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A Journal For Military Defense Counsel

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THE ADVOCATE

Volume 12, Number 3

May-June 1980

CHIEF, DEFENSE APPELLATE DIVISION

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BRIEFLY WRIT

SPECIAL ISSUES OF THE ADVOCATE

This issue and our next issue, which focus on the new Military Rules of Evidence, should become defense library references.

The lead article, written by Major Fredric Lederer (a member of the working group that drafted the new Rules), furnishes us with an overview of the Rules, and also some insight into their development.

What is possibly the most important section of the new Rules, Section III, is covered by Captain Scott Castle's article on motion practice. His in-depth and precise analysis of the Rules of that section will be of great benefit to counsel in learning the Rules and employing them in the courtroom.

As is to be expected in a body of material which effects such a major change in the law, the Military Rules of Evidence contain certain provisions which are difficult both to interpret and to apply. The last article surveys problem areas in Sections IV, VI, VII, VIII, and X, and provides a useful discussion of the interpretation and application of their Federal Rule counterparts by Article III courts.

STAFF CHANGES

The Editorial Board expresses its thanks to Captain Julius Rothlein who has left his post as Managing Editor of The Advocate for reassignment to the Graduate Course at Charlottesville, Virginia. The work, dedication, and organization that Jules gave to The Advocate is greatly appreciated by all of us. We also take this opportunity to express our gratitude to Captain Allan T. Downen who long served as our Trial Tactics Editor. Al provided us with many novel techniques and useful trial strategies. We are pleased to announce their replacements: Captain Alan W. Schon as the new Managing Editor and Captain Courtney B. Wheeler as Trial Tactics Editor.

I am also leaving what has been a professionally rewarding position as Editor-in-Chief. If The Advocate has been as informative and beneficial to you as it has been to me, my efforts as Editor-in-Chief have been worthwhile. Captain Edwin S. Castle, our present Articles Editor who was instrumental in preparing this special issue, has been named as the new Editor-in-Chief. Replacing Scott as Articles Editor is Captain Edward J. Walinsky.

Captain Terrence L. Lewis, our present Case Notes Editor, is departing to enter civilian practice. We thank Terry for his outstanding work as Case Notes Editor in bringing our attention to cases useful to criminal defense practitioners and in spotting trends in the law. His replacement is Captain Robert D. Ganstine.

I wish the new Board well.



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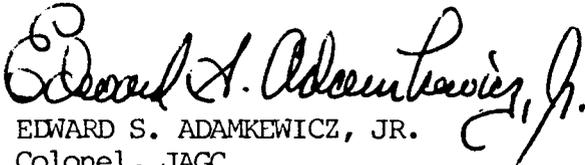
4 June 1980

SUBJECT: New Military Rules of Evidence

TO: Readers of The Advocate

1. This special edition of The Advocate is designed to inform military defense counsel of the major ways in which the new Military Rules of Evidence affect their responsibility to represent defendants before courts-martial. That is an ambitious undertaking, in view of the pervasive manner in which the new evidentiary rules and the attendant revisions of Chapter 27 of the Manual for Courts-Martial modify not only the substantive aspects of criminal procedure, but the procedural mechanisms for lodging evidentiary objections and motions to suppress as well. Indeed, the dimensions of the task preclude the possibility of adequately assessing these revisions in a single special edition; accordingly, the next volume of The Advocate will likewise be devoted to the new evidentiary rules. Conjunctively, these two issues should apprise the military defense counsel of the most significant aspects of the new provisions. Issues of The Advocate published subsequent to these special editions will, of course, continue to explore the secondary ramifications of the new rules.

2. Apart from the numerous instances in which they depart from or modify prior military law, the new rules also signal an overriding change in approach with regard to practice before courts-martial. The emphasis on conformity between military and civilian law has never been more marked. The Federal Rules of Evidence were incorporated into the new provisions wherever practicable, and amendments to that body of law will be automatically adopted unless the President takes action to the contrary. As a result, the defense counsel's trial responsibilities are augmented. Hopefully, this and future editions of The Advocate will assist him or her in discharging those responsibilities in an effective, professional manner.


EDWARD S. ADAMKEWICZ, JR.
Colonel, JAGC
Chief Appellate Defense Attorney

THE MILITARY RULES OF EVIDENCE: AN OVERVIEW

Major Fredric Lederer, JAGC*

On 12 March 1980, the President signed Executive Order 12,198,¹ which promulgates the Military Rules of Evidence. It is difficult to overestimate the significance of this event, since the new evidentiary rules arguably effect the largest single change in military criminal law since the enactment of the Uniform Code of Military Justice. The Rules alter the nature of trial practice, and substantially change the rules of criminal procedure as well as the rules limiting the nature and quantity of evidence admissible before a court-martial. Perhaps equally important is the significant change in approach symbolized by the Rules. Following Article 36,² the Rules not only adopt civilian federal practice unless it would be impracticable or "contrary to or inconsistent with" the Uniform Code of Military Justice, but they also automatically adopt any amendments to the Federal Rules of Evidence 180 days after their effective date, unless the President takes action to the contrary.³ Thus, the Rules are designed to ensure conformity with civilian federal practice - a conformity that should keep military practice current.

The Military Rules of Evidence were initially drafted by a special committee of the Joint Service Committee on Military Justice Working

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1. Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). The executive order prescribes amendments to the Manual for Courts-Martial, United States, 1969 (Revised edition), and is effective 1 September 1980.

2. Uniform Code of Military Justice, Article 36(a), 10 U.S.C. §836(a) [hereinafter cited as Article 36].

3. Mil. R. Evid. 1102 prescribes that "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President." Normally this should be twelve months after initial promulgation of the amended Federal Rules.

Group, and subsequently reviewed and modified by the Joint Service Committee on Military Justice.⁴ The final draft of the Rules was forwarded through the General Counsel of the Department of Defense⁵ to the Office of Management and Budget, which circulated the Rules to the Department of Justice⁶ and other agencies, and finally forwarded them to the President via the White House Counsel's Office. The final product is a body of black letter rules which its authors believe to be clearer than the present Manual and more susceptible to use by laymen. At the same time, the Rules modernize military law and will hopefully make practice before courts-martial simpler and more efficient.

The Rules have three principal parts. Sections⁷ I-II, IV, and VI-XI adopt the Federal Rules of Evidence without change except when

4. The Joint Service Committee on Military Justice, whose primary function is to ensure that the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1969 (Revised edition) are current, is an interservice body composed of the chiefs of the criminal law divisions of the Army, Navy, Air Force, Coast Guard, and Marines, and a representative of the Court of Military Appeals. The Working Group that drafted the Military Rules of Evidence, a subordinate agency of the Joint Service Committee, was composed of two representatives from the staff of the Court of Military Appeals, and one representative from the Army, Navy, Air Force, Coast Guard, and Office of the General Counsel of the Department of Defense, respectively. The Marine Corps did not participate at the drafting level.

5. The Code Committee, Uniform Code of Military Justice, Article 67(g), 10 U.S.C. §867(g), served as an intermediate reviewing agency between the Joint Service Committee on Military Justice and the General Counsel of the Department of Defense except with regard to Section III of the Rules, which the judges of the Court of Military Appeals chose not to review. Except for matters which involved interservice conflicts that had to be reviewed by the Code Committee, the proposed Military Rules of Evidence were not reviewed by the Code Committee. Those few matters which were reviewed were generally not of great importance.

6. A number of minor changes were made at the request of the Department of Justice.

7. The term "section" was used in lieu of the word "article," which is used in the Federal Rules of Evidence, because of the use of "article" in the Uniform Code of Military Justice. The Committee was concerned that confusion might result if "article" were used.

modification of the Federal Rule was required to ensure compliance with the Uniform Code of Military Justice or to ensure practicality within the military setting. Section V prescribes a complete body of privileges derived primarily from the present Manual for Courts-Martial and the proposed Federal Rules of Evidence dealing with privileges. Section III replaces those federal evidentiary rules dealing with civil matters with a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification. This section also includes, in Rule 313(b), a rule governing inspections which permits inspections for contraband under certain circumstances. Section III represents a balance between complete codification - the approach best suited for situations principally involving laymen - and flexibility, which is generally permitted only when dealing with matters primarily within the province of lawyers. Section III was expressly intended to serve the needs of the numerous laymen, commanders, non-lawyer legal officers, and law enforcement personnel who play important roles in the administration of military justice.

The Military Rules of Evidence provide defense counsel with additional opportunities and responsibilities. The new Rules depart from prior law by placing primary responsibility in a number of critical instructional areas on the defense counsel rather than the military judge. Thus, instructions to disregard uncharged misconduct⁸ or the silence of the accused⁹ are usually contingent upon defense request. Correspondingly, a defense counsel's failure to request such an instruction normally constitutes a waiver of that right. Far more evidence is admissible under the new Rules than under the present Manual.¹⁰ This change results in a notable opportunity for defense counsel, but it is one that will more often inure to the benefit of the prosecution because of the government's burden of proof. Consequently, it is imperative that defense counsel completely familiarize themselves with the Rules, and learn not only to employ them affirmatively on the part of the client but also to object to their improper use by the trial counsel. In this latter respect, it is important to note that a failure to object under the new Rules will almost always¹¹ result in a waiver of the objection; nor will the issue be preserved if the objection or motion lacks sufficient specificity.

