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THE ADVOCATE

THE ADVOCATE

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TRANSITION

LANDMARKS

United States v. Ezell and Burch v. Louisiana, recent decisions of the Court of Military Appeals and the Supreme Court, respectively, could have serious impacts on military justice. Their significance to defense counsel provides the topics for two articles in this issue of The Advocate.

* * * * *

F.Y.I.

For your information, articles on Trial Defense Service at the Disciplinary Barracks and the effect of a court-martial conviction on a servicemember's pay are provided in the pages which follow. We trust both will be beneficial in defense counsel's day-to-day business with his clients.

* * * * *

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NEW MANAGING EDITOR

The Advocate welcomes to its Editorial Board Captain Julius Rothlein, an action attorney at Defense Appellate Division. Captain Rothlein assumes the demanding position of managing editor, which has been so ably filled by Captain William L. Finch, who will be attending the JAGC Graduate Course at Charlottesville in August 1979.

Before coming to DAD, Captain Rothlein served as an administrative law - procurement law officer, trial counsel, and chief defense counsel at Fort Campbell, Kentucky. He received both his undergraduate and law degrees from Rutgers University.

NEUTRAL COMMANDERS IN THE BARRACKS

Captain Malcolm H. Squires, Jr., JAGC*

Introduction

The Court of Military Appeals has devoted renewed attention to the problems associated with the scope of permissible governmental intrusion into the serviceman's living quarters. While the latest cases do little to reverse the Court's past trend of decisional disunity on Fourth Amendment questions,¹ the opinions of United States v. Ezell² and United States v. Hessler³ have clarified the role of a commander in "policing" the barracks. The purpose of this article is to review these recent decisions as they apply to the serviceman's reasonable expectation of privacy in his unit quarters.

United States v. Ezell

Rejecting contentions that any commander should be per se disqualified from authorizing a search,⁴ the entire Court found that neither the Constitution nor prior case law

* Captain Squires is the Training Officer of the United States Army Trial Defense Service and a member of The Advocate Editorial Board. He has written previous articles, appearing in Volumes 9 and 10 of this journal.

1. See United States v. Roberts, 2 M.J. 31 (CMA 1976); United States v. Thomas, 1 M.J. 397 (CMA 1976).
2. 6 M.J. 307 (CMA 1979).
3. 7 M.J. 9 (CMA 1979).
4. Defense counsel argued that commanders, as members of the executive branch of government, were disqualified to act as magistrates under the rationale of United States v. United

automatically divests a commander of his capacity to determine probable cause.⁵ Fourth Amendment protection will be afforded the military community, so long as the commander approaches the task of issuing search authorization "with a 'judicial' rather than a 'police' attitude."⁶

Judge Perry, writing the lead opinion, set guidelines within which to test for the neutrality of the official ordering the search. A finding that the authorizing official becomes personally involved, by actively participating in gathering evidence to support probable cause or demonstrating a personal bias against the suspect, will impugn his constitutionally mandated neutrality and invalidate the search authorization.

Reflecting a recent Supreme Court trend in the Fourth Amendment area,⁷ Chief Judge Fletcher predicated his concurrence on the reasonableness of the Government's action in

4. Continued.

States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed. 2d 752 (1972); that paragraph 152 of the Manual for Courts-Martial, United States, 1969 (Revised edition) exceeded the scope of the President's authority under Article 36, Uniform Code of Military Justice; and that the commander's job of maintaining good order and discipline to insure an effective fighting force was the quintessence of law enforcement.

5. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972) requires that a magistrate issuing warrants for Fourth Amendment purposes must be neutral and detached and capable of determining the existence of probable cause.

6. *Ezell*, *supra* at 315, citing *United States v. Drew*, 15 USCMA 449, 454, 35 CMR 421, 426 (1965).

7. See *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978).

that case and three others decided the same day.⁸ The Chief Judge questioned the need to rigorously apply civilian search and seizure law to the military. By balancing the right of the individual to remain free from unreasonable invasions of privacy against that of the Government to maintain an effective fighting force, the fine line between competing interests can be maintained. Unlike Judge Perry's analysis, which requires the carving out of military necessity as an exception to Fourth Amendment requirements, a strict balancing test would require the exception be placed on the scales of "reasonableness."

This differing approach to the problem surfaced in United States v. Hessler, supra, where Chief Judge Fletcher determined that servicemen's smoking marijuana in the barracks in a foreign country, presumably "freedom's front," created a danger to the mission and necessitated immediate action. The Chief Judge's approach recognized the exigency of the situation and balanced the procedures used to abate the drug's use with the soldier's reasonable expectation of privacy. Judge Perry recognized the problem, but was unwilling to make military necessity an exception to Fourth Amendment requirements when civilian jurisprudence is silent in the area.

Judge Cook, concurring and dissenting in Ezell, reasoned that the commanders' actions there and in the three other cases did not remove them from the realm of neutrality, or cast any one of them in the mold of a law enforcement official.

Personal Bias Disqualifications

As the Ezell dissent correctly states, "[A] commander is not disqualified because he has previous knowledge of information adverse to the person who is the subject of the search."⁹ In fact, the commander may initiate an investigation

8. United States v. Boswell, 6 M.J. 307 (CMA 1979); United States v. Sanchez, 6 M.J. 307 (CMA 1979); United States v. Brown, 6 M.J. 307 (CMA 1979).

9. Ezell, supra at 331 (Cook, J., dissenting).

based on such information, without forfeiting his neutrality, by requesting law enforcement officials to examine the allegations.¹⁰ The commander in Sheffield, supra, had requested a criminal investigation of the accused, received regular reports of its progress, and knew of a controlled drug transaction before she authorized a search of Private Sheffield's barracks room. However, she remained detached from the actual investigation and her characterization of the accused as a "poor soldier" did not reflect a disqualifying personal bias.

Similarly, a commander is not required to close his eyes to previously garnered adverse information when determining the existence of probable cause to order a search. Johnson v. United States makes it clear that "the usual inferences which reasonable men draw from evidence" are not restricted by the Fourth Amendment.¹¹ Information that the suspect has been involved in past illegal activities of the type under investigation may be taken into consideration with other relevant facts in deciding whether to authorize a search.¹² Acting as a magistrate, the commander may also draw on his knowledge derived from the routine administration of his office.¹³

10. See United States v. Sheffield, 7 M.J. 47 (CMA 1979) (summary disposition); United States v. Guerette, 23 USCMA 281, 49 CMR 530 (1975).

11. 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 437, 440 (1948).

12. See United States v. McCorn, 7 M.J. 46 (CMA 1979) (summary disposition); Ezell, supra; United States v. McCarthy, 1 M.J. 993 (NCMR 1976), affirmed, 7 M.J. 42 (CMA 1979) (summary disposition).

13. United States v. Hill, 7 M.J. 44 (CMA 1979) (summary disposition) (commander had seen stereo equipment in accused's room on an earlier barracks walk-through inspection the same day he granted search permission); United States v. Wilson,

On the other hand, when the commander, acting as a magistrate, voices a note of vindictiveness¹⁴ or revenge¹⁵ resulting from previous unsuccessful attempts to snare the offender, his personal bias outstrips the required neutrality and detachment of his judicial position.

Active Involvement in Evidence Gathering

Voiding searches authorized by commanders or their delegates¹⁶ who stray from their judicial to law enforcement roles is not new to military jurisprudence.¹⁷ As with most Fourth Amendment questions, the balance between a reasonable

13. Continued.

7 M.J. 46 (CMA 1979) (summary disposition) (commander knew the informant had received nonjudicial punishment for drug abuse, was being discharged for same, and the commander cross-referenced and corroborated the allegations with his own S-2 file on known and suspected drug users); *United States v. Simpson*, 7 M.J. 47 (CMA 1979) (summary disposition) (accused's detachment commander authorized search for fruits of APO break-in and larceny based in parts on the commander's knowledge, derived from routine administration of his office, it was "an inside job").

14. "'[W]e'd been after him' for some time." *United States v. Staggs*, 23 USCMA 111, 113, 48 CMR 672, 674 (1974).

15. *United States v. Boswell*, supra.

16. See *United States v. Drew*, supra. The issue of a commander's power to delegate his judicial duty to authorize searches is presently undergoing review by the Court of Military Appeals in *United States v. Burden*, 5 M.J. 704 (AFCMR 1978), pet. granted, 6 M.J. 124 (CMA 1978); *United States v. Brewer*, pet. granted, 6 M.J. 27 (CMA 1978); *United States v. Kalscheuer*, pet. granted, 5 M.J. 363 (CMA 1978); *United States v. Albright*, pet. granted, 5 M.J. 214 (CMA 1978).

17. *United States v. Staggs*, supra.

intrusion and an unreasonable one may turn on a single distinguishing fact. Ezell and its progeny provide sufficiently varying factual circumstances regarding barracks searches to enable one to draw some conclusions.

Any doubts that may have lingered about the propriety of a commander ordering the use of drug detection dogs in those areas of the barracks where a serviceman lives¹⁸ and then authorizing a search based on a canine alert have been dispelled.¹⁹

Whether a cannabis canine's use constitutes a search, and if so, an unreasonable one, has resulted in scholarly debate and a difference of opinion among the courts.²⁰

18. "Generally a military person's place of abode is the place where he bunks and keeps his few private possessions. His home is the particular place where the necessities of the service force him to live Whatever the name of his place of abode, it is his sanctuary against unlawful intrusion; it is his 'castle.'" United States v. Adams, 5 USCMA 563, 570 18 CMR 187, 194 (1955).

19. See United States v. Sanchez, supra; United States v. Paulson, 2 M.J. 326 (AFCMR 1976), reversed in part, 7 M.J. 43 (CMA 1979) (summary disposition). The use of a marijuana dog during an "inspection" of a barracks living area, without prior probable cause, is still under appellant consideration. United States v. Middleton, pet. granted, 3 M.J. 425 (CMA 1977).

20. United States v. Venema, 563 F.2d 1003 (10th Cir. 1977); United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (per curiam); Note, "Constitutional Limitations on the Use of Canines to Detect Evidence of Crime," 44 Fordham L. Rev. 973 (1976); Note, "United States v. Solis: Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?" 13 San Diego L. Rev. 410 (1976).

