how prejudicial the conduct was to good order and discipline in the unit. The unit commander and NCO's felt it was deleterious to good order and discipline, while the soldiers and accused viewed it as a prank or joke in the manner of a popular television program. The Court also noted that just as the accused was about to leave the barracks in the offending garb, he waivered in his resolve; at that point he was ordered to the formation by a Sergeant Charge-of-Quarters.

The Court, in finding that under the circumstances of the case the accused's conduct was not criminal, stated "Article 134 is not a catch all. 'It does not confer general criminal jurisdiction upon courts-martial . . . [and] [i]t does not make every irregular, mischievous or improper act a court-martial offense.' United States v. Lefort, 15 CMR 596, 597 (CGBR 1954)."

As humorous as the case is, it provides an excellent example of one method of attacking Article 134 offenses which involve allegations of conduct "to the prejudice of good order and discipline in the armed forces."

3. Instructions on the Severity of Punishment. Paragraph 76b(2) MCM, 1969 and Paragraph 8-8, DA Pamphlet 29-9, Military Judges' Guide, provide for general voting instructions to court members. It requires the court to vote on proposed sentences, beginning with the lightest, until a sentence is adopted by the concurrence of the required number of members.

Paragraph 8-8, DA Pamphlet 21-9, provides some additional advice on how the court is to rank the severity of sentences by stating that a bad conduct discharge is more severe than one year confinement and total forfeitures. The instruction also states that the ranking of severity of sentences is a matter "which cannot be resolved with mathematical certainty," and that "in determining the order of severity, any differences . . . must be decided by majority vote."

(concluded on page 147)

"ON THE RECORD"

or

Quotable Quotes From Actual
Records of Trial Received in DAD

After six pages of explanation to the accused about the various court compositions:

MJ: All right, what other questions do you have?

ACC: Which are my best chances of winning it?

MJ: Pardon?

ACC: Which are my best chances of not --- winning by judge alone or panel?

MJ: Well, I --- I --- I really don't know . . .

Q: I take it from your previous answer that they don't like Americans that they also don't approve of your relationship with _____, then, is that correct?

A: Yes, but I'm now a major, I'm over 18, and you're no longer a minor when you're over 18.

MJ: And are your legal qualifications and status as to oaths, as far as you are aware, correctly stated in the vocal convening order which we have not seen yet?

DC: I assume they are correct, sir.

TC: I would submit, Your Honor, that counsel having called the witness, is limited on his direct, he's on a fishing expedition here. It's almost as if he was cross-examining. And I renew my objection.

MJ: The objection is overruled. Beautiful day to go fishing, so you may continue.

Q: All right, Now you drove to the scene where you found the body?

A: Yes, sir.

Q: Now who was with you?

A: Mister _____, the accused, and the interrupter.

MJ: Excuse me, and who?

A: A German Interrupter from the MP Station.

MJ: . . . As a matter of fact, as I've said once before concerning you, Captain _____, your recognition of the gratuity of the military judicial system so rapidly is amazing. And to continue a little bit more, the military justice system reminds me of some friendly, defensive, well-meaning bumbling giant that's lumbering in to attack, then you have defense counsel who flits around with his rapier out and hamstring this giant and then they complain about the mismatch and the mismatch is exactly the opposite. With that, your notion to dismiss for lack of speedy trial is denied.

Character witness in a rape case:

MJ: The question is he's been convicted of the offense of rape. Now would that change your opinion? That's the question.

WIT: Well, he didn't rape me, sir.

Q: Would you like to have the record read back so you could hear what you said; would that refresh your recollection as to what you initially said?

A: No, I understand what I said. I don't know what I said, but I know what I was meaning.