8. Mil. R. Evid. 105.

9. Mil. R. Evid. 301(g).

10. See, e.g., Mil. R. Evid. 801(d)(1).

11. Mil. R. Evid. 103(a). But see Mil. R. Evid. 103(d).

New forms of evidence are admissible under the Rules. Not only do the Rules affect such mundane areas as inconsistent¹² and consistent¹³ statements, which the new Rules treat as non-hearsay and thus make generally admissible on the merits, but the Rules also make the results of polygraphs, drug induced statements, and statements made under hypnosis¹⁴ potentially admissible for the first time. Indeed, under Rule 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the Uniform Code of Military Justice, these rules, this Manual, or any Act of Congress" Notwithstanding this general approach favoring admissibility, however, the defense counsel will find that the Rules sharply limit the admissibility of some forms of evidence which were previously admissible. Rule 412, for example, substantially limits admissibility of evidence of the alleged victim's past sexual behavior in cases involving sexual offenses.

Section III covers the exclusionary rules and related matters; it is too lengthy and complex to summarize here. It can be said, however, that the section makes numerous changes in present law. For example, while Rule 302 protects the accused against disclosure of information given to a sanity board, and while Rule 305 grants the suspect entitled to counsel both a free military lawyer, regardless of wealth or indigency,¹⁵ and a civilian counsel at no expense to the government, Rule 305 eliminates any right to individual military counsel of a suspect's own selection. Furthermore, Rule 304 conforms military law to civilian federal practice by eliminating the "two bite" rule for determining the admissibility of confessions and admissions. Similar modifications could be identified

12. Mil. R. Evid. 801(d)(1)(A).

13. Mil. R. Evid. 801(d)(1)(B).

14. The prohibition on use of such evidence, now found in paragraph 142e of the current Manual for Courts-Martial, has been deleted. Such evidence will consequently be admissible to the same degree as in civilian federal courts. Although polygraph evidence, for example, is not yet generally admissible in the Article III courts, the trend is clearly towards admissibility.

15. Mil. R. Evid. 305(d)(2). This overrules *United States v. Hofbauer*, 5 M.J. 409 (CMA 1978); and *United States v. Clark*, 22 USCMA 570, 48 CMR 77 (1974).

in all of the Section III Rules.¹⁶ Perhaps the single largest change in the Rules from the perspective of the defense bar, however, is the new suppression motion practice. Set forth in Rules 304, 311, and 321, the new procedure will require the defense to move to suppress any illegally obtained evidence¹⁷ prior to plea on pain of waiving the objection, so long as the evidence was previously disclosed by the prosecution. Since the military judge must rule upon the motion prior to plea,¹⁸ the defense may submit a suppression motion and still utilize any pretrial agreement. However, the new Rules also require the defense to object with specificity should the military judge so require. This requirement will enable a prompt resolution of suppression motions and prevent receipt of irrelevant evidence. On the other hand, it will also require proper preparation, and will severely penalize the client of the unprepared or lazy counsel.

The new Military Rules of Evidence substantially alter present military legal practice. To assist counsel in the field, Change 3 to the Manual, which should be disseminated by 1 August 1980, will include a detailed analysis of the new Rules and will express both the "legislative intent" of the authors of the Rules and the changes from current practice effected by the Rules. The Analysis also clarifies a number of the Rules with examples and occasionally suggests possible trial practice considerations. Although the Analysis is not part of the executive order, it will be published as a non-binding appendix to the Manual so that it will be easily available to the field.

Practice under the Military Rules of Evidence will be more demanding and will require the best that counsel can give. At the same time, the new Rules will reward creativity and afford counsel the opportunity to utilize fully their professional abilities. The role of the defense attorney will be significantly enhanced under the new Rules. The new responsibilities will be attended by new opportunities. It should be an exciting time to be in the courtroom.

16. Rule 321, for example, eliminates for all practical purposes the right to counsel at lineups. Yet, it is also somewhat more protective of the accused than is present law because of the application of the hearsay rule to eyewitness identifications. But see Mil. R. Evid. 801(d)(1)(C); 803.

17. Derivative evidence need not be disclosed; see, e.g., Mil. R. Evid. 311(d)(2)(C), in which case it may be objected to when offered.

18. See, e.g., Mil. R. Evid. 311(d)(4). A ruling may be deferred only when deferral is for "good cause" and the "party's right to appeal the ruling is [not] affected adversely." Thus, deferral can only result when the accused is definitely going to plead not guilty and good cause is present.

MOTION PRACTICE UNDER SECTION III OF THE
MILITARY RULES OF EVIDENCE

Captain E. Scott Castle, JAGC*

From the defense counsel's perspective, the most crucial aspect of the new Military Rules of Evidence is the extensively revised procedure for presenting evidentiary objections and motions under Section III. In part, that section codifies decisional law relevant to exclusionary rules and related matters such as self-incrimination, search and seizure, and eyewitness identification. The drafters of the Rules digested pertinent case law in those areas where legal principles are relatively settled, where uniformity is particularly desirable, or where public policy concerns support such an approach. This article focuses not on the substantive legal rules expounded in Section III, however, but on the procedural framework governing the presentation and disposition of evidentiary objections tendered pursuant to that section. Although there are variations in this framework depending on the nature of the contested issue, the drafters produced a set of motion practice rules which generally applies to objections throughout Section III.

Rule 301. Privilege Concerning Compulsory Self-Incrimination.

Rule 301 essentially restates prior military law. The rule specifically limits the privilege against self-incrimination to evidence of a "testimonial or communicative" nature.¹ The "bodily fluid" cases² which suggest that Article 31, Uniform Code of Military Justice³ applies to examinations of blood and urine are not thereby overruled; instead, the drafters contemplate that the Court of Military Appeals will define the proper scope of the phrase. If a witness "appears likely to incriminate himself," either the trial or defense counsel, or counsel representing the witness, may request that the military judge advise him of his right "to

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1. See Mil. R. Evid. 301(a).
2. See United States v. Ruiz, 23 USCMA 181, 48 CMR 797 (1974); United States v. Musquire, 9 USCMA 67, 25 CMR 329 (1958).
3. 10 U.S.C. §831 [hereinafter UCMJ].

decline to make any answer that might tend to incriminate [him] and that any self-incriminating answer [he] might make can later be used as evidence against [him]."⁴ The request must be made out of the hearing of the witness and the members, except in a special court-martial without a military judge. Testimony is not rendered inadmissible by the failure of the military judge or either counsel to advise the witness of his rights in accordance with this rule. If the witness asserts his privilege against self-incrimination despite the fact that the "circumstances are such that no answer [he] might make to the question could have the effect of tending to incriminate [him]," counsel for either side may request that the military judge require the witness to answer.⁵ A witness may also be compelled to testify if counsel can demonstrate that the witness would not be subject to "criminal penalty" as a result of that testimony. It is unclear to what extent quasi-criminal sanctions such as disbarment will be recognized as sufficiently severe to support the privilege.

Either counsel may request the military judge to compel the witness to "disclose all information relevant to" any self-incriminating fact he admitted without asserting the privilege, "except when there is a real danger of further self-incrimination."⁶ The extent of this waiver depends first upon the military judge's conclusion as to the relevance of information surrounding the admitted fact. The waiver is also specifically limited by Rule 608(b), which provides in part that the "giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility."⁷ An accused who voluntarily testifies as a witness thereby waives the privilege against self-incrimination; during cross-examination, the trial counsel may question him on matters relevant to an offense about which he testified during direct examination. Otherwise, an accused who is tried for two or more offenses may be cross-examined only as to the offense about which he testified on direct examination.⁸

4. Mil. R. Evid. 301(b)(2).

5. Mil. R. Evid. 301(c).

6. Mil. R. Evid. 301(d). The point at which the possibility of further incrimination becomes a "real danger" is unclear: the issue must be resolved on an ad hoc basis by the military judge after an assessment of all surrounding circumstances in the case.

7. Mil. R. Evid. 608(b).

8. Mil. R. Evid. 301(e).

The trial counsel must reduce to writing any grant of immunity or leniency extended to a prosecution witness in return for his testimony, and serve that document on the accused prior to arraignment, "or within a reasonable time before the witness testifies."⁹ This provision is designed to avoid the need for defense recesses or continuances; the military judge can best support the policies underlying the rule by requiring trial counsel to notify the defense of any grants of immunity or leniency as early as possible: service after arraignment should be permitted only when the circumstances of the case preclude earlier disclosure. If the trial counsel does not comply with Rule 301(c)(2), the defense counsel should request a continuance until the grant of immunity is reduced to writing and served on the accused. The military judge also has the discretion to prohibit the witness from testifying, to strike the testimony if it already appears on the record, or to "enter such other order as may be required" under the circumstances.¹⁰ Especially when the prosecution witness' testimony is damaging and unexpected and is presented in violation of these notice requirements, defense counsel should move to suppress the testimony. If the witness asserts the privilege against self-incrimination during cross-examination, the defense counsel should move to strike the direct testimony in whole or in part under the provisions of Rule 301(f)(2), unless the "matters to which the witness refuses to testify are purely collateral."¹¹

The fact that a witness asserted the privilege either during official pretrial questioning or during the court-martial itself "cannot be considered as raising any inference unfavorable to either the accused or the government."¹² If the invocation of Fifth Amendment or Article 31 rights occurred prior to trial, evidence of that fact is inadmissible under Rule 301(f)(3). When the accused does not testify at trial, the defense counsel may either request the military judge to instruct the members of the court

9. Mil. R. Evid. 301(c)(2). This rule reflects prior military law, which required the staff judge advocate or trial counsel to notify the defense, in writing, of promised grants of immunity or clemency before trial. *United States v. Webster*, 1 M.J. 216 (CMA 1975). Failure to adhere to these notice requirements may disqualify the witness. See *United States v. Saylor*, 6 M.J. 647 (NCMR 1978).