The Court of Military Appeals appears to have adopted the rationale of Judge Mansfield in United States v. Bronstein,²¹ that the use of these dogs constitutes a search, the reasonableness of which will be tested on the facts.²² It also appears that a serviceman, within his barracks living area, is given that protection afforded a civilian in his home, albeit this area, at times, may be accessible to a "limited" public, e.g., the commander, first sergeant, charge of quarters, etc.²³ Otherwise, there simply would be no requirement that a neutral and detached magistrate authorize the use of drug detection dogs prior to searching a private area of a barracks.

While the Court has yet to delineate which areas of a barracks are a "serviceman's own," and thus protected by stringent Fourth Amendment limitations, it is noteworthy that the barracks areas searched in Sanchez and Paulson present both ends of the spectrum. Private Sanchez resided on the second floor of a barracks consisting of "personal, locked wall lockers placed against the outer walls with bunks in

21. Supra, 521 F.2d at 464-65.

22. See United States v. Grosskreutz, 5 M.J. 344 (CMA 1978); United States v. Roberts, supra; United States v. Unrue, 22 USCMA 466, 47 CMR 556 (1973).

23. "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private even in an area accessible to the public may be constitutionally protected." (citations omitted). Katz v. United States, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1967). While the issue was not presented for resolution, nothing would appear to negate a commander's right to use canines to discover contraband in common areas of the barracks. Likewise, the serviceman who does not reasonably attempt to protect his possessions from public view within his living area would be subject to a canine intrusion into this area. Cf. United States v. Rosado, 2 M.J. 763 (ACMR 1976).

between. An alternating series of lockers and beds ran down each side of the room. None of these beds and lockers were sectioned into individual cubicles except for several such structures at the end of the barracks which were the quarters of staff noncommissioned officers."²⁴ Airman Paulson, by contrast, had a semiprivate room with a locked door. In both cases the searches were invalidated as canines were directed to gather evidence in protected areas and supply missing probable cause by the same commander who later attempted to act as a magistrate.

Given the spartan environs in which Private Sanchez lived, it may now be concluded that a serviceman has a reasonable expectation to privacy in the area in which he sleeps and maintains his clothing and equipment, whether the area is sectioned or not. When care is taken to keep inviolate that which a serviceman does not wish exposed to the public, a commander must respect that privacy by refraining from unreasonable searches.

Commanders who, acting on information received from a member of their unit, undertake an investigation on their own to ferret out contraband, lose the requisite neutrality to authorize a search.²⁵ In Gorman, a marine informed his company commander and first sergeant that the accused had displayed a pistol in the barracks. Without further investigation or information about the weapon's location, the commander authorized the first sergeant to search Gorman's wall locker. He then accompanied his subordinate to the barracks for the search.

By comparison, United States v. Wilson, supra, presents a situation where the company commander, acting on information

24. Brief on Behalf of Appellant Under Rule 22(b), p. 3-4.

25. Compare United States v. Gorman, 7 M.J. 50 (CMA 1979) (summary disposition) with United States v. Wilson, 7 M.J. 46 (CMA 1979) (summary disposition).

by a known drug user that heroin was seen in the accused's room the previous night, brought the matter to the attention of the battalion commander. Realizing the speed with which drugs are generally distributed, the battalion commander instructed the informant to reaffirm the drug's presence in the barracks. Upon receiving this reaffirmation, he authorized a search by the company commander, but provided no instructions on how to conduct that search.²⁶

The directing and controlling of those performing a law enforcement function will disqualify a commander from performing a magistrate's role the same as if he had investigated the matter himself. Brown, Gorman, both supra. By distinction, however, the officer-magistrate who, upon a finding of probable cause, merely wishes to assure that the drugs exist at a certain location prior to commencement of the search, does not become embroiled in law enforcement evidence gathering.²⁷ Such action is indeed commendable in keeping with the constitutional requirement that searches be limited in scope, "particularly describing the place to be searched, and the persons or things to be seized."²⁸

Ezell seems to create an inference that presence of the authorizing magistrate at a search scene demonstrates his involvement in ferreting out crime. However, as Judge Cook's dissent and the cases summarily decided in light of Ezell document, mere presence does not equate to active participation in the search.

26. The decision in United States v. Brown, supra, hinges on the conduct of the base commander throughout the investigation, and not his directing the informant to perform one act. Query: Would the result in Paulson, be different if the OSI agent had requested permission to search the barracks from a lower level commander and, upon an "alert" by the dog, requested permission to search Paulson's room from the base commander pursuant to this probable cause?

27. See United States v. Wilson, supra; United States v. Martin, 7 M.J. 47 (CMA 1979) (summary disposition).

28. U.S. Const. Amend. IV.

The power of a magistrate to observe law enforcement officials do his bidding in the execution of a warrant does not "impugn his neutrality and detachment."²⁹ As Judge Cook notes, Shadwick did not deal squarely with the Duncan issue of mere observation and whether such inspection is a judicial or law enforcement "activity." The right of observation, however, does not transform one into an overseer, with plenary powers of supervision. Still, whether an observing magistrate could correct those officials carrying out his order without overstepping the bounds of his judicial role is another question.

To extrapolate from Duncan, the right to "supervise an activity" or "take independent action to assure . . . that a search is carried out within the terms of [a magistrate's] authorization"³⁰ stretches the point. When read in its limited First and Fourteenth (not Fourth) Amendment context, Heller v. New York³¹ does not sanction a magistrate's involvement in seeking out evidence of criminal misconduct.

While a magistrate's presence at a search scene may be an indicator of his assuming a police role, any presumption arising from this activity is rebuttable. In United States v. Hill, supra, a Criminal Investigation Division (CID) agent requested permission from Hill's company commander to search the accused's room for fruits of a Post Exchange break-in. After determining that probable cause existed, the commanding officer authorized a search. Recalling that he had previously seen stereo equipment of the type described by the agent in Hill's room, the commander went to the room. When Hill was discovered packing the stereo equipment, the commander-magistrate placed him under apprehension and secured the room until the CID agents arrived to conduct the authorized search. Similarly, in United States v. Stoves,³² the detachment commander's

29. Ezell, supra at 333, citing United States v. Duncan, 420 F.2d 328, 331 (5th Cir. 1970).

30. Ezell at 334.

31. 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

32. 7 M.J. 45 (CMA 1979) (summary disposition).

presence at the search scene, the accused's billets and wall locker, did not impugn the neutrality he exhibited at the time he authorized a search.

However, where the commander-magistrate accompanies police agents for the purpose of authorizing a search if consent cannot be obtained, his neutral, judicial role is compromised.³³ After obtaining probable cause to arrest Morrison in connection with a series of robberies, government agents asked his executive officer to accompany them to his room to authorize a search if the suspect withheld his consent. When Morrison withdrew his consent, the executive officer immediately gave his permission, leading to the discovery of a .357 magnum revolver under the dust cover of the suspect's bed.

Morrison does not reflect the type of passive presence at a search scene found acceptable in Hill or Stoves, or the mere observation approved in Duncan. The action of the executive officer in Morrison is more akin to the "hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"³⁴ The scene of an arrest, with its attendant pressures and hostility is not the atmosphere in which to make an informed and deliberate determination about the sufficiency of probable cause to search.

Finally, Hessler addressed the situation where a command official must abate the use of contraband exposed to public view.³⁵ The official's action in halting the contraband's use cannot exceed the bounds of reasonableness dictated by the situation encountered. As his action is by necessity an enforcement of the law, any authority he might have had to act as a magistrate vanishes. Consequently, as a law enforcement officer, his authority extends to seizure of contraband

33. United States v. Morrison, 7 M.J. 49 (CMA 1979) (summary disposition).

34. Ezell at 310, quoting United States v. Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977).

35. Under this doctrine, anything a government official can perceive with his own five senses would not be afforded Fourth Amendment protection.

in plain view and within the scope of the Chimel³⁶ doctrine, as well as the arrest and search of clearly identifiable culprits. Any further search authority must be gained from a neutral magistrate who is detached from the atmosphere surrounding the criminal activity.

Defense Tactics

If Ezell and its progeny stand for any one proposition, it is to leave law enforcement to those individuals who are charged solely with that responsibility. When commanders, who are later called upon to act as magistrates, attempt to become the alter ego of police officials by hunting down the offender, they are singularly disqualified.

With this premise in mind, defense counsel must ascertain with particularity and utmost clarity the role any purported magistrate plays in the discovery of evidence. A commander who orders drug detection dogs into the barracks without probable cause is not a constitutionally sanctioned magistrate. If he should aver that probable cause to find concealed drugs existed prior to the canine search, one must question the accuracy of his probable cause determination. The necessity of requiring "double probable cause" before authorizing a search should be regarded as suspect. Commanders who conduct traditional health and welfare or administrative type inspections must be questioned thoroughly. If any stated objective of this inspection was to discover contraband, it becomes a search, ordered and usually participated in by a non-neutral and detached magistrate.³⁷

The role of the would-be magistrate in the evidence gathering process must be delineated. While initiation of the investigation is permissible, its orchestration may not

36. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

37. See United States v. Wilcox, 3 M.J. 863 (ACMR 1977); United States v. Hay, 3 M.J. 654 (ACMR 1977).

be. Whenever a commander points an informant in a direction other than to military police officials, he walks the thin line of investigative involvement.

Counsel must bear in mind the words of the Chief Judge in Ezell that neutrality alone may not always be sufficient to sustain a commander's search authority in future cases. The reasonableness of alternatives to the commander acting as a magistrate in a particular case must be explored.³⁸ In those situations where a military judge or magistrate is available to authorize a search, the reasonableness of not using this prudent judicial source must be questioned. If Ezell mandates the use of true law enforcement officials to investigate crime, it can also be read as a direction to government officials to use only judges and magistrates to evaluate the police officer's findings before searching.