10. Id.

11. Mil. R. Evid. 301 (f)(2). This provision restates prior military law. See *United States v. Rivas*, 3 M.J. 282 (CMA 1977); *United States v. Anderson*, 4 M.J. 664 (ACMR 1977).

12. Mil. R. Evid. 301(f)(1).

to disregard that fact and draw no adverse inferences from it, or ask the military judge to refrain from so instructing the members. The military judge has no discretion in this matter and is obligated to abide by the defense counsel's desires, "except that [he] may give the instruction when [it] is necessary in the interests of justice."¹³ Since one of the objectives in revising the rules is to enable the military defense bar to assume responsibilities equal to its civilian counterpart, this provision should be interpreted to mean that the military judge will override the defense counsel's decision only when the latter is clearly inexperienced or incompetent and there appears to be a fair risk of prejudice to the accused. Otherwise, the decision is regarded as a tactical choice properly left to the judgment of the defense counsel.

Rule 302. Privilege Concerning Mental Examination of an Accused.

Under Rule 302, the defense counsel may move¹⁴ to suppress any statements (and other evidence derived therefrom) made by the accused at mental examinations conducted pursuant to paragraph 121, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter Manual]. This privilege applies during the extenuation and mitigation phase of the trial and exists "notwithstanding the fact that the accused may have been warned of the rights provided by Rule 305 at the examination."¹⁵ The warnings enumerated in Article 31, UCMJ, need not be provided to the accused in this setting, and if given, they will have no effect. The privilege may not be asserted if the accused introduces the statements or evidence. Thus, because of the inherent tension between the right to raise the insanity defense and the right against self-incrimination, the accused's decision to raise the issue of mental responsibility necessarily constitutes an implied waiver, and enables the government to require an independent psychiatric examination.

Prior to trial, the convening authority may order the accused to submit to a psychiatric examination; after the case has been referred, the military judge may take the same action. A refusal to cooperate exposes

13. Mil. R. Evid. 301(g).

14. The privilege recognized in Rule 302 must be asserted in accordance with the procedures delineated in Rule 304 for an objection or motion to suppress. See Mil. R. Evid. 302(e). Prior military practice lacked a formal motion to suppress evidence; suppression motions were treated either as evidentiary objections or motions for appropriate relief. See United States v. Mirabal, 48 CMR 803 (ACMR 1974). See also, Basham, Suppression Motions Under the Military Rules of Evidence, The Army Lawyer, May 1980, at 19.

15. Mil. R. Evid. 302(a).

the accused to potential prosecution for disobedience of a lawful order. In addition, if the accused is uncooperative during a psychiatric examination authorized under paragraph 121 of the Manual, the military judge may prohibit him from presenting "any expert medical testimony as to any issue that would have been the subject of the mental examination."¹⁶ Presumably, the government can present testimony as to the reasons underlying the conclusions reached by the experts who examined the accused, although that testimony may not extend to statements by the accused which were not previously introduced by the defense counsel.¹⁷

Normally the sanity board examining the individual will release its ultimate conclusions to the officer ordering the examination, the accused's commanding officer, the Article 32 investigating officer, both counsel, and the convening authority. The defense counsel's copy will include the board's ultimate conclusions, its psychiatric diagnosis, and any specific statements made by the accused. No one may release the full report to the trial counsel unless the sanity issue is properly raised. If the defense counsel introduces statements made by the accused during the examination, the trial counsel may request the disclosure of "such statements made by the accused and contained in the report as may be necessary in the interests of justice."¹⁸ If the defense counsel did not introduce statements by the accused, he may excise any such statements from the psychiatric report before complying with a prosecutorial discovery motion submitted pursuant to Rule 302(c).

Rule 303. Degrading Questions.

Rule 303 extends to witnesses a privilege against presenting evidence which is immaterial and potentially degrading.¹⁹ This privilege is also recognized in Article 31(c), UCMJ.²⁰ Although evidentiary rules do not apply at Article 32 investigations, Rule 303's status as a privilege renders it applicable to those proceedings. Its significance at subsequent stages

16. Mil. R. Evid. 302(d).

17. Mil. R. Evid. 302(b)(2).

18. Mil. R. Evid. 302(c). Under *United States v. Babbidge*, 18 USCMA 327, 40 CMR 39 (1969), the trial counsel was entitled to the entire report, including any statements by the accused.

19. See Mil. R. Evid. 303.

20. 10 U.S.C. §831(c).

of the case, however, is questionable in light of Rule 402, which provides that "[e]vidence which is not relevant is not admissible."²¹ Evidence which is inadmissible under Rule 303 because of its immateriality is presumably irrelevant as well under Rule 401.²²

Rule 304. Confessions and Admissions.

Rule 304 presents procedures for removing from the court-martial's consideration any evidence consisting of or derived from involuntary statements by the accused. This provision departs from the "Massachusetts Rule" which was previously followed in litigating confessions before courts-martial. Under that procedure, the voluntariness issue was first argued before the military judge; at that stage, the government shouldered the burden of demonstrating voluntariness by a preponderance of the evidence.²³ If the prosecution satisfied that threshold requirement, the defense was nevertheless entitled to reargue the issue before the members of the court-martial. In addition, the military judge had a sua sponte duty to instruct the members that they could not consider the statement unless they found it voluntary beyond a reasonable doubt.²⁴

Essentially, the new rule enables the defense counsel to exclude any statement "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."²⁵ Statements are also "involuntary" and may be suppressed if they are obtained in violation of Rule 305, which sets forth requirements regarding the rights warnings to be afforded an accused or suspect. However, Rule 304 does not prevent the government from impeaching an accused's in-court testimony with his involuntary statement, or from introducing the statement in a subsequent trial for perjury, false swearing,

21. Mil. R. Evid. 402.

22. The evidence would thus be inadmissible based on Mil. R. Evid. 402 and 303.

23. See, e.g., *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *United States v. Newborn*, 17 USCMA 431, 38 CMR 229 (1968).

24. See, e.g., *United States v. Graves*, 1 M.J. 50 (CMA 1975).

25. Mil. R. Evid. 304(c)(3).

or making false official statements, as long as the statement is involuntary "only in terms of noncompliance with the requirements concerning counsel under Rule 305(d)-(e)."²⁶

The motion procedures outlined in Rule 304 proceed from the disclosure requirement imposed by Rule 304(d)(1). That provision imposes upon the trial counsel the duty to reveal any oral or written statements made by the accused that are "relevant to the case, known to the trial counsel, and within the control of the armed forces."²⁷ The defense counsel must receive these disclosures prior to arraignment, and although the rules do not require a particular format, military judges should ensure that trial counsel prepare formal, written notifications of the contents of statements, in order to reduce the likelihood of time-consuming evidentiary objections subsequent to arraignment. While prosecutorial disclosure of statements is mandatory under Rule 304(d)(1), disclosure of any derivative evidence obtained therefrom is optional.²⁸ Once the accused's statements are disclosed prior to arraignment, any motion to suppress or other evidentiary objection under Rules 302, 304 or 305 must be presented before the submission of a plea.²⁹ Failure to submit the motion in a timely fashion constitutes a waiver of the objection, although the military judge possesses discretion to entertain the issue after entry of a plea if the defense counsel can demonstrate "good cause" for that action.³⁰

If the accused's statements are not discovered by the trial counsel until after arraignment, or if they are beyond the control of the armed forces prior to that point and therefore cannot be disclosed in accordance with Rule 304(d)(1), the trial counsel must nevertheless provide "timely"

26. Mil. R. Evid. 304(b).

27. Mil. R. Evid. 304(d)(1). Constitutional and ethical considerations also require the trial counsel to reveal evidence favorable to the defense in some circumstances. See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). ABA Cannons of Professional Ethics No. 7, DR 7-103(B).

28. Mil. R. Evid. 304(d)(2)(C).

29. Mil. R. Evid. 304(d)(2)(A). Under prior law, the military judge possessed discretion as to when motions to suppress would be entertained. See *United States v. Kelly*, 4 M.J. 845 (ACMR 1978), pet. denied, 5 M.J. 267 (CMA 1978).

30. Mil. R. Evid. 304(d)(2).

notice to both the military judge and opposing counsel as soon as he ascertains his intent to offer the statement against the accused.³¹ At that time, the defense counsel may move to suppress the evidence, and the military judge possesses discretion to enter "such orders as are required in the interests of justice."³² Normally, of course, Rule 304's disclosure requirement will ensure that suppression issues are resolved at one point in the trial; this procedure enables defense counsel to submit evidentiary motions without sacrificing the benefits of a pretrial agreement, and it affords trial counsel the certainty and convenience of answering suppression motions at a single designated stage in the court-martial.

The specificity requirement of Rule 304 is one example of the manner in which the new evidentiary rules expand the defense counsel's trial responsibilities. Under the rule, the military judge possesses discretion to require the defense to enumerate the grounds upon which motions to suppress or other evidentiary objections are tendered.³³ This requirement imposes upon the defense the burden of going forward with an offer of proof; actual evidence is not required. The rule recognizes the fact that personnel turbulence is endemic to the military community, and it enables the military judge to accept general objections or motions to suppress, presumably raised only by oral offers of proof, if defense counsel, "despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement."³⁴ Unless the military judge allows a general objection under this provision, the prosecutorial burden to demonstrate voluntariness by a preponderance of the evidence³⁵ "extends only to the grounds upon which the defense moved to suppress or object to the evidence."³⁶

31. Mil. R. Evid. 304(d)(2)(B).

32. Id.

33. Mil. R. Evid. 304(d)(3).

34. Id.

35. This showing is made before the military judge, who must find by a preponderance of the evidence that the accused's statement was issued voluntarily before it may be admitted. Mil. R. Evid. 304(e)(1). In cases tried by a special court-martial without a judge, this determination is made by the president of the court, subject to objection by any member. Disputed voluntariness findings are to be resolved pursuant to paragraph 57f of the Manual. Mil. R. Evid. 304(e)(1).

36. Mil. R. Evid. 304(e).

The military judge must rule on evidentiary motions prior to the submission of a plea if the motion was presented before arraignment; the judge may, however, defer his decision upon a showing of good cause, unless such a deferral would adversely affect the accused's right to appeal the ruling. In light of Rule 304(d)(5), this latter exception enables the judge to defer his ruling only when it is certain that the accused will plead not guilty. Rulings must be accompanied by an on-the-record statement of the essential findings of fact underlying the decision, if factual issues are implicated.³⁷ When the admissibility of derivative evidence is challenged, the military judge may permit its introduction if trial counsel demonstrates by a preponderance of the evidence "either that the statement was made voluntarily or that the evidence was not obtained by use of the statement."³⁸

If the trial counsel establishes the voluntariness of the statement by a preponderance of the evidence and successfully moves for its admission,³⁹ the military judge must permit the introduction of defense evidence relevant to voluntariness.⁴⁰ The judge must also instruct the members of the court-martial to attribute to the statement the weight it deserves "under all the circumstances."⁴¹ Thus, the trier of fact no longer determines admissibility under the reasonable doubt standard; instead, the members assess evidence which would have been introduced for that purpose under prior law, and determine the weight to be accorded the statement. Upon notifying the military judge of his intention, the defense counsel

37. Mil. R. Evid. 304(d)(4). The Army Court of Military Review held that a military judge who had been requested to enter special findings on a jurisdictional motion erred in declining to make such findings; there is thus support for the proposition that special findings may be required on matters other than those pertaining to guilt or innocence. *United States v. Falin*, 43 CMR 702 (ACMR 1971).

38. Mil. R. Evid. 304(e)(3).

39. Oral confessions or admissions which are voluntary "may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for. Mil. R. Evid. 304(h)(1). This provision effectively waives applicability of the "best evidence" rule unless the content of the statement is in issue.

40. Mil. R. Evid. 304(e)(2).

41. The military judge assesses the proper weight to accord statements by the accused in courts-martial without members. Mil. R. Evid. 304(c)(2).

may present testimony by the accused for the limited purpose of denying authorship or voluntariness of the statement. The scope of cross-examination is limited to matters about which the accused testified on direct examination, and, except in subsequent prosecutions for perjury, false swearing or making false official statements, the testimony may not be used against him.⁴²

The admissibility of an accused's admission or confession is conditioned not only upon the voluntariness showing required under Rule 304(e) (1), but also upon the introduction of direct or circumstantial independent evidence that "corroborates the essential facts admitted to justify sufficiently an inference of their truth."⁴³ Related uncorroborated statements by the accused which would themselves require corroboration prior to admission do not qualify as independent evidence for this purpose.⁴⁴ Further, evidence that the accused failed to deny an accusation of wrongdoing during custodial interrogation "does not support an inference of an admission of the truth of the accusation."⁴⁵ The military judge must determine whether the corroborating evidence adduced at trial is sufficient to permit introduction of the admission or confession;⁴⁶ generally, he should require that this evidence be presented prior to the admission of the accused's

42. Mil. R. Evid. 304(f). Constitutional considerations limit the scope of cross-examination to those matters covered on direct examination. At least when the defendant is confronted with the need to decline to exercise one constitutional right in order to assert another, the testimony cannot be used substantively as an admission on the merits. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (court excluded accused's inculpatory testimony on pretrial motion to suppress). Such testimony may, however, be admissible for impeachment purposes. See *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) (confession violative of *Miranda* held admissible to impeach).

43. Mil. R. Evid. 304(g).

44. Id.

45. Mil. R. Evid. 304(h)(3).

46. The independent corroborative evidence need not establish the veracity of the admission or confession beyond a reasonable doubt: the applicable evidentiary standard is clearly lower than that. It is to be applied only by the military judge.

statement, although he may admit the statement subject to subsequent corroboration.⁴⁷ Once the military judge determines that an inference of truthfulness is demonstrated, the statement may be admitted. The trier of fact may properly consider the amount and type of corroborating evidence in determining the weight to be accorded the admission or confession.⁴⁸

If the independent evidence corroborates only a portion of the admission or confession, only the substantiated facts may be considered as evidence against the accused.⁴⁹ The admission into evidence of a portion of a statement made by the accused entitles the defense counsel to introduce the remaining portions pursuant to Rule 304(h)(2) and Rule 106; this option may be of tactical importance when the admission of part of the statement is more prejudicial than admission of the whole. Finally, the trial counsel is not required to present corroborating evidence "for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions."⁵⁰

Rule 305. Warnings About Rights.

There are two primary bases for the suppression of "testimonial or communicative" evidence⁵¹ obtained in a setting in which the right to counsel expounded in Rule 305(d) is applicable. If the accused did not affirmatively decline his right to counsel, the prosecution must demonstrate his waiver of that right by a preponderance of the evidence.⁵² Further, when the interrogation is conducted by one who "knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect," the counsel must be notified and afforded a "reasonable time

47. Mil. R. Evid. 304(g)(2).

48. Mil. R. Evid. 304(g)(1).

49. Mil. R. Evid. 304(g).

50. Id.

51. Under Rule 305(d)(1), the dimensions of the phrase "testimonial or communicative nature" are defined by Fifth Amendment jurisprudence and not by judicial interpretations of Article 31, UCMJ.

52. Mil. R. Evid. 305(g)(2).

in which to attend before the interrogation may proceed."⁵³ Under these circumstances, the prosecution shoulders the additional burden of demonstrating by a preponderance of the evidence either that "reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given."⁵⁴ Failure to meet this requirement will negate any purported waiver of the right to counsel and will render the statement or derivative evidence involuntary and susceptible to suppression pursuant to Rule 304(a).⁵⁵

Rule 306. Statements by One of Several Accused. *

This rule addresses the problem encountered in a joint trial of two or more defendants when the prosecution seeks to introduce an admission or confession by one. The rule continues prior military practice⁵⁶ and enables the defense counsel to move for redaction of all references inculcating a defendant in any statement which is admissible only with respect to certain of the accused. The military judge must either delete inculpatory references pertaining to an accused against whom the statement is inadmissible, unless the statement's author is subjected to cross-examination, or allow a severance of the trial.⁵⁷

Rule 311. Evidence Obtained from Unlawful Searches and Seizures.

The procedures for suppressing evidence obtained from unlawful searches or seizures are expounded in Rule 311. The rule generally provides that evidentiary products of unlawful searches and seizures are inadmissible if the accused has standing to challenge the particular governmental action and tenders a timely objection or motion to suppress pursuant to the rule,

53. Mil. R. Evid. 305(e).

54. Mil. R. Evid. 305(g)(2).

55. See Mil. R. Evid. 305(a). The right to counsel established in Rule 305 includes the right to free military counsel regardless of wealth or indigency. Mil. R. Evid. 305(d)(2). This provision overrules *United States v. Hofbauer*, 5 M.J. 409 (CMA 1978); and *United States v. Clark*, 22 USCMA 570, 48 CMR 77 (1973).

56. See *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *United States v. Pringle*, 3 M.J. 308 (CMA 1977).

57. Mil. R. Evid. 306.

and if the evidence is not introduced to impeach, by contradiction, his in-court testimony.⁵⁸ The rule recognizes that an accused has an interest sufficient to support a constitutional challenge if he possesses either a reasonable expectation of privacy in the object of the search, a property interest in the seized item, or any other grounds to object under the Constitution as applied to members of the armed forces.⁵⁹ The rule does not confer automatic standing except to the extent that it is constitutionally required.

The legality of a particular search or seizure cannot be determined without first ascertaining the status of the government actors. Thus, military personnel and their agents must conform their conduct to the Constitution as it applies to members of the armed forces, and to any congressional acts applicable to courts-martial which would require exclusion of evidence obtained in contravention thereof, as well as Rules 312-317. Military judges can best protect the interests underlying this provision by interpreting it expansively, and by excluding evidence obtained in violation of military regulations, although it is not clear that a violation of Army regulations requires exclusion. If the government actors are civilian, they must adhere to the Constitution as it is interpreted and applied in federal district courts.⁶⁰ Finally, searches or seizures effected by foreign officials or their agents are unlawful only when they subject the accused to "gross and brutal maltreatment."⁶¹ The mere

58. Mil. R. Evid. 311(b).

59. Mil. R. Evid. 311(a)(2). Standing to object is conferred if an accused has a property interest in the evidence seized and if an essential element of the charged offense is possession of that evidence, but it is unlikely that merely being "on the premises," without a reasonable expectation of privacy therein, will confer standing. Compare Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) with Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) and United States v. Harris, 5 M.J. 44 (CMA 1978).