Finally, counsel must note that narrowness of the Hessler holding regarding intrusion into the living areas of servicemen. Hessler speaks in terms of "emergency situations" where "the unit is strategically located in the front line of our defenses in foreign countries."³⁹ The plain view ("plain smell") rationale of the Chief Judge would not limit such intrusion to those barracks located abroad. However, the perceived threat to the military mission caused by smoking marijuana in stateside barracks may not generate the emergency situation created overseas. Chief Judge Fletcher's analysis clearly distinguishes "activated" from "dormant" marijuana. For future resolution is the question of what causes the "emergency situation," the "activated" drug or the situs of the drug's use or both. As with most Fourth Amendment questions, this issue requires a delicate balancing of individual privacy expectations with the readiness required of the individual involved to perform the military mission.

38. Id. at 330.

39. Hessler, supra at 10.

Ballew and Burch - Round Two

Captain Peter A. Nolan, JAGC*

Introduction

The Supreme Court has decided two cases which could reshape the manner in which trials by members are conducted in the military. In Ballew v. Georgia¹ the Court held that a jury consisting of less than six members was unconstitutional because it was "unfair." More recently, in Burch v. Louisiana,² the same idea of basic fairness was stressed by a unanimous court to hold that a conviction by a non-unanimous six-person jury was unconstitutional.

The applicability of Ballew in the military, either under the Sixth Amendment or through Article 16, Uniform Code of Military Justice [hereinafter UCMJ], via military due process, has already been discussed in The Advocate.³ This article will readdress the applicability of that decision and discuss the

* Articles Editor, The Advocate.

1. 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978).

2. ___ U.S. ___, 25 Crim.L.Rptr. 3011, 47 U.S.L.W. 4393 (April 17, 1979).

3. See Schafer, "The Military and the Six Member Court--An Initial Look at Ballew," 10 The Advocate 67 (1978). It should be noted that the Court of Military Appeals has thus far been reluctant to consider fully the issue, and in fact, after granting review on a Ballew argument, soon thereafter vacated the grant. United States v. Lamella, pet. granted, 6 M.J. 11; grant vacated, as to Issue I, 6 M.J. 32; pet. for reconsideration denied, 6 M.J. 128 (CMA 1978). Concededly, for the defense lawyer, Round One has been lost.

applicability of Burch in trial by court-martial solely by invoking the principles of due process.⁴

The Decisions Reviewed

Despite his objections at trial,⁵ Claude Ballew was tried by a jury of five persons and convicted of a misdemeanor for distributing obscene materials. In overturning the conviction, a unanimous Supreme Court concluded that a five-member jury violates basic concepts of fairness. The Court reasoned that "[a]t some point, [the] decline in jury size leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts."⁶ It was the doubt about the reliability and appropriate representation of courts with fewer than six members which led the Court to conclude that the danger rose to constitutional magnitude.

Daniel Burch was convicted by a nonunanimous six person jury in a state criminal trial for a non-petty offense. The denial of his appellate objection to a unanimous verdict was eventually reviewed by the United States Supreme Court, which held that convictions by a non-unanimous six-person jury were simply unfair. In overturning Burch's conviction, the Court relied on the same rationale which it employed in Ballew:

However, much the same reasons that led us in Ballew to decide that the use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a non-petty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the

4. The Court of Military Appeals has long recognized that the due process clause of the Fifth Amendment is applicable in the military. See, e.g., United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967).

5. See Schafer, supra at 79 for a suggested procedure for raising this issue at the trial level.

6. Ballew, supra at 239, 98 S.Ct. at 1033, 55 L.Ed.2d at 246.

jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.⁷

Due Process

The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law" The due process clause is applicable to courts-martial.⁸ While due process in the military is not always identical with due process in civilian life, any differences must be justified by some exigency of military service since, "[c]onstitutional requirements should be qualified by the special condition of the military only when they are shown to require a different rule."⁹

"A fair trial in a fair tribunal is a basic requirement of due process."¹⁰ Juries composed of fewer than six members and convictions of six-member courts that do not require unanimity are not fair. Indeed, as the Supreme Court pointed out in Ballew and Burch, they are so unfair as to violate due process of law.

Therefore, in order to continue to conduct courts-martial with less than six members, and permit courts with six or fewer members to convict upon the concurrence of less than all the members, the military must show some great need or exigency peculiar to the military. The lack of any exigency

7. Burch v. Louisiana, supra, at 3013.

8. United States v. Tempia, supra, ". . . the military is not freed from the requirements of due process of the Fifth Amendment," citing Burns v. Wilson, 346 U.S. 137, 149, 73 S.Ct. 1045, 99 L.Ed 1508 (1953).

9. Kauffman v. Secretary of the Air Force, 415 F.2d 991, 992 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013, 90 S.Ct. 572, 24 L.Ed.2d 505 (1970).

10. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 632, 636, 99 L.Ed. 942, 946 (1955).

which would require a jury of fewer than six members has already been discussed.¹¹ The only arguable benefits in continuing to sanction non-unanimous six-person jury convictions are reducing jury deliberation time and saving the expense of retrials because of hung juries. However, the Supreme Court has already considered these arguments and found them speculative, at best, and insufficient to deprive an accused of a fair trial.¹²

Raising the Issue

Defense counsel should emphasize that Congress has guaranteed servicemembers a statutory (as opposed to a constitutional) right to a "jury" trial.¹³ Having been guaranteed the right to a trial by jury, it only follows that military accused are entitled to a "fair trial" by jury.¹⁴ Without discussing a constitutional right to a jury, per se, it should be stressed that, once a jury is chosen, there is still a constitutional right that it be a fair jury.

Upon establishing that the present military practice would be unconstitutionally unfair in the civilian courts, defense counsel should ask that reasons be brought forth as to why the military must deny an accused the guarantees of a fair trial. The burden should be upon the Government to justify a system which has been condemned, albeit in a civilian setting, by the highest court in the land. If important reasons, dictated by unique military circumstances, are not brought forth, the accused should not be denied his right to a fair trial as embodied in the Ballew and Burch decisions.

Conclusion

To date, no military appellate tribunal has satisfactorily addressed the due process considerations expounded in Ballew and Burch. Although, a few of the service Courts of Military

11. Schafer, supra at 72, 79.

12. Burch, supra, 25 Cr.L.Rptr. at 3014.

13. Article 16, UCMJ.

14. In re Murchison, supra.

Review have entertained the applicability of Ballew to the military, they have circumvented it either under the oft-cited rule that servicemembers are not protected by the Sixth Amendment right to trial by jury or by flatly refusing to accept the empirical data relied upon by the Supreme Court. See, e.g., United States v. Montgomery, 5 M.J. 832 (ACMR 1978); United States v. Wolff, 5 M.J. 923 (NCMR 1978). It is facile to say that there is no constitutional mandate to trial by jury in our system or that the data referred to in Ballew came from a civilian, rather than a military community. However, it would be short-sighted to say that due process does not apply to court-martial composition or that due process is not violated by a system which allows two of three court members to determine guilt and adjudge a sentence which includes a punitive discharge and confinement for six months.

* * * * *

NEW CASE NOTES EDITOR

Captain Terrence L. Lewis, an action attorney at Defense Appellate Division, is the new case notes editor of The Advocate, responsible for providing our readers with timely summaries of recent civilian and military court opinions. Having prior enlisted service with the 4th Infantry Division in Viet Nam and JAG service with VII Corps, Heilbronn and the 2d Support Command, Nelligen, the former Brooklyn assistant district attorney takes over the position formerly held by Captain Joseph W. Moore, who is entering civilian practice in Oregon. Welcome, Terry and good luck, Joe.

FINANCES AND THE CONVICTED GI

Captain Joseph W. Moore, JAGC*
and
Captain Willard E. Nyman, III, JAGC**

Introduction

What you don't know can definitely hurt your client. The case of United States v. Sena, 6 M.J. 775 (ACMR 1978) is a perfect example. There, the accused entered into a pretrial agreement which called for a suspension of forfeitures in excess of \$197.00 per month so long as he supported his wife and child. He was sentenced to a dishonorable discharge, confinement at hard labor for two years, total forfeitures, and reduction to Private E-1. In accordance with the pretrial agreement, the convening authority approved the sentence but suspended any forfeiture in excess of \$197.00 per month. The accused went to the Disciplinary Barracks, thinking that his family would be getting some money during his confinement. However, he and his attorney were unaware of paragraph 10316b (2), Department of Defense Military Pay and Allowances Entitlements Manual, 1967 (C42, 19 Mar. 1976) [hereinafter cited as Pay Manual], which states:

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The authors gratefully acknowledge the assistance of Mr. Abraham Nemrow, Chief, Examinations and New Trials Division, USALSA.

If a member is confined serving court-martial sentence when his enlistment expires, pay and allowances end on date the enlistment expires.

The accused's expiration of term of service (ETS) was nine months after the date he was sentenced. On that ETS date, his pay was totally discontinued, despite what he believed his agreement to be or what the fair interpretation of the wording of his pretrial agreement was. The Army Court of Military Review rejected the accused's contention that his plea was improvident, but did put forth some sage advice to field defense counsel. The author judge wrote:

The Department of Defense Military Pay and Allowances Manual is a "general regulation" issued by the Secretary of Defense in implementation of Title 37 U.S. Code. As such, it falls within the category of laws and regulations soldiers and their attorneys are presumed to know. [Emphasis in original].

Sena, supra at 778. Footnotes 5 and 6 of the opinion point out graphically the responsibility standard to which a defense counsel should be held. In light of the Sena warnings, the following digest of the more pertinent provisions of the Pay Manual are presented for your consideration. As an aid to understanding the material, Tables 7-5-2 and 7-5-3 are reproduced at the end. Citations refer to paragraphs and tables in the Pay Manual, unless otherwise noted.

Forfeitures

A forfeiture, unless total, is an amount taken from pay for the number of days or months as expressly stated in the sentence or as approved by the convening authority. Paragraph 7050l. Basic pay, sea or foreign duty pay, and a voluntary allotment are all subject to forfeiture. Paragraph 70503. Various other allowances are also subject to forfeiture, when a general court-martial sentence includes forfeiture of all pay and allowances. Paragraph 7050ld. If the sentence does not include total forfeitures of pay and allowances, the convening authority's action should apply only forfeitures of pay, not allowances.

Forfeitures are either applied, deferred, or executed. Application of forfeitures means that the amount of the forfeiture is withheld and not collected. Paragraph 7050le. When forfeitures are executed, the monies are actually collected. Paragraph 7050lf. In all cases, the convening authority can defer application of forfeitures, but not after the sentence is ordered into execution. He may also suspend the forfeitures.