60. Mil. R. Evid. 311(c)(2).

61. Mil. R. Evid. 311(c)(3). This rule vitiates much of United States v. Jordan, 1 M.J. 334 (CMA 1976). The product of a search conducted by a foreign official will not be inadmissible merely because the search fails to meet constitutional standards, even though it is conducted in the presence of U.S. officials. Mere presence of U.S. officials does not amount to participation, which would invoke constitutional safeguards. Mil. R. Evid. 311(c)(1).

presence of military or other domestic officials does not trigger the application of a stricter standard; similarly, public policy concerns support the inclusion of the rule that the foreign status of a search or seizure will not be negated simply because a domestic official "acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure."⁶²

Motions to suppress and other objections relating to the evidentiary products of unlawful searches and seizures are governed by the same procedures described in Rule 304. Underlying the procedural rules is the disclosure requirement, which is designed to ensure that, prior to arraignment, the defense is informed of any seized evidence which the prosecution intends to enter against the accused at trial. The rule does not specify a format for this disclosure, but in the interests of judicial efficiency, military judges should require formal, written disclosures as early in the trial as practicable. Objections with regard to properly disclosed evidence must normally be submitted prior to the entry of a plea, and can be raised after that point only as permitted by the military judge in his discretion, for good cause. In the absence of good cause, a failure to submit a timely motion or objection constitutes a waiver of the issue.⁶³ If circumstances prevent the disclosure of evidence⁶⁴ prior to arraignment, the trial counsel must nevertheless notify both the military judge and the defense counsel as soon as practicable; the defense may pose an objection at that time, and the military judge possesses broad discretion to issue appropriate orders required in the interest of justice.⁶⁵

Defense counsel must specify the grounds for motions to suppress or other objections submitted under this rule; however, the military judge may entertain general motions or objections if he determines that the defense counsel's diligent efforts to ascertain the factual setting of the search or seizure were unavailing.⁶⁶ If a specific motion or objection has been

62. Mil. R. Evid. 311(c)(2).

63. Mil. R. Evid. 311(d)(2).

64. The rule makes no distinction between primary evidence obtained as a result of an illegal search, and derivative evidence: if derivative evidence is disclosed prior to arraignment, the procedures delineated in Rule 311(d)(2)(A) apply; otherwise, defense objections must be submitted in accordance with Rule 311(d)(2)(B).

65. Mil. R. Evid. 311(d)(2)(B).

66. Mil. R. Evid. 311(d)(3).

required under Rule 311(d)(3), the prosecutorial burden of demonstrating the lawfulness of the search or seizure by a preponderance of the evidence extends only to the grounds enumerated by the defense. This emphasis on specificity is also reflected in the requirement that rulings on motions and objections submitted pursuant to Rule 311 must include on-the-record statements of essential findings of fact when factual issues are relevant to the ruling.⁶⁷ In support of a motion or objection properly submitted under this rule, the defense may introduce evidence relevant to the admissibility of a product of an allegedly unlawful search or seizure. The accused may testify for the limited purpose of contesting this issue, and he may be cross-examined only as to matters about which he testified during direct examination. The testimony of the accused may not be used against him "for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement."⁶⁸

The rule establishes a specialized procedure for challenging probable cause determinations underlying search warrants or authorizations. Normally, evidence is admissible in this regard only if it concerns the information "actually presented to or otherwise known by the authorizing officer" since only that information is relevant in determining whether there was a sufficient basis for the authorization.⁶⁹ However, if the defense counsel makes a "substantial preliminary showing" that a false statement was knowingly, intentionally, or recklessly incorporated into the information upon which the authorizing officer acted, and if the allegedly false information is necessary to the finding of probable cause, he will be entitled to a hearing on the matter. The defense must then establish by a preponderance of the evidence either the falsity of the contested information, or the fact that it was incorporated into the other supporting information in reckless disregard for its truthfulness.

A successful showing shifts the burden to the prosecution, which must then establish, by the same evidentiary standard, that the unaffected information still constitutes probable cause sufficient to justify the search.

67. Mil. R. Evid. 311(d)(4).

68. Mil. R. Evid. 311(f). Under prior military law, the accused's testimony, whether exculpatory or inculpatory, could not be admitted against him on the issue of guilt unless he made no objection, and even an unsuccessful objection or motion to suppress barred the prosecutorial use of the testimony. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *United States v. Starr*, 23 USCMA 584, 50 CMR 849 (1975).

69. Mil. R. Evid. 311(g).

Unless the search is otherwise lawful under the rules, the defense objection or motion to suppress must be granted.⁷⁰ The military judge may not inform the members of the court-martial that defense motions submitted pursuant to this rule were sustained in whole or in part, except, of course, insofar as he must instruct them to disregard inadmissible evidence.⁷¹ Presumably, the military judge will rarely be called upon to provide even this limited instruction, since the motion will be litigated and resolved during a pre-trial session conducted outside the presence of the members, in accordance with Article 39(a), UCMJ; the defense counsel may make a motion in limine to ensure that evidence which is properly excluded by the military judge prior to arraignment is not brought to the attention of court members during the trial.

Rule 321. Eyewitness Identification.

The procedures for objecting to relevant out of court identifications are delineated in Rule 321. With minor variations, the rule adopts the procedural framework presented in Rules 304 and 311. Thus, the trial counsel is obligated to disclose to the defense, prior to arraignment, "all evidence of a prior identification of the accused at a lineup or other identification process that [he] intends to offer into evidence against the accused at trial."⁷² Defense objections to properly disclosed evidence will typically be submitted prior to entry of a plea, although objections or motions presented after that point may be entertained by the military judge for good cause; otherwise, failure to submit a timely motion or objection constitutes waiver.⁷³ The rule recognizes that circumstances may occasionally prevent the pre-arraignment disclosure of evidence of a prior identification of the accused; the prosecution is nevertheless required to notify the military judge and the defense counsel as soon as practicable.⁷⁴ The defense counsel may enter an objection or motion at that time, and the military judge has broad discretion to issue appropriate orders warranted by the interests of justice.⁷⁵

70. Mil. R. Evid. 311(g)(2). See Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

71. Mil. R. Evid. 311(h).

72. Mil. R. Evid. 321(c)(1).

73. Mil. R. Evid. 321(c)(2)(A).

74. Mil. R. Evid. 321(c)(2)(B).

75. Id.

The military judge will generally require the defense counsel to explicitly state the grounds for evidentiary objections or motions with respect to pretrial eyewitness identifications, as well as in the areas of confessions, admissions, searches and seizures.⁷⁶ When specificity has been required, the prosecution's burden extends only to the grounds enumerated by the defense counsel in his objection or motion.⁷⁷ The military judge possesses broad discretion to enter an appropriate order if the defense counsel, despite the exercise of due diligence, is unable to ascertain the facts surrounding the lineup or other pretrial identification process; in this connection, he may entertain a general objection or motion to suppress.⁷⁸ The defense is entitled to present evidence in support of the motion or objection, including the testimony of the accused, who may take the stand "for the limited purpose of contesting the legality of the lineup or identification process giving rise to the challenged evidence."⁷⁹ The defense counsel must inform the military judge that the accused's testimony is being offered for this purpose, and the judge should ensure that the scope of cross-examination is strictly limited to matters about which the accused testified during direct examination, and that any statements made by the accused are not used in an incriminatory manner, except in a subsequent prosecution for perjury, false swearing, or making a false official statement.⁸⁰

Judicial rulings on objections or motions to suppress submitted pursuant to Rule 321 must normally be rendered prior to the entry of a plea. The judge may require that the rulings be deferred for determination at trial on the merits or after findings if "good cause" supports the deferral and if the party's right to appeal the ruling is not thereby undermined.⁸¹ The ruling should reflect the judge's essential findings of fact if factual issues were involved in the disposition of the objection or motion.⁸² The standard to be applied by the military judge in resolving objections made

76. Mil. R. Evid. 321(c)(3).

77. Mil. R. Evid. 321(d).

78. Mil. R. Evid. 321(c)(3).

79. Mil. R. Evid. 321(e).

80. Id.

81. Mil. R. Evid. 321(f).

82. Id.

under this rule depends upon the nature of the issue raised by the defense. When the right to counsel is implicated, the prosecution must prove by a preponderance of the evidence that "counsel was present at the lineup or that the accused, having been advised of the right to presence of counsel, voluntarily and intelligently waived that right prior to the lineup."⁸³ If the trial counsel fails to meet this burden and the military judge determines that the identification is tainted by absence of counsel or ineffective waiver, the trial counsel must demonstrate, by clear and convincing evidence, that any subsequent identification by an individual present at the earlier, unlawful lineup is not a "result" of that prior lineup.⁸⁴

If the defense objection alleges that an unnecessarily suggestive identification process infringed upon the accused's due process rights, the prosecution must prove, by a preponderance of the evidence, that the lineup or other identification process "was not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity."⁸⁵ A determination by the military judge that the identification did generate a "very substantial likelihood of irreparable mistaken identity" will bar the prosecution from introducing evidence of a subsequent identification. If, on the other hand, the judge determines that the identification, although unnecessarily suggestive, was not irreparably prejudicial, a subsequent lineup or similar

83. Mil. R. Evid. 321(d)(1). This evidentiary standard should be compared with Rule 314(e)(5), which requires the prosecution to demonstrate consent to a search by clear and convincing evidence. There appears to be no substantive conflict between the latter rule and the requirement under current decisional law that the voluntariness of consent be proved by "clear and positive" evidence. See United States v. Watkins, 22 USCMA 270, 46 CMR 270 (1973); United States v. Rushing, 17 USCMA 298, 38 CMR 96 (1967).

84. Mil. R. Evid. 321(d)(1).

85. Mil. R. Evid. 321(d)(2). The phrase "unnecessarily suggestive" appears in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), although the unreliability of the evidentiary products of identification processes, rather than the suggestive nature of those procedures, appears to be the relevant object of inquiry with regard to alleged violations of due process. See Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

pretrial procedure may be introduced upon a prosecutorial showing by clear and convincing evidence that the later identification is not the "result" of the improper procedure.⁸⁶

Conclusion

Section III of the Military Rules of Evidence presents a coherent and efficient scheme for submitting evidentiary objections and motions to suppress. The procedural framework established in Rule 304 is incorporated with minor variations in Rules 311 and 321, and generally requires prompt disclosure of all evidence which the prosecution intends to introduce against the accused pursuant to the section. Evidentiary issues will typically be resolved prior to the entry of a plea; the accused is thereby entitled to a ruling on objections and motions before he relinquishes the benefits of any pretrial agreement. Although the prearrest disposition of these issues clearly enhances judicial efficiency, defense counsel must recognize that a failure to lodge timely objections generally results in waiver. In this regard, counsel must also appreciate the pervasive ramifications of a guilty plea on the scope of appellate review.⁸⁷ Another significant departure from prior practice is marked by the requirement that defense counsel specify with particularity the grounds for evidentiary objections and motions, and the requirement that military judges enumerate findings of fact in their rulings. This emphasis on specificity should not only streamline the litigation of exclusionary issues at trial, but enable more efficient appellate review as well. It is also indicative of the manner in which the revisions in motion practice confer a greater degree of responsibility - and opportunity - on the defense counsel.

86. Id.; see Mil. R. Evid. 321(d)(1). The criteria which the military judge should consider in assessing the reliability of the identification are set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

87. See, e.g., Mil. R. Evid. 304(d)(5), which provides that a "plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea." According to Rule 311, a plea of guilty deemed provident by the military judge waives "all issues under the Fourth Amendment to the Constitution of the United States and Rules 311-317 with respect to that offense whether or not raised prior to plea." Mil. R. Evid. 311(i). A provident guilty plea also waives all issues under Rule 321. Mil. R. Evid. 321(g).

THE MILITARY RULES OF EVIDENCE: A SURVEY OF PROBLEM
AREAS IN SECTIONS IV, VI, VII, VIII AND X

Pursuant to Article 36(a) of the Uniform Code of Military Justice,¹ the drafters of the Military Rules of Evidence adopted the evidentiary rules applied in United States district courts to the extent that those provisions were deemed practicable within the military setting and consistent with the UCMJ. Thus, Sections I, II, IV and VI-XI incorporate the Federal Rules of Evidence with few modifications. This approach furthers the substantial policy interest of establishing conformity between military and civilian practice; congruity between the two legal systems is also ensured by Rule 1102, which provides for the automatic adoption of amendments to the Federal Rules 180 days after their effective date, unless the President takes action to the contrary.² In interpreting the rules, the decisions of the United States Court of Military Appeals and Courts of Military Review are, of course, dispositive; decisions of Article III courts which address federal evidentiary rules with a common counterpart in the Military Rules of Evidence are also highly relevant in this regard, and should be considered very persuasive.

This survey summarizes the methods of analysis those Article III courts have endorsed in applying the more troublesome and ambiguous provisions in the Federal Rules. Its scope is limited to those sections of the Military Rules which have virtually identical counterparts in federal practice; Sections III and V are therefore beyond its purview. Nor does the survey address the general provisions set forth in Section I, or the miscellaneous rules contained in Section XI, since those provisions are self-explanatory, and are unlikely to be of paramount strategic importance to the trial-level defense counsel.³ Instead, the survey focuses on those rules in Sections IV, VI, VII, VIII and X which have generated the greatest degree of controversy within the federal circuits. Hopefully, it will inform defense counsel of the major problems the civilian bar has encountered in applying these rules, and suggest ways in which viable solutions may be fashioned within the military judicial system.

1. 10 U.S.C. §836(a) [hereinafter cited as UCMJ].

2. See Mil. R. Evid. 1102.

3. For similar reasons, Sections II and IX are also beyond the ambit of this survey.

SECTION IV. RELEVANCY AND ITS LIMITS

Rules 401 and 402 liberally define logical relevancy: if evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable," it is relevant⁴ and may be introduced, unless its admissibility is foreclosed by law under Rule 402,⁵ or its probative value is outweighed by the countervailing considerations enumerated in Rule 403.⁶ That rule requires the military judge to balance the need for the evidence, as well as its probative value, against the potential harm which would result from its admission. Factors which should be considered in this analysis include the availability of alternative forms of proof and the probable effectiveness of a limiting instruction.⁷ The trial judge is afforded broad latitude in this regard, and his decision will not be overturned on appeal unless it constitutes an abuse of discretion. Rule 403 does not specify surprise as a ground for exclusion, and in that sense it perpetuates the common law.⁸ The preferred judicial response to unexpected

4. Mil. R. Evid. 401.

5. Mil. R. Evid. 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the Uniform Code of Military Justice, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

6. Under Mil. R. Evid. 403, relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

7. Arguably, however, it is unrealistic for a trial judge to assume that the prejudicial impact of evidence can be significantly reduced by a limiting instruction. See 2 C. Wright, Federal Practice and Procedure §410 (1969).

8. 6 J. Wigmore, Evidence §1849 (3d Ed. 1940).

evidence is a continuance; procedural notice requirements and tools of discovery limit the incidence of legitimate surprise, and there is substantial difficulty in fashioning a workable definition of surprise for inclusion in an evidentiary rule.

The policy concerns underlying Rule 403 are also reflected in Rule 404(b), which recognizes that "[a]lthough a defendant's previous acts may have some probative value in determining his guilt or innocence, the fear is that introduction of such evidence will so prejudice the jury against the accused that a fair verdict will not be possible."⁹ The rule acknowledges that the probative value of evidence of other crimes, wrongs, or acts may in some instances outweigh its potential for prejudice, and consequently provides that such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" rather than propensity.¹⁰ Courts confronted with the problem of applying this rule typically follow either the "inclusionary" or the "exclusionary" approach.¹¹ Trial judges who subscribe to the "inclusionary" form of analysis must determine whether the evidence in question is "relevant otherwise than merely through propensity."¹² Unless its sole value is in demonstrating the defendant's character, the evidence is admitted. Thus, this approach favors admissibility¹³ and affords the judge considerably more flexibility than he possesses under the alternative "exclusionary" method of analysis. That approach merely requires the judge to determine whether the evidence falls under one of the exceptions enumerated in the rule.¹⁴

9. Note, Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis, 71 NW. U.L. Rev. 634, 635 (1977).

10. Mil. R. Evid. 404(b).

11. See Note, supra note 9, at 636.

12. Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 1005 (1938).

13. In this sense, the "inclusionary" approach comports with congressional intent as reflected in the rule's legislative history. See H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), reprinted in [1974] U.S. Code Cong. & Ad. News 7075.

14. See, e.g., United States v. Cochran, 475 F.2d 1080 (8th Cir. 1973), cert. denied, 414 U.S. 833 (1973).

The obvious danger inherent in the inclusionary form of analysis is that the emphasis on admissibility will obscure concern for the prejudicial qualities of the evidence. To protect the interests of the accused, the defense counsel should insure that the military judge realizes his responsibility to measure all tentatively admitted evidence against the criteria expounded in Rule 403. Thus, the trial court must conduct a discrete balancing test in which the probative value of the evidence is weighed against its potential for prejudice after determining that the evidence meets the requirements of Rule 404(b).¹⁵ The defense counsel can further protect the accused by proposing ways¹⁶ in which probative evidence in a particular case may be admitted without exposing the accused to undue prejudice; the military judge possesses a great deal of discretion in this area, and he is arguably authorized "to interpret the Rules creatively so as to promote growth and development in the law of evidence in the interests of justice and reliable factfinding."¹⁷

Rule 412 attempts to strike an equitable balance between the privacy interests of sexual offense victims and the accused's constitutional right to present evidence in his defense. Its federal counterpart, enacted in 1978, followed the example set by approximately two-thirds of the states, which had enacted similar statutes or rules of court.¹⁸ There is a paucity of decisional law interpreting the federal rule, and in view of the limited number of rape prosecutions under the federal rape statute,¹⁹ the military judicial system must confront the responsibility of developing principled and equitable methods of applying

15. This two-step approach was followed in *United States v. Conley*, 523 F.2d 650 (8th Cir. 1975), cert. denied, 424 U.S. 920 (1976).

16. See, e.g., *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976) (selective exclusion of evidence of defendant's prior acts, coupled with tailored limiting instruction, sufficiently reduced prejudicial impact).

17. *United States v. Jackson*, 405 F. Supp. 938, 943 (E.D.N.Y. 1975); see *Mil. R. Evid.* 102.

18. S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 88 (2d ed. Cum. Supp. 1979).

19. Federal rape prosecutions over a 3-year period extending from 1974 through 1976 involved only 42 defendants. Id. at 92 (Cum. Supp. 1979).

the provision. Subdivision (a) of the rule states that "reputation or opinion evidence of the past sexual behavior of an alleged victim of [a] nonconsensual sexual offense is not admissible."²⁰ The preference for opinion or reputation evidence expressed in Rule 405(a) is thus superseded in this context; instead, evidence of specific acts is admissible under certain circumstances.

The scope of potentially admissible defense evidence is much narrower under Rule 412 than it was under prior military law. Previously, the defense counsel representing an accused in a nonconsensual sexual offense case could present "any evidence, otherwise competent, tending to show the unchaste character of the alleged victim," regardless of whether the victim testified as a witness.²¹ Subdivision (b)(1) of Rule 412 reflects the realization that some evidence of this nature may be constitutionally required; the provision therefore establishes the limited types of evidence of specific acts which may be introduced.

The first category of admissible evidence is open-ended, and includes matter which must be received in order to satisfy the accused's constitutional rights. The second category embraces evidence of "past

20. Mil. R. Evid. 412(a). In a "nonconsensual sexual offense," the victim's consent constitutes an affirmative defense, or the lack of consent is an element; the term includes "rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." Mil R. Evid. 412(e). The scope of the rule is thus broader than its federal counterpart, which applies only to rape or assault with intent to commit rape. See Fed. R. Evid. 412.