If the sentence as approved by the convening authority includes, in addition to forfeitures, unsuspended or undeferred confinement, and appellate review is required before the sentence can be ordered executed, then forfeitures may be applied (withheld) from the date of the action. 7050le. If no confinement is adjudged, or the entire period of confinement is suspended or deferred, forfeitures cannot be applied or collected until the sentence is ordered executed. Articles 57(a) and 71(c) and (d), Uniform Code of Military Justice (hereinafter UCMJ); 7050lf. When an accused, therefore, is sentenced to a punitive discharge and forfeitures, but no confinement, he will not lose any money, since forfeitures cannot be collected, until the sentence is executed. Because the member will also be discharged at the time his sentence is executed, there is no pay which the government can collect. Paragraph 7050l. See also Rule 13, Tables 7-5-2 and 7-5-3 in the Appendix.

The amount forfeited is based on the grade to which the member is reduced. Article 58a, UCMJ, provides for automatic reduction of an enlisted member to pay grade E-1, if his approved sentence includes confinement, hard labor without confinement, or a punitive discharge. The secretaries of the services concerned, however, have provided in regulations that the convening or higher authority may retain the accused in his present or intermediate grade by suspending the automatic reduction elements of the sentence. See, e.g., para. 7-64a(4), Army Reg. 635-200, Enlisted Personnel Management System (C59, 15 Jul. 1978).

In cases in which partial forfeitures and a discharge are adjudged and approved, the client loses all pay and allowances once appellate review is completed and the discharge is ordered executed. Tables 7-5-2 and 7-5-3, Note 1. Even when forfeitures have not been adjudged, an enlisted member

of the Army or Air Force while in confinement, under a suspended dishonorable discharge, loses all pay and allowances upon completion of appellate review. Other service prisoners continue to accrue pay and allowances. 37 U.S.C. §804; Table 7-5-2, Note 2.

When partial forfeitures and a bad-conduct discharge are adjudged and approved, and the convening authority suspends the discharge, the servicemember's pay accrues until the suspension is vacated and the bad-conduct discharge is ordered executed. Table 7-5-3.

Forfeitures take precedent over fines. Paragraph 70507.

Fines

Fines are debts to the government until paid by the servicemember, collected from his current pay, or deducted from his final pay account upon discharge. Paragraph 70501b. Presumably, fines may be paid in full by any combination of these methods of payment. Fines may be collected involuntarily from the current pay of enlisted members of the Army and Air Force, but not of the Navy and Marine Corps. In the Navy and Marine Corps, unless the member consents to an earlier collection, fines are collected from final pay. Paragraph 70507. If fines are to be collected from current pay, however, the amount collected plus prior deductions (forfeitures) cannot exceed two-thirds of the total pay. Id. Since fines cannot be applied, the convening authority's action should not use that term. Fines are not collectable until the sentence is ordered into execution subject to the above provisions. United States v. Vinyard, 3 M.J. 551 (ACMR 1977). Fines cannot be involuntarily collected from an officer's current pay, but can be applied against his final pay.

Sentences Disapproved or Set Aside; New Reviews and Actions

If the sentence is executed and then is set aside and a new trial or rehearing is not ordered, all rights, privileges and property affected by the sentence as executed are restored. Paragraph 70509a. If a rehearing or new trial is ordered and the sentence again includes forfeitures, the member is credited with the amount of any forfeiture effected under the first

sentence. If no forfeitures are adjudged the second time, presumably the member receives all pay and allowances taken under the first sentence. 70509b(1).

If the sentence was unexecuted when set aside and a re-hearing (or new trial) ordered, the member is entitled to full pay and allowances from the date of the convening authority's original action to the date of the subsequent action. Paragraph 70509b(1); 36 Comp. Gen. 512 (1957). Likewise, the ordering of a new review and action will produce the same result. 39 Comp. Gen. 42 (1959). When the member is entitled to restoration of full pay and allowances, as opposed to a credit, he should request repayment of the forfeitures withheld upon receipt of the decision in his case.

Restoration to Duty Pending Appellate Review

A member, who is restored to duty (pending completion of appellate review) and whose sentence included a punitive discharge, total forfeitures, and confinement, is entitled to full pay and allowances, and the forfeitures become inoperative from the date of restoration. However, if a member is restored to duty to serve out his incomplete enlistment, such restoration revives partial unsatisfied forfeitures. Paragraph 70508d. Additionally, when a sentence to confinement has expired prior to completion of the appellate process, a service member may be restored to duty by remitting that portion of all sentences involving forfeitures of pay which remain unapplied and which exceed forfeiture of two-thirds pay per month. Para. 4-7a(1), Army Reg. 190-47, The United States Army Correctional System (1 Oct. 1978). It is imperative that the individual has the order when he arrives at his new duty station to assure that he receives his entitlements from the local finance office.

Errors in Actions and Promulgating Orders

If forfeitures are to be deferred, a statement as to the deferral must be reflected in the action and the promulgating order. Otherwise, the forfeitures will be applied or executed as if no deferral occurred. If the sentence does not include confinement, or the entire period of confinement is suspended, or deferred, and the sentence is not executed, the action

and order should defer the application of forfeitures until the sentence is ordered into execution or the deferment rescinded. Paragraph 7050le.

If total forfeitures are not adjudged, then forfeitures apply to pay only, not allowances. Paragraph 7050ld.

Conclusion

The military practitioner should be familiar with the above rules and the others set forth in the Tables. Since a soldier's pay is always a high priority item, proper advice is important. You owe it to yourself as a professional, as well as to your client, to be knowledgeable about the impact of a conviction on military pay. Don't end up making a Sena mistake!

Appendix

R U L E	A	B	C	D	E	F	G	H	I	J
	When a court-martial sentence to dishonorable discharge also includes	and the convening authority approves the sentence				then pay and allowances	and are	and forfeitures are		
		as adjudged	and defers forfeiture until the sentence is ordered executed	and suspends the DD	and suspends the DD and orders the sentence executed	accrue until		applied (withheld) on and after the date of approval by the convening authority	executed (collected) on and after the date of approval by the convening authority	the sentence is finally approved and ordered executed
1	total forfeiture and confinement	X				sentence is finally approved and ordered executed (note 2)	not paid to the member	X		X
2	for 1 year or longer		X				paid to the member (note 2)			X (note 1)
3				X				X		X
4	total forfeiture, confinement for less than 1 year	X				sentence is finally approved and ordered executed (note 2)	not paid to the member	X		X
5			X				paid to the member (note 2)			X (note 1)
6					X				X	
7	partial forfeiture confinement for 1 year or longer	X				sentence is finally approved and ordered executed (note 2)	paid to the member subject to partial forfeiture	X		X
8			X				paid to the member (note 2)			X (note 1)
9				X				X		X
10	partial forfeiture confinement for less than 1 year	X				sentence is finally approved and ordered executed (note 2)	paid to the member subject to partial forfeitures	X		X
11			X				paid to the member (note 2)			X (note 1)
12					X				X	

TABLE 7-5-2--Continued

	A	B	C	D	E	F	G	H	I	J	
R U L E	When a court-martial sentence to dishonorable discharge also includes	and the convening authority approves the sentence				then pay and allowances		and forfeitures are			
		as ad-judged	and defers forfeiture until the sentence is ordered executed	and sus-pends the DD	and sus-pends the DD and orders the sentence executed	accrue until	and are	applied (with-held) on and after the date of approval by the convening authority	executed (collected) on and after the date		
									of approval by the convening authority	the sentence is finally approved and ordered executed	
13	forfeiture	X				sentence is finally approved and ordered executed	paid to the member			X (note 1)	
14					X	suspension of DD is vacated and DD is ordered executed	paid to the member subject to forfeiture (note 3)		X		
15	confinement for 1 year or longer	X				sentence is finally approved and ordered executed	paid to the member				
16				X		(note 2)	(note 2)				
17	confinement for less than 1 year	X				sentence is finally approved and ordered executed	paid to the member				
18					X	(note 2)	(note 2)				

NOTES: 1. Although sentence to forfeiture is ordered executed, pay and allowances against which forfeitures may operate do not accrue after the discharge is ordered executed.
 2. Pay and allowances accrue to all members until the sentence is approved and ordered executed (or affirmed, as appropriate). After completion of appellate review, any amounts accrued in excess of applied or executed forfeitures are paid to the member. For Army and Air Force enlisted members, pay and allowances do not accrue beyond the date the sentence is approved and ordered

executed (or affirmed) while the member is in confinement under suspended dishonorable discharge (see para 70506). For all other members, pay and allowances continue to accrue after the sentence is approved and ordered executed (or affirmed) while the member is in confinement under suspended dishonorable discharge and any amounts in excess of executed forfeitures are paid to the member.

3. When total forfeiture is involved, no payment is made to the member after the order of execution by the convening authority.

TABLE 7-5-3

APPLICATION AND EXECUTION OF COURTS-MARTIAL SENTENCES INVOLVING BAD CONDUCT DISCHARGE

R U L E	A when a court-martial sentence to bad conduct discharge also includes	B and the convening authority approves the sentence				E and suspends the BCD and orders the sentence executed	F Then pay and allowances		G and forfeitures are		H applied (withheld) on and after the date of approval by the convening authority	I executed (collected) on and after the date of approval by the convening authority	J the sentence is finally approved and ordered executed
		B as adjudged	C and defers forfeiture until the sentence is ordered executed	D and suspends the BCD	E and suspends the BCD and orders the sentence executed		F accrue until	G and are					
1	total forfeiture and confinement for 1 year or longer	X				sentence is finally approved and ordered executed	not paid to the member	X			X		
2							paid to the member				X (note 1)		
3			X		X	suspension of BCD is vacated and BCD is ordered executed	not paid to the member	X			X		
4	total forfeiture and confinement for less than 1 year	X				sentence is finally approved and ordered executed		X			X		
5			X				paid to the member				X (note 1)		
6					X	suspension of BCD is vacated and BCD is ordered executed	not paid to the member		X				
7	partial forfeiture and confinement for 1 year or longer	X				sentence is finally approved and ordered executed	paid to the member subject to partial forfeiture	X			X		
8			X				paid to the member				X (note 1)		
9				X		suspension of BCD is vacated and BCD is ordered executed	paid to the member subject to partial forfeitures	X			X		
10	partial forfeiture and confinement for less than 1 year	X				sentence is finally approved and ordered executed		X			X		
11			X				paid to the member				X (note 1)		
12					X	suspension of BCD is vacated and BCD is ordered executed	paid to the member subject to partial forfeitures		X				
13	forfeiture	X				sentence is finally approved and ordered executed	paid to the member				X (note 1)		
14					X	suspension of BCD is vacated and BCD is ordered executed	paid to the member subject to forfeitures (note 2)			X			
15	confinement for 1 year or longer	X				sentence is finally approved and BCD is ordered executed	paid to the member						
16				X		suspension of BCD is vacated and BCD is ordered executed							
17		confinement for less than 1 year	X				sentence is finally approved and ordered executed						
18					X	suspension of BCD is vacated and BCD is ordered executed							

NOTES: 1. Although sentence to forfeiture is ordered executed, pay and allowances against which forfeitures may operate do not accrue after discharge is ordered executed.
 2. When total forfeiture is involved no payments are made to the member.

TRIAL DEFENSE SERVICE
AT THE
UNITED STATES DISCIPLINARY BARRACKS

Captain Jerome M. Mosier, JAGC*
and
Captain Glenn L. Madere, JAGC**

Introduction

The Fort Leavenworth Field Office of the U.S. Army Trial Defense Service (USATDS) maintains two offices, one inside and one outside the U.S. Disciplinary Barracks (USDB). The vast majority of the services performed by both offices is for USDB prisoners or former prisoners assigned to the USDB Correctional Holding Detachment. This confinement setting requires a mix of trial, appellate, and administrative hearing practice as well as almost constant USATDS efforts at coordinating communications between USDB prisoners and their trial and appellate defense counsel, both military and civilian. Finally, USATDS counsel, through weekly briefings to new inmates and preparation of memoranda pertaining to particular areas of prisoners' rights, attempt to educate prisoners on matters of widespread interest or concern to them. Prisoners

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of all military services, as well as finally discharged prisoners (those whose discharges have been ordered into execution), are eligible for these defense services.

USATDS, Fort Leavenworth - Functions and Priorities

Trial Representation

Trial work at Fort Leavenworth consists of both cases of original jurisdiction and cases in which the military appellate courts have exercised their statutory authority¹ to order a new trial, a rehearing on findings and/or sentence, or a so-called DuBay² hearing, which is typically limited to a few narrowly-defined factual issues. Clients include prisoners, USDB Cadre, Fort Leavenworth personnel, and others attached or assigned for justice purposes. Problems obviously arise in the area of attorney credibility with inmates, especially when guards are accused of offenses within the USDB. Possibilities for conflict of interest and multiple representation are ever present up to and through the appellate process.

Because of the length of time typically required to complete the appellate process, as well as the availability of such avenues of sentence relief as clemency, parole, and restoration to duty,³ rehearings are frequently held long after the accused's release from confinement. At that time, the client is either on excess leave at a civilian address within the United States,⁴ or is serving on active duty at a

1. Uniform Code of Military Justice, Articles 66(d), 67(e), 73, 10 U.S.C. §§866(d), 867(e), 873 (1970) [hereinafter cited as UCMJ].

2. United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967).

3. See Army Reg. 190-47, The United States Army Correctional System, Chapters 6, 12 (1 Oct. 1978) [hereinafter cited as AR 190-47]. See also Madere, "Clemency, Parole, and Restoration to Duty for the Military Prisoner," 9 The Advocate 29 (1977).

4. See Army Reg. 630-5, Leave, Pass, Administrative Absence, and Public Holidays, para. 5-2d (C2, 18 Mar. 1977).

post other than Fort Leavenworth.⁵ Initial contact with such a client is accomplished by mail or telephone. In cases in which final disposition of the case is by administrative discharge in lieu of court-martial,⁶ it is not unusual for the accused to remain at his excess leave address until he ultimately receives his discharge.⁷

Witnesses for most rehearings are scattered all over the country and, frequently, around the world. Witness interviews are often conducted by telephone. At times, an accused requests as individual defense counsel (IDC) at the rehearing, his detailed defense counsel from the original trial. In such cases, the Fort Leavenworth counsel and the IDC must coordinate their efforts prior to trial by mail and telephone. The unavailability of government witnesses (which raises the issue of the admissibility of their testimony at the earlier trial),⁸ the risks and advantages of using the accused's confinement record as evidence in mitigation, and the mechanics of applying the sentence limitation and sentence credit rules applicable to rehearings⁹ frequently present

5. It is the policy of the Department of the Army not to assign ex-prisoners to units at Fort Leavenworth except to await rehearings or under unusual circumstances requiring the ex-prisoner's continued presence on the installation.

6. Army Reg. 635-200, Personnel Separations - Enlisted Personnel, Chapter 10 (21 Nov. 1977).

7. It should be noted that the cost of transportation from the accused's excess leave address to the place of the rehearing is borne entirely by the accused. This fact and the potential interruption of the accused's civilian occupation engendered by a rehearing appear to be an important (and sometimes decisive) factor in the choice of Chapter 10 proceedings in a surprising number of cases.

8. See Manual for Courts-Martial, United States, 1969 (Revised edition) para. 145b [hereinafter cited as MCM, 1969]; Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

9. The basic rule of rehearing sentence limitations appears to be relatively simple, i.e., the accused may not receive a sentence more severe than that previously adjudged and approved, and he is entitled to credit for all punishments

issues which make the rehearing legally, as well as logistically, more complex than the original trial. A further complication might arise when an accused is held in pretrial confinement at the USDB pending a rehearing,¹⁰ for USATDS counsel provide the necessary defense counselling to the pretrial detainee, whether the rehearing is to be held at Fort Leavenworth or elsewhere.

Appellate Advice and Post-Conviction Remedies

With the exception of representation at DuBay-type hearings (which may or may not constitute part of the appellate process),¹¹ defense counsel at Fort Leavenworth do not represent USDB prisoners in military appellate matters. Also, USATDS counsel -- and indeed all Judge Advocate General's Corps officers -- are prohibited from representing clients in collateral attacks on their convictions (or other proceedings)

9. Continued.

served or executed. MCM, 1969, para. 81d, 89c(8). This simplicity is quite deceptive, however, in cases involving time served on parole and cases where the accused's sentence on rehearing puts him in a lower good conduct time bracket than that under his original sentence. See United States v. Larner, 1 M.J. 371 (CMA 1976); United States v. Schauer, 6 M.J. 748 (ACMR 1978); Army Reg. 633-30, Military Sentences to Confinement, para. 5b (6 Nov. 1964). The effect of clemency action by the Commandant, USDB, with respect to uncollected forfeitures, and the effect upon entitlement to back pay by the passage of the accused's ETS during confinement further complicate the sentence limitation and credit rules. AR 190-47, para. 6-19e; Department of Defense Pay and Entitlements Manual, para. 10316b, 70509 (C42, 19 Mar. 1976, C50, 19 Dec. 1977, respectively).

10. See AR 190-47, para. 4-1c.

11. Compare United States v. Flint, 1 M.J. 428 (CMA 1976) and United States v. Johnson, 5 M.J. 664, 667 (ACMR 1978) with United States v. Martin, 4 M.J. 852, 856, 861-862 (ACMR 1978) and United States v. Herndon, 2 M.J. 875, 877 (ACMR 1976), reversed on other grounds, 5 M.J. 175 (CMA 1978) (summary disposition).

in civilian courts.¹² The prohibition extends to the drafting of pleadings for such proceedings.¹³

Given these limitations, one might assume that the Fort Leavenworth USATDS office is generally not involved in the appellate process. In practice, however, more than ten percent of attorney and more than thirty-five percent of non-attorney duty time in the office is devoted in one way or another to appellate proceedings and other post-conviction remedies. The post-conviction services rendered to USDB prisoners generally fit into one of the following categories: (1) facilitating communication between prisoners and their appellate or trial defense counsel; (2) providing appellate advice prior to appointment of the prisoner's appellate counsel or after the prisoner's case has become final; (3) providing advice concerning clemency, parole, upgrading of discharges, and other forms of sentence relief; (4) preparing and processing of applications for deferment of confinement;¹⁴ and (5) preparing, collecting, and forwarding affidavits or personnel records which are needed by appellate counsel. In addition, USATDS counsel at the USDB sometimes prepare or assist in preparing applications for relief under Article 69, UCMJ, and petitions for extraordinary relief to the Courts of Military Review and the United States Court of Military Appeals.

Inmates occasionally seek the assistance of Fort Leavenworth USATDS counsel to voice complaints about or to change their appellate counsel. The policy of the Fort Leavenworth Field Office is to refer prisoners with questions about specific appellate issues or with complaints about appellate counsel to their respective appellate counsel or, when appropriate, to their trial defense counsel. This policy derives from the practical impossibility of sifting every incoming record of trial for potential errors, the statutory

12. Army Reg. 27-10, Legal Services - Military Justice, App. D, para. D-2c (C17, 15 Aug. 1977) [hereinafter cited as AR 27-10]; Army Reg. 27-40, Litigation - General Provisions, para. 1-4b (15 Jun. 1973).

13. AR 27-10, App. D, para. D-2c(3) (C12, 12 Dec. 1973).

14. See UCMJ, Art. 57(d), 10 U.S.C. §857(d).

assignment of that duty to attorneys of the Defense Appellate Division¹⁵ and the recent pronouncements of the Court of Military Appeals in United States v. Palenius¹⁶ and United States v. Iverson¹⁷ regarding trial defense counsel's continuing relationship with and duty to render post-trial assistance to his client.

USATDS counsel do answer general inquiries about the appellate process including its length, the powers of the appellate courts, the appointment of appellate counsel, and the availability of extraordinary relief in military and civilian courts. At the request of appellate or trial defense counsel, the office frequently assists prisoners in completing and compiling supporting documents for deferment applications. Similarly, at the request of a prisoner's counsel, USATDS helps locate, reproduce, and certify enlistment and other personnel records, and obtains affidavits from co-actors and witnesses confined at the USDB.