21. Manual for Courts-Martial, United States, 1969 (Revised edition), para. 153b(2)(b), [hereinafter cited as MCM, 1969]. In this connection, it should be noted that the "fresh complaint" exception to the hearsay rule was deleted as part of the revision of military evidentiary law; evidence of fresh complaint may still be admissible if it is not hearsay, or if it may be subsumed under an exception to the hearsay rule. See, e.g., Mil. R. Evid. 803(1); (2); (3); (4); and (24). Another tangential revision was effected with regard to the prior Manual prohibition of convictions supported only by the uncorroborated testimony of the victim of a sexual offense; that prohibition has been deleted. See MCM, 1969, para. 153a.

sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury."²² The final exception permits the introduction of evidence of prior sexual behavior between the victim and the accused; this evidence is admissible with regard to the issue of consent.²³ The admissibility of evidence under any of these exceptions is conditioned upon compliance with the procedural requirements delineated in Rule 412(c).²⁴

Those requirements are designed to ensure that the trial counsel and military judge are notified of the accused's intention to offer evidence under the rule; the procedures also require the military judge to conduct a hearing under Article 39(a), UCMJ, in order to determine the admissibility of the evidence. This session may be closed if the exclusion of the public in the particular case does not violate the accused's constitutional rights.²⁵ Both parties may call witnesses and present relevant evidence, including the testimony of the alleged victim. If, on the basis of the evidence adduced at this hearing, the military judge determines that the matter sought to be introduced is relevant and that its probative value outweighs the risk of unfair prejudice,²⁶ it must be admitted.²⁷ Further, the rule apparently requires the military judge to specify the "evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined."²⁸

22. Mil. R. Evid. 412(b)(2)(A).

23. Mil. R. Evid. 412(b)(2)(B).

24. The substantial restriction of admissible character evidence may generate constitutional problems if the ban on opinion and reputation testimony precludes the defendant from presenting a defense based on the reasonableness of his interpretation of the victim's behavior. See S. Saltzburg, supra note 18, at 89 (Cum. Supp. 1979).

25. Mil. R. Evid. 412(c)(2).

26. This standard should be compared with Rule 403, which extends to the military judge the discretion to exclude evidence if its probative value is substantially outweighed by the enumerated countervailing considerations. See Mil. R. Evid. 403.

27. Mil. R. Evid. 412(c)(3).

28. Id.

SECTION VI. WITNESSES

Rule 607²⁹ changes the "voucher rule"³⁰ and allows a party to impeach his own witness. The rule thus supersedes paragraph 153b(1) of the Manual, which stipulates that a party may impeach his own witness only when the latter testified in an unexpectedly adverse manner during direct examination, or is indispensable. The modification effected by Rule 607 responds to the reality that "in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them."³¹ When Rule 607 is compared with Rules 608(b) and 609(a), an inconsistency arises as to the method of impeachment authorized by the provisions. While Rule 607 enables impeachment of a witness during direct examination, the latter rules explicitly state that counsel may impeach witnesses only during cross-examination.³² The drafters may have anticipated that the term "cross-examination" as used in those provisions would be interpreted as synonymous with impeachment during direct examination.³³

Cross-examination is arguably the most effective weapon in the trial lawyer's arsenal,³⁴ and its denial in criminal cases may implicate constitutional rights.³⁵ The Advisory Committee realized that the effective-

29. Mil. R. Evid. 607 provides that the "credibility of a witness may be attacked by any party, including the party calling the witness."
30. See E. Cleary, McCormick's Handbook of the Law of Evidence §38 (2d ed. 1972). According to the rule, litigants vouch for the "trustworthiness" of the witnesses they call to testify.
31. Chambers v. Mississippi, 410 U.S. 284, 296, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297, 309 (1973).
32. See Mil. R. Evid. 608(b) and 609(a).
33. See, e.g., United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976); S. Saltzburg, supra note 18, at 312-13.
34. See, e.g., 5 J. Wigmore, Evidence §1367 (Chadbourn rev. ed. 1974).
35. See, e.g., Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

ness of cross-examination depends to a large extent on the latitude counsel are afforded in making specific inquiries into the witness' past. The Committee consequently incorporated into the Rules a provision enabling proof of a witness' character by allowing inquiry into specific instances of conduct.³⁶ The high potential for prejudice which is endemic to such a liberal position prompted the inclusion of several safeguards, including a proscription against extrinsic proof of specific acts, and an explicit reference to the retention of judicial discretion in this area.³⁷ The last sentence of Rule 608(b) reflects the principle that the self-incrimination privilege does not shield the accused or witness from "matters he has himself put in dispute."³⁸ Criminal activities may be proper subjects of inquiry, however, if they are probative either of bias or an element of the case-in-chief.

36. Mil. R. Evid. 608(b) provides:

Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning [his] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

37. See Mil. R. Evid. 608(b). Further, Rules 403 and 611(a) suggest that extreme prejudice or embarrassment may require exclusion in certain cases.

38. *Brown v. United States*, 356 U.S. 148, 156, 78 S.Ct. 622, 627, 2 L.Ed.2d 589, 597 (1958).

Rule 608(b) is ambiguous with regard to the practice of bolstering a witness' credibility with evidence of specific acts during direct examination.³⁹ In view of the preference for reputation and opinion evidence articulated in Rule 608(a), military judges should generally disallow this practice; there are, however, two instances in which the direct examiner should be allowed to elicit evidence of specific acts. Thus, if a witness "admits during cross-examination that he previously perjured himself before a grand jury, fairness requires that the direct examiner be allowed to elicit that the witness turned himself in to the government and recanted his perjury before the government ever realized that he lied."⁴⁰ In addition, a party calling a character witness whose credibility has previously been attacked through cross-examination of another witness⁴¹ should be permitted to place the former witness' testimony in perspective.⁴² Under the rule, in sum, "both the direct examiner and the cross-examiner are free to impeach witnesses with specific bad act evidence" but "except in very limited circumstances, the party seeking to bolster the credibility of a witness may not use specific instances of conduct."⁴³

The practice of impeaching a witness by introducing evidence of his prior convictions draws several competing interests into conflict. Although the defendant has an interest in "relating his side of the story without being convicted on the basis of his prior record," there is also a societal interest in "assuring that the [jury impaneled] to ascertain the truth in a criminal trial [is] not deprived of one of the traditional

39. Some commentators interpret "cross-examination" as used in Rule 608(b) synonymously with impeachment on direct examination. See, e.g., S. Saltzburg, supra note 18, at 313.

40. Id. at 312-13.

41. "When one witness testifies as to the character for truthfulness or untruthfulness of another witness, he may be examined about specific instances of conduct on the part of the person about whom he is testifying." Id. at 312; see Mil. R. Evid. 405(a); 608.

42. S. Saltzburg, supra note 18, at 313.

43. Id. Recall, however, that "[s]pecific conduct [generally] may not be proved by extrinsic evidence." Mil. R. Evid. 608(b).

devices for assessing credibility."⁴⁴ Further, the introduction of a defendant's prior criminal record during his testimony may unconstitutionally infringe upon his due process rights, and his right to testify in his own behalf.⁴⁵ The importance of these various interests has prompted considerable judicial concern over the nature of prior convictions into which counsel may inquire; in this regard, the rule is only partially successful as a precise, workable evidentiary principle.

While the ten-year limitation on the age of admissible convictions lends itself to facile construction, the provision recognizing the admissibility of convictions for crimes of "dishonesty or false statement" is more ambiguous. The precise compass of that expression is difficult to ascertain, although the drafters contemplated that it would embrace crimes such as "perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."⁴⁶ Secondary ambiguities involve the burden of proof under the rule and the scope of protection afforded by the provision.

Prior to the promulgation of the Federal Rules of Evidence, the Court of Appeals for the District of Columbia Circuit addressed the problem of admitting prior convictions, and concluded that they would be admissible unless the defendant convinced the court that there were sufficient reasons for withholding evidence of his prior record.⁴⁷ Under Rule 609(a) however, the government arguably bears the burden of proof.⁴⁸ With regard to the protection afforded under the rule, there

44. Curran, Federal Rule of Evidence 609(a), 49 Temple L.Q. 890, 891 (1976).

45. Compare Hubbard v. Wilson, 401 F. Supp. 495 (D. Colo. 1975) with State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

46. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 9 (1974).

47. Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968); see also Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

48. See Curran, supra note 44, at 894.

is some support in the legislative history for the proposition that its ambit extends only to the defendant and his witnesses. Thus, when Congressman Hungate, Chairman of the House Subcommittee on Criminal Justice, presented the conference report on the rule to the House for final consideration, he observed:⁴⁹

Rule 609(a), in practical effect, means that in a criminal case the prior felony conviction of a prosecution witness may always be used. There can be no prejudicial effect to the defendant if . . . the defendant impeaches the credibility of a prosecution witness. The prior conviction of a defense witness, on the other hand, may have a prejudicial effect on the defendant.

The countervailing argument, of course, is that the Federal Rules of Evidence were not designed to create windfalls for the defendant, but to facilitate the pursuit of truth.⁵⁰

The provision in Rule 609(c)(1) which bars evidence of a prior conviction if that conviction is the subject of a "pardon, annulment, certificate of rehabilitation or other equivalent procedure" should apply to certificates of completion awarded to successful graduates of the Retraining Brigade at Fort Riley, Kansas.⁵¹ The present Manual contains

49. 93d Cong., 2d Sess., 120 Cong. Rec. 12254 (1974).