The USATDS office is the contact point for all military and civilian attorneys wishing to communicate with their clients by telephone. Based on requests from prisoners and their counsel, the USATDS office prepares a daily schedule of telephone call appointments which is then implemented through use of the USDB inmate pass system. For this reason, the USATDS office requests at least two full days notice of proposed calls to inmates except in emergencies.

USATDS counsel at the USDB prepare petitions for extraordinary relief only in cases where the prisoner has no appellate counsel. Considering the dismissal of the petition for extraordinary relief in Stewart v. Stevens,¹⁸ and in

15. UCMJ, Art. 70(c), 10 U.S.C. §870(c).

16. 2 M.J. 86 (CMA 1977).

17. 5 M.J. 440 (CMA 1978). The specific holding of Iverson is that, absent "truly extraordinary circumstances," the staff judge advocate's post-trial review must be served upon the accused's original trial defense counsel, even when the review and the convening authority's action are accomplished at a location distant from the situs of trial.

18. 5 M.J. 220 (CMA 1978) (miscellaneous order).

light of Judge Cook's concurring opinion therein, it appears that such extraordinary relief is available, if at all, only in cases which are at least potentially reviewable by the Court of Military Appeals under Article 67, UCMJ. The petitions filed in such cases have generally involved either a claim of lack of jurisdiction because of a void enlistment (which was not litigated at trial or on direct appeal), a Dunlap¹⁹ violation, or improper revocation of parole.

Administrative Hearings at the USDB

Allegations of misconduct against prisoners within the USDB are generally resolved not by court-martial or punishment under Article 15, UCMJ, but by institutional Discipline and Adjustment Boards.²⁰ These boards have the power to determine the guilt or innocence of the prisoner and recommend to the Commandant administrative disciplinary measures ranging from loss of recreation privileges to forfeiture of good conduct time.²¹ Although attorneys are not permitted to appear before the board, each prisoner is entitled to consult with a lawyer prior to his hearing. Approximately one-third of the prisoners facing boards request such consultation.

When a former USDB prisoner who has been released on parole is accused of violating the conditions of his parole, he is subject to termination of his parole and forfeiture of credit for time served on parole, following a parole violation hearing.²² Although the applicable Army regulation makes no provision for representation of the alleged parole violator at government expense, in practice military counsel is provided (by USATDS) for revocation hearings held at the USDB. Military counsel is not provided when the parole violation hearing is held elsewhere.

19. Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974).

20. See AR 190-47, Chapter 9.

21. AR 190-47, para. 9-3.

22. See AR 190-47, para. 12-27.

In Morrissey v. Brewer²³ and Gagnon v. Scarpelli²⁴ the U.S. Supreme Court established certain minimum due process requirements for proceedings to revoke parole or probation.²⁵ Although the Court of Military Appeals has held the requirements of Morrissey and Gagnon applicable to proceedings under Article 72, UCMJ, to vacate the suspended portions of court-martial sentences,²⁶ our High Court has not yet addressed the applicability of these cases to revocation of military parole. Since May 1978, two former parolees have filed petitions for extraordinary relief challenging the constitutionality of the revocation procedure outlined in AR 190-47. Although the Court of Military Appeals granted show cause orders in both cases, one petition was subsequently dismissed as being moot,²⁷ and the other was denied without opinion.²⁸ The

23. 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

24. 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

25. Taken together, these two cases require the following minimum procedural safeguards: (1) advance written notice of the alleged parole violation; (2) disclosure of evidence against the parolee; (3) the right to be heard in person at a two-step hearing; (4) the right to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses (with certain exceptions); (6) the right to a neutral and detached hearing body; (7) a written statement of the reasons for revocation and the evidence relied upon; (8) provision of appointed counsel for indigent parolees in complex cases and cases where the alleged violation itself is contested or the parolee is incapable of acting effectively as his own advocate; and (9) holding of the final revocation hearing within a "reasonable time" after the parolee is taken into custody. Morrissey v. Brewer, 408 U.S. at 485-489, 92 S.Ct. 2602-2604; Gagnon v. Scarpelli, 411 U.S. at 785-786, 93 S.Ct. at 1761-1762.

26. United States v. Hurd, 7 M.J. 18, 19 (CMA 1979); United States v. Bingham, 3 M.J. 119, 123 (CMA 1977).

27. Johnson v. Army Clemency and Parole Board, 5 M.J. 396 (CMA 1978) (miscellaneous order).

28. Ritter v. United States, 6 M.J. 241 (CMA 1979) (summary disposition).

future potential for litigation in this area is uncertain, particularly in light of the small number of parole revocation hearings conducted at the USDB.

Administrative elimination actions against USDB prisoners are rare, since most prisoners have adjudged punitive discharges upon arrival. When such actions are initiated, USATDS counsel are available to advise or represent the prisoner-respondent.

Of paramount concern to most prisoners is the annual (or more frequent) hearing which each prisoner receives before the USDB Disposition Board. The Disposition Board makes recommendations to the Commandant, USDB, to the Clemency and Parole Boards of the various services, and to the respective service Secretaries with respect to clemency, parole, and restoration to duty. USATDS counsel do not represent prisoners before such boards but frequently do advise clients concerning the presentation of favorable information to the board.²⁹ In some cases, USATDS counsel assist the inmate or his counsel in preparing clemency petitions in addition to those which appellate counsel are specifically authorized to present to such boards.³⁰

Teaching

In order to educate USDB prisoners as fully as possible about their appellate rights and the effect of their court-martial sentences, each week a USATDS counsel conducts a briefing for new inmates. The briefing describes the appellate process and the prisoner's options upon release from confinement in the event such release occurs prior to completion of appellate review in his case. The operation of sentences to forfeiture of pay is explained, as is the effect upon military pay of passage of the prisoner's ETS date or the execution of his punitive discharge while in confinement. The final portion of the briefing deals with the operation of the USDB Discipline and Adjustment Board and the prisoner's rights in hearings before that board. The prisoners are

29. USDB Memorandum 15-1 (1 December 1976).

30. AR 27-10, App. D, para. D-3**b**(2) (C12).

informed, of course, of all legal services available to them, including use of the USDB law library and the assistance of USATDS counsel and the USDB legal assistance officer.

The USDB USATDS office has prepared a number of standard memoranda for inmates concerning particular topics of interest to a large portion of the inmate population. These publications are used to answer routine written inquiries concerning such matters as upgrading of discharges and deferment of sentences to confinement. Other subjects covered by these memoranda include reports of survey, receipt of military pay while in confinement, the effect of federal and state detainers, recovery of damages under the federal wrongful conviction statute, transfer of prisoners to the Federal Bureau of Prisons system, and appeal of Discipline and Adjustment Board results. All of these publications are available to appellate or trial defense counsel upon request.

Conclusion

Although the primary responsibility of the USATDS Field Office at Fort Leavenworth is the defense of clients at court-martial trials and administrative board hearings, the office also performs a number of appellate functions which are crucial to maintenance of "uninterrupted representation of the accused" after trial as mandated by the Court of Military Appeals in United States v. Palenius, supra.³¹ In addition to the appellate advice and assistance furnished directly to USDB prisoners, the office stands ready to assist appellate and trial defense counsel in their efforts to provide timely post-trial advice and representation to their clients. The office may be contacted by mail (United States Trial Defense Service, United States Disciplinary Barracks, Fort Leavenworth, Kansas 66027) or telephone (Autovon 552-2551).

31. 2 M.J. 86, 93 (CMA 1977).

CASE NOTES

FEDERAL DECISIONS

DUE PROCESS -- ROLE OF CONVENING AUTHORITY

Curry v. Secretary of the Army, 25 Crim. L. Rptr. 2050 (D.C. Cir. 1979).

After the Court of Military Appeals denied his petition for review, the defendant collaterally attacked his court-martial conviction in federal district court (439 F.Supp. 261 (D.C. 1977)). The court granted the Army's motion for summary judgment and the defendant appealed to the United States Court of Appeals for the District of Columbia.

The thrust of the defendant's claim was that the structure of the court-martial system does not comply with due process of law as embodied in the Fifth Amendment, and, absent exceptional circumstances, the military's legal system should not be different from the civilian one. The defendant premised his argument on the facts that the convening authority determines which charges should be referred to a court-martial, selects the members, and details the military judge, the prosecutor, and defense counsel. Further, the convening authority reviews the court-martial record, approves the findings and sentence, and returns records for reconsideration and appropriate action on specifications dismissed without a finding of not guilty.

The Court agreed that the system established in the military would be inconsistent with due process in a civilian criminal context. However, it found the military system justified as serving a unique society whose function is "to fight or be ready to fight wars."

Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these

needs for all branches of the service,
at home and abroad, in time of peace,
and in time of war.

25 Crim. L. at 2050.

Responding directly to the challenges concerning the role of the convening authority, the Court upheld the convening authority's power to refer charges as a discretionary means to use efficiently limited supplies and manpower and as a way of maintaining order and discipline, which is imperative to a successfully functioning military. Also, his ability to personally select court members enhances the function of the command, which constantly requires capable troops to be available to perform various tasks that may not be able to be predicted in advance. Such personal selection is an expeditious way of convening a military jury, in order to help assure a speedy trial, "a desirable feature in any system of criminal justice."

Finally, the Court noted that, in drafting the Uniform Code of Military Justice, Congress built into the system sufficient safeguards to protect against the improper exercise of power granted to the convening authority. These include the role of the staff judge advocate in rendering the pretrial advice and post-trial review, the establishment of the Court of Military Appeals and Courts of Military Review, and the inclusion of Article 37 which makes the improper use of command influence a military offense.

SEARCHES -- INVENTORIES

United States v. Bloomfield, 24 Crim. L. Rptr. 2530 (8th Cir. 1979).

Finding the defendant unconscious in his automobile, police officers called an ambulance which took him to a hospital and a tow truck which removed his automobile to the police station where it was impounded. Prior to the removal of the car, the police conducted a routine inventory of the automobile, in which they found a knapsack that was secured by a zipper but not locked. The police opened the zippered bag and found narcotics and \$1300.00 in cash.

At trial, the defendant was successful in having the drugs suppressed. The Eighth Circuit Court of Appeals affirmed, holding that the knapsack should have been inventoried as a unit, rather than opened and each object therein individually itemized.

Citing South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Court began its analysis by reviewing the proper purposes of an inventory search: the protection of the goods while in police custody, protection of the police against claims of lost or stolen property, and protection of the police from potential danger. Since the knapsack was zippered, preventing anything therein from falling out, the Court concluded that the first two purposes are "better served" if the knapsack were inventoried as a unit. The third purpose was more difficult to address. In balancing the governmental interest of protecting the police from danger against the individual's right of privacy, the Court decided that it is the likelihood of danger which must be considered. "Because there (was) no indication . . . (that the) knapsack posed any danger to police, we do not believe that opening and inventorying its contents, rather than storing the knapsack as a unit can be justified on the basis of protecting police." 24 Crim. L. Rptr. at 2531.

COURTS OF MILITARY REVIEW DECISIONS

ULTIMATE OFFENSE

United States v. Morris, NCM 78 1294 (NCMR 22 Mar. 1979).

At 1420 hours on the day in question, appellant received permission to go to an exchange facility, but, instead, went to a bus station. A noncommissioned officer discovered appellant and ordered him to return to his company area or else "be put on U.A." Since appellant did not return until 1800 hours, he was charged and convicted of AWOL and willful disobedience of the NCO's order. The Navy Court of Military Review, noting that appellant, who was already AWOL at the time he received the order, had a preexisting duty to return to his unit, set aside and dismissed the disobedience charge. The "ultimate offense," the Court concluded, was the Article 86 violation, and it was improper to enhance that offense to the greater one under Article 91.

[NOTE: The "ultimate offense" defense to willful disobedience charges often involves Article 86 violations. However, counsel should be alert to the issue in other areas, where a duty to obey already exists. See, e.g., United States v. Sidney, 23 USCMA 185, 48 CMR 801 (1974) (order of company commander to register personal weapons, where regulation requires the same); United States v. Nixon, 21 USCMA 480, 45 CMR 254 (1972) (refusal of order to get into jeep in order to place accused in confinement chargeable as resisting apprehension, not willful disobedience); United States v. Wartsbaugh, 21 USCMA 535, 45 CMR 309 (1972) (order to remove bracelet, predicated on battalion's directive, chargeable under Article 92, not 90)].

TRIAL IN ABSENTIA

United States v. Knight, SPCM 13968, ___ M.J. ___ (ACMR 4 May 1979) (ADC: CPT O'Brien)

Appellant was duly arraigned at the first session of trial and requested a continuance until a specific date. On that day, the court reconvened, but appellant did not appear because he had been incarcerated in the local civilian jail for failing to appear on several outstanding warrants. Defense counsel requested a continuance, which was opposed by the prosecutor, who argued that appellant's decision to ignore the warrants, while aware of the date of his military trial and knowing that he could be arrested at any time on those warrants, made the absence "voluntary." Appellant was tried and convicted in absentia.

The Army Court of Military Review held that the military judge erred in proceeding with trial, because "[a] defendant in custody does not have the power to waive his right to be present." In reaching its decision, the Court relied on United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969) (defendant's giving false name when jailed, which contributed to his absence from trial in another state, did not constitute waiver of right to be present) and Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) (defendant's refusal to return to courtroom from jail did not constitute waiver of right to be present). The Court reversed the conviction and allowed for a rehearing.

PROVIDENCE -- MISTAKE AS TO MAXIMUM PUNISHMENT

United States v. Satterlee, CM 437659 (ACMR 30 Apr. 1979)
(unpub.) (ADC: CPT Wheeler).

Believing that the two offenses with which he was charged (possession and transfer of marijuana) were separately punishable and that the maximum imposable sentence included confinement for ten years, the accused entered into a pretrial agreement with the convening authority. Pursuant to his pleas, he was convicted and sentenced, with the ten year confinement period agreed upon as the correct sentence limitation.

The Army Court of Military Review, deciding that the offenses had merged for punishment purposes, concluded that the correct maximum confinement time was five years. Citing United States v. Harden, 1 M.J. 258 (CMA 1975) and noting the absence of any evidence that the accused would have pled guilty regardless of the maximum imposable sentence, the Court held "the 100% miscalculation (to be) substantial," rendering the plea improvident, and requiring the findings and sentence to be set aside.

TRIAL COUNSEL ARGUMENT

United States v. Mills, CM 437370, ___ M.J. ___ (ACMR 30 Apr. 1979) (ADC: CPT Downen)

Although it found the following remarks of trial counsel to the members during the presentencing phase of trial erroneous as constituting a comment on the accused's failure to testify, the Army Court of Military Review decided that it was not necessary to test for prejudice:

. . . You have heard no evidence on extenuation and mitigation. No evidence has been presented by the defense to show you that this Specialist Five is a good soldier. He's not even claiming to be a good soldier. He presents no evidence from his unit. He obviously (sic) doesn't have to if he doesn't want to, but he hasn't. Surely someone

could come in here and say that he is a good soldier. But, there's nobody here saying that . . .

Instead, the Court found other parts of the same argument even more improper as "a gratuitous, unwarranted personal opinion * * * without any support by the evidence adduced at trial," requiring the setting aside of the sentence. The following remarks, unchecked by a cautionary instruction, were held to improperly imply to the members that the accused, who was convicted of attempted sale of heroin, escape from custody, and possession of five pounds of marijuana, was involved in uncharged misconduct involving drugs:

. . . These offenses are extremely serious offenses. They are offenses which involve the very heart of discipline in the Army. What Steven Mills has been doing, he has been utilizing the United States Army in Europe to traffic drugs in Europe.

STATE DECISIONS

ARREST -- PROBABLE CAUSE

Commonwealth v. Collini, 24 Crim. L. Rptr. 2533 (Pa. Super. Ct. 1979)

Upon noticing the defendant commit several traffic violations, police officers stopped his car. After asking the defendant for his operator's license and vehicle registration card, one officer reached into the car and seized an object that was described as reddish brown and wood-grained from the dashboard. Thinking that it was peyote, the policemen arrested the occupants of the car and searched it, finding marijuana and PCP.

Upon arriving at the police station, the officers obtained a consent search form and searched the defendant's home, where more drugs were found and seized. Additionally, the defendant, after being warned of his Miranda rights, confessed that he was selling illegal narcotics.

Although the Pennsylvania Superior Court determined that the stop was legal, it concluded that there was no probable cause to arrest the defendant. The Court held that it was unreasonable to believe that a block of wood was peyote. "Good faith is not sufficient. * * * An officer must reasonably and objectively conclude, rather than suspect, that a seized item is contraband." 24 Crim. L. Rptr. at 2534. The mistake of the seizing officer, who had little training or special knowledge in drug identification, was not reasonable because the block of wood bore no resemblance at all to peyote. The Court went on to hold that all of the evidence, including the confession and drugs found in the house, was tainted by the unlawful arrest.

INTERROGATION -- DUTY TO OBTAIN DEFENSE LAWYER'S CONSENT

People v. Green, 24 Crim. L. Rptr. 2440 (Mich. Sup. Ct. 1979)

The defendant was convicted of first degree murder. Some of the evidence introduced at his trial included an exculpatory statement he had made to a detective and prosecutor approximately three months after his arrest and after counsel had been appointed for him. The defendant had asked the detective to come to his cell. Accompanying the detective was an assistant prosecutor who did not first call defense counsel to obtain permission to speak with the accused. The statement was obtained after the accused was advised of his rights and waived the presence of his lawyer. The defense sought to suppress that statement because the assistant prosecutor had violated Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility.

The majority opinion agreed that the assistant prosecutor had violated the disciplinary rule. They held, however, that disciplinary infractions should be dealt with by disciplinary action rather than by withholding relevant material from the jury. The Code of Professional Responsibility is not designed to grant statutory rights to individual persons, but to prescribe standards of conduct for members of the bar. Since the defendant sought the interview and waived his Miranda rights, his statement was voluntary as a matter of law.

Three of the judges, writing separately, felt that the defendant's case should be reversed. The dissenters would hold that the court should protect a defendant from violations of the disciplinary rule in a very meaningful way - by suppressing the statements and ordering new trials in appropriate cases.

WITNESSES -- CONFRONTATION

State v. Compton, 24 Crim. L. Rptr. 2435 (La. Sup. Ct. 1979)

After the trial judge had accepted the defendant's guilty pleas to four counts of carnal knowledge of a juvenile, the defendant sought to withdraw them. The defendant's contention was that one of the alleged victims, who testified at the preliminary hearing that the defendant had sexual intercourse with her, later went to the defense counsel's office and volunteered that she had lied at the hearing. Accordingly, counsel called the girl to testify and established that she had visited his office to discuss her prior testimony. At this point, the trial judge called for a recess and informed the girl and her parents that, if she contradicted her earlier testimony, she could be charged with perjury. The parents stated that they did not approve of their daughter testifying that she had lied.

After the girl returned to the stand, defense counsel proceeded to cross-examine her about the truthfulness of the testimony she had given at the preliminary hearing. The trial judge prohibited him from delving into that matter, however, believing that the witness had asserted her privilege against self-incrimination, and denied the motion to withdraw the pleas.

Finding that the record did not reflect an assertion against self-incrimination, the Louisiana Supreme Court reversed. By prohibiting the defense counsel's cross-examination, the trial judge prevented the defendant from presenting evidence concerning a key issue, the believability of the complaining witness. The Court concluded that the judge's action violated the defendant's rights to present witnesses in his own behalf, to have effective assistance of counsel, and to due process of law.

"SIDE-BAR"

or

Points to Ponder

1. Standards governing convening authority's decision to defer confinement. The Court of Military Appeals recently examined the process of granting sentence deferment in United States v. Brownd, 6 M.J. 338 (CMA 1979). The appellant (an Air Force officer-physician) was convicted of adultery, distributing drugs, and using marijuana. He requested in writing, the day after trial, that the convening authority defer his five month sentence to confinement. He asserted that there was no evidence that he was inclined to flee, that he possessed substantial personal property in the community, that the offenses were not violent, that his medical profession made it unlikely the offenses would recur, and that he had financial responsibilities as well as custody of his six-year-old daughter. The convening authority denied the request as not serving "the best interests of the United States Air Force."

On review, the Court acknowledged that, under Article 57(d), UCMJ, the decision to defer is in the "sole discretion" of the convening authority, but held that this discretion is not absolute and unreviewable. The Court adopted the American Bar Association Standard, Criminal Appeals §2.5(b) (1970), as its standard for review, which provides that several factors should be considered on application for deferment: the risk that the appellant will not appear to serve the confinement following the appellate proceedings, the likelihood that he will commit a serious crime, intimidate witnesses or interfere with the administration of justice, and the nature of the crime and length of sentence, as well as pretrial release standards. Applying these factors, the Court found that there had been an abuse of discretion and that the confinement should have been deferred. However, Captain Brownd's victory was illusory. Since he had served his period of confinement (after being denied a writ of habeas corpus requested before his confinement had run), the Court held the issue moot and affirmed the findings and sentence.

Defense counsel has the burden in a deferment request to demonstrate that his client will not flee, commit another crime, intimidate witnesses, or interfere with the judicial process. The use of preprinted forms, which simply list conclusions such as "the accused is not a danger to the community; . . . is unlikely to repeat this or any other offense; and . . . is unlikely to flee to avoid service of his sentence" is insufficient. Instead, concrete evidence should be provided the convening authority, such as the accused's prior clean record, his residing near the post with his family, and any favorable character testimony adduced at trial. Other factors could be the nonviolent nature of the offense of which the accused stands convicted, the decision of the command not to impose pretrial restraint, and the presence of a meritorious appellate issue. See United States v. Thomas, CM 437657, ___ M.J. ___ (ACMR 29 May 1979). Significantly, §2.5(b) of the standards and its commentary suggest that where a short sentence is imposed, it "should be stayed more or less routinely so as not to foreclose appellate review."

The convening authority must then weigh petitioner's assertions against the community interest. If a case can be made under the ABA standards, deferment should be granted, except for the most egregious crimes. Utilizing these same principles, it would also appear that, notwithstanding the plenary power granted the convening authority in Article 57(d) to rescind deferment "at any time," absent ordering the sentence into execution, rescission is also reviewable for abuse of discretion.

If the application for deferment is denied, the applicant "may" request review by the next superior convening authority, or, if the record of trial is subject to an Article 66 review, The Judge Advocate General. Para. 2-30b, Army Reg. 27-10, Legal Services: Military Justice (Cl7, 15 August 1977). Whether this remedy must be exhausted before the denial of deferment may be raised before the appellate tribunals was specifically left unaddressed by the Army Court of Military Review in Thomas, supra, slip opinion at 8, n. 6.

Before requesting deferment, defense counsel should advise his client that granting deferment interrupts the running of the term of confinement. If the sentence is subsequently ordered into execution, the accused must return to complete his term of confinement with no credit for the time spent on

deferment. Consequently, deferment would best suit those clients with a legitimate chance for appellate reversal or who would very likely be able to convince the convening authority to remit the unexecuted confinement if the conviction is affirmed. A detailed discussion of the deferment application process appears at 10 The Advocate 8 (1977).

2. Prejudicial joinder of unrelated charges. Defense Appellate Division has received a record of trial in which the accused was charged with two rapes occurring four to five months apart. Civilian defense counsel requested separate Article 32 investigations of the two rapes because of the risk of evidence of one rape prejudicing a decision on the other. The convening authority denied the request and ordered a combined trial, forcing the accused to defend himself against both unrelated charges at one trial. Appellate defense counsel have raised the ordering of the joint trial as error.

Although the military rule has long been that all known offenses should be tried together in a single trial, that practice should not be followed where substantial prejudice may accrue to the accused. United States v. Batson, 12 USCMA 48, 30 CMR 48 (1960); paragraph 39g, Manual for Courts-Martial, United States, 1969 (Revised edition). An accused may be prejudiced in three respects by this practice. First, the finders of fact might use the evidence of one of the offenses to infer a criminal disposition on the accused's part on which to base guilt of the other offense. Second, they might cumulate the evidence of the multiple offenses and find guilt as to one of them as a compromise, where the evidence, considered independently, could have resulted in an acquittal. Third, the accused may become embarrassed or confounded in presenting separate defenses. The dangers are summed up in McElroy v. United States, 164 U.S. 76, at 79-80, 17 S.Ct. 31 at 32, 41 L.Ed. 355 (1896), as follows:

In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the

settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction.

In arguing this issue, trial defense counsel should note the proposition expressed in paragraph 138g of the Manual that evidence of other acts of misconduct is not admissible as tending to prove the guilt of the accused. The same principles should apply, since the same dangers exist, when two crimes are joined for trial. An important factor in determining whether prejudice exists depends on whether the evidence of one of the crimes would be admissible in a separate trial for the other crime. See Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).

Accordingly, evidence of other crimes is admissible when relevant to (1) identify the accused as the perpetrator of the charged offense, (2) prove a plan or design of the accused, (3) prove knowledge or guilty intent in a case in which these matters are in issue, (4) show the accused's consciousness of guilt of the charged offense, (5) prove motive, (6) rebut entrapment, accident or mistake as defenses, and (7) rebut any issue raised by the accused except the accused's good character. Paragraph 138g, Manual. If, under these rules, the evidence of each charge would be admissible in a separate trial of the other charge, the possibility of "criminal propensity" prejudice might be outweighed by the judicial economy of a common trial. This rests upon the assumption that, given a proper instruction, the jury can easily keep such evidence separate in their deliberations, thereby reducing the danger of the jury's cumulating the evidence. See Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). Where such is not the case, counsel should consider pressing for separate trials.

3. Sample instruction on immunized witness testimony. The following instruction can be tailored to situations where the witness has been granted either testimonial or transactional immunity by the Government. The editors wish to thank Mr. Donald A. Timm, Esq., Seoul, Korea, for this contribution.

Gentlemen, with respect to the testimony of _____ (which you are about to hear)¹ I instruct you that he (has testified) (will testify)¹ as a result of an order to testify as a Government witness, under which he has been granted immunity.

What this means is that the testimony which _____ (has given) (will give)¹ in this proceeding may not be used against him in any criminal (or administrative) proceeding, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the immunity order. Effectively this means that _____ will not be (further) prosecuted for his involvement in any offense about which he testifies, and this is _____'s understanding.²

What this means is that the Government has promised _____ that he would not be prosecuted for his involvement in any offense about which he testifies, if he cooperated with the Government in this case, and that it was _____'s full understanding that he will not be so prosecuted for these offenses.³

1. Use appropriate language depending on whether the instruction precedes the testimony of the witness or is given after the close of the evidence. The instruction could be more effective when given immediately before the witness testifies, as was done in the case from which this instruction was modeled. *United States v. De Loach*, 530 F.2d 990,994, n. 5 (D.C. Cir. 1975). When the instruction is given at the time the witness testifies, it should be alluded to, although not necessarily repeated, during final instructions.

2. This paragraph is appropriate where the witness has been granted testimonial or use immunity.

3. This paragraph is appropriate where the witness has been granted transactional immunity.

You are instructed that one who testifies under a grant of immunity with a promise from the Government that (he will not be prosecuted) (his testimony will not be used against him) is a competent witness and you may convict a person accused of crime upon the uncorroborated testimony of such a witness, if you believe that testimony proves the guilt of the defendant beyond a reasonable doubt.⁴

However, such a witness' testimony should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interest, for such a witness, confronted with the realization that he can procure his own freedom by incriminating another, has a motive to falsify.

4. Where the immunized witness is also an accomplice, this paragraph should be modified to include the corroboration requirement. For example, after the word "witness," the sentence could be altered to read ". . . however, as this witness (is) (may be) an accomplice, you must keep in mind that you may not convict a person accused of crime on the uncorroborated testimony of a purported accomplice if such testimony is self-contradictory, uncertain, or improbable." Alternatively, the better solution might be merely to strike that portion of the sentence following the word "witness" when the witness is or may be an accomplice, and rely on the standard accomplice instruction (Dept. of Army Pam. 27-9, Military Judges' Guide, para. 9-22 (1969)) to set out the special law on accomplice testimony.

"ON THE RECORD"

or

Quotable Quotes from Actual Records of Trial Received in DAD

* * * * *

MJ (during larceny of monies providence inquiry): And did you intend to keep it permanently?

ACC: No, sir:

MJ: What?

ACC: Not intend to keep it permanently - we spent it.

* * * * *

IDC: Have you ever socialized with Major (JAGC officer) in the past?

MBR: Yes. I have nothing against JAG's in particular. In fact, some of my best friends are or were JAG's.

* * * * *

MJ: Alright, would you show that to your client, please.

DC: Yes, Your Honor.
(Defense counsel hands to trial counsel).

MJ: Your client is over here.

* * * * *

TC (on cross): Do you feel that good people commit aggravated assaults?

A: Whenever they are aggravated.

* * * * *

TC: Your Honor, since the law clearly states, that persons can be required to wear various items, or do various things in a line-up in order to be identified, I would request that in some way we set up an experiment in which the accused can have his fingers bit, so that we can see how long it takes for the marks to go away.

* * * * *

DC: Your Honor, would the offense please get his things off my desk.

MJ: He is known as the prosecution and not the offense.

* * * * *

MJ: Now, lawyers are known to make things as obscure as possible. So the lawyer who apparently drew up this specification thought it was very smart to say that you are a member of the regular forces of the United States Army. But then they went ahead and they said in accordance with 10 U.S.C. Section 802. Do you know what U.S.C. stands for? -- other than University of Southern California.

ACC: U.S.C. stands for United States Consulate.

MJ: What!?

* * * * *

DC: . . . he should not be acquitted of these offenses on such an insufficient compilation of evidence.

MJ: Excuse me, Captain _____, I believe you said he should not be acquitted.

DC: Excuse me, I meant convicted, and I beg the indulgence of the Appellate Courts, should the issue ever arise.

* * * * *

MJ: If Caesar's legions had as many legionnaires in Trier (FRG) as the CID narcotics suppression agents, we'd all be speaking Latin today.