50. In this connection, military judges should examine the manner in which the rule was applied in *United States v. Jackson*, supra note 17 (pretrial ruling prevented introduction of defendant's prior conviction, so long as defendant refrained from (1) misleading jury about his background and (2) impeaching government witness with evidence of convictions for similar crimes without prior court approval).

51. Mil. R. Evid. 609(c) provides:

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been

no version of this evidentiary restriction; prior convictions were admissible in aggravation on sentencing⁵² or for impeachment purposes,⁵³ regardless of the existence of proof that the accused had been restored to good repute in the interim. Defense counsel who intend to suppress evidence under Rule 609(c)(1) should submit a discovery motion requesting disclosure of the correctional treatment folder which the Retraining Brigade maintains for each trainee. Pertinent Army regulations may also be helpful in developing a description of the training program administered at that facility.⁵⁴

The federal counterpart to Rule 612 is expressly subject to the Jencks Act, which provides in pertinent part that in criminal prosecutions, statements by government witnesses shall not be the subject of "subpoena, discovery, or inspection until [the] witness has testified on direct examination in the trial of the case."⁵⁵ The Joint Service Committee deleted this reference to federal codal law since it was deemed contrary to the military's interest in broad discovery. As a result, the rule unqualifiedly broadens the opponent's right under prior military law to inspect memoranda examined by a witness to refresh his memory. Previously, that right extended only to writings used while testifying.⁵⁶ As expressed in Rule 612, the right includes writings used before testifying, if the interests of justice will thereby be served. Apparently, Congress anticipated that the discretionary nature of the provision would guard against fishing expeditions directed at attorney work products

51. Continued.

convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

52. MCM, 1969, para. 75b(2).

53. Id. at para. 153b(2)(b).

54. See, e.g., Army Regulation 190-47, Military Police - The United States Army Correctional System (1 Nov. 1978).

55. 18 U.S.C. §3500 (1976).

56. See MCM, 1969, para. 146a.

or other privileged information.⁵⁷ The exercise of this discretion by the president of a special court-martial without a military judge constitutes an interlocutory ruling, and is not subject to objection by the members.⁵⁸

Rule 613 modifies the foundation requirements which must be satisfied before a witness may be impeached by evidence of his prior inconsistent statement. Subdivision (a) abrogates the Rule of the Queen's Case,⁵⁹ which required counsel to show the witness the prior statement at the time of the examination. The opposing counsel is still entitled to inspect the statement upon request, however.⁶⁰ Before extrinsic evidence of the prior statement may be introduced, the examiner must enable the witness to explain the statement, and allow the statement to be examined by opposing counsel. These foundational requirements need not be satisfied if the interests of justice require otherwise.⁶¹

57. H.R. Rep. No. 650, 93d Cong., 1st Sess. 13 (1973).

58. See MCM, 1969, para. 57a.

59. 2 Br. & B. 284, 129 Eng. Rep. 976 (1820).

60. Mil. R. Evid. 613(a) provides:

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to [him] at that time, but on request the same shall be shown or disclosed to opposing counsel.

61. Mil. R. Evid. 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 615 recognizes that sequestration of witnesses effectively discourages collusive testimony and exposes variances within adduced evidence. The military judge is therefore empowered to exclude witnesses on his own motion or at the request of either party, so that they cannot hear the testimony of other witnesses. The Sixth Amendment clearly entitles a defendant to be present in a criminal case, and therefore the rule's first exception addresses parties to the proceeding. The same constitutional concerns dictate that a representative of a corporate party be allowed to attend the trial, and the federal version of the rule therefore excludes "an officer or employee of a party which is not a natural person designated as its representative by its attorney."⁶² The reformulation of this provision in the military rule allows a trial counsel to designate the government's main witness as a representative of the United States and thereby enables him to hear the testimony of other government witnesses before he takes the stand. Defense counsel should urge the military judge to require such representatives to testify early in the trial or to refrain from testifying, in order to minimize any prejudice stemming from the witness' opportunity to hear prior testimony.⁶³

SECTION VII. OPINIONS AND EXPERT TESTIMONY

Although the traditional proscription of opinion testimony comports with the need to obtain the most trustworthy information available to assist the trier of fact, the strict enforcement of that ban has proved unworkable. Section VII of the Military Rules of Evidence codifies most of the judicial exceptions which have emerged as methods of circumventing the opinion testimony rule.⁶⁴ Thus, Rule 701 relaxes the common law prohibition against lay opinion testimony and permits the introduction of such evidence if it is "rationally based on the perception of the witness" and is "helpful to a clear understanding of [his testimony] or the determination of a fact in issue."⁶⁵ The first qualification restates the personal perception requirement expounded in Rule 602; the second qualification relaxes the "necessity test," which allowed the admission of opinion testimony only when it was essential to a relevant factual deter-

62. Fed. R. Evid. 615.

63. See In re United States, 584 F.2d 666 (5th Cir. 1978).

64. See McCormick, supra note 30, at §10.

65. Mil. R. Evid. 701.

mination. Both provisions should serve to mitigate the inherently prejudicial nature of opinion evidence.

Rule 702 retains the common law practice of allowing expert opinion testimony when it will "assist the trier of fact to understand the evidence or to determine a fact in issue."⁶⁶ Expert opinion testimony should not be admitted if the military judge determines that the particular issue in question can be adequately clarified through factual testimony, since the use of opinion testimony in those instances is both prejudicial and time-consuming.⁶⁷ The military rules restate the requirement that an expert witness rely on personal knowledge or properly adduced evidence to formulate his opinion, but they expand the potential bases for his opinion; under Rule 703, he may also rely on information "reasonably relied upon by experts in the particular field."⁶⁸ The military judge should ascertain the reasonableness of relying on the particular information before the witness testifies, in order to avoid prejudice. Experts need not state the factual bases of their testimony before rendering opinions; this rule obviates the need for hypothetical questions while ensuring trustworthiness through the provision which enables the military judge or opposing counsel to ascertain that basis.

A significant change in the law relating to expert testimony is effected by Rule 704, which allows experts to testify as to ultimate factual issues.⁶⁹ The previous restriction on this form of testimony stemmed from the notion that a contrary rule would infringe upon the fact-finder's proper province; further, the potential for prejudice was

66. Mil. R. Evid. 702.

67. See Collins v. Zediker, 421 Pa. 52, 218 A.2d 776 (1966).

68. Mil. R. Evid. 703. A standard for determining the admissibility of scientific evidence applied by some courts is set forth in United States v. Frye, 293 F. 1013 (D.C. Cir. 1923), which requires that the evidence be generally accepted and valid. The relaxation of this standard in the Military Rules of Evidence may enable the introduction of polygraph evidence.

69. Mil. R. Evid. 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

considered to be substantial. The traditional rule was difficult to apply, however, and was the object of scholarly criticism since it arguably deprived courts of useful testimony.⁷⁰ The safeguards applicable to all forms of opinion testimony were thought to be sufficient to protect the interests of the accused.⁷¹

SECTION VIII. HEARSAY

Section VIII of the Military Rules of Evidence continues the common law practice of excluding hearsay in the absence of an exception recognized in the provisions or in "any Act of Congress applicable in trials by court-martial."⁷² Rule 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁷³ This definition is refined in Rule 801(d), which exempts certain prior statements by a witness.⁷⁴ Under the new military rules, as at common

70. See, e.g., Brinton, The Proposed Federal Rules of Evidence: Pointing the Way to Needed Changes in Illinois, 5 John Marshall J. 242, 249 (1972).

71. Thus, to be admissible the opinion must be helpful, the expert must be qualified (Rule 702); there must be an acceptable basis for his opinion (Rule 703); and the testimony as a whole must neither be irrelevant nor unduly time-consuming, confusing, repetitive or prejudicial under Rule 403.

72. Mil. R. Evid. 802.

73. Mil. R. Evid. 801(c).

74. Mil. R. Evid. 801(d)(1) provides that a statement is not hearsay if the declarant:

testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.

law, prior statements are admissible if they are offered not to prove the truth of the matter asserted, but merely the fact that they were made. The statements must still meet the relevancy standard established in Rule 401, and be of sufficient probative value to satisfy Rule 403. Prior statements which fall under one of the enumerated hearsay exceptions may, of course, be admitted as substantive evidence.

The formulation of Rule 801(d)(1)(A), which admits certain prior inconsistent statements⁷⁵ as substantive evidence, was marked by intense Congressional debate.⁷⁶ The issue over which the legislators disagreed was whether the statements should be admitted as substantive evidence, or whether they should instead be inadmissible except for the limited purpose of impeachment. Although most jurisdictions endorsed the latter approach,⁷⁷ both the House and Senate drafts of the rule departed from this orthodox position; the final version composed in the Committee of Conference⁷⁸ recognizes the admissibility, as substantive evidence, of prior inconsistent statements made at a "trial, hearing, or other proceeding or in a deposition."⁷⁹ The meaning of the term "other proceeding" was not discussed before the rule was enacted,⁸⁰ and "except for a committee note that the term included a grand jury

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75. A prior statement will be adjudged inconsistent with subsequent testimony if there is any "material difference" between the two. See, e.g., *McCormick*, *supra* note 30, at 67; *People v. Sam*, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969).
76. See generally H.R. Rep. No. 650, 93d Cong., 2d Sess. 13 (1973); S. Rep. No. 1277, 93d Cong., 2d Sess. 15-16 (1974); H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 10 (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 7051-112.
77. A number of pertinent cases are discussed in 3A J. Wigmore, Evidence §1018 (Chadbourn rev. ed. 1970).
78. The Committee was comprised of representatives from the House and the Senate who were tasked to develop compromise rules that would be acceptable to Congress. H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 10, reprinted in [1974] U.S. Code Cong & Ad. News 7051, 7104.
79. Mil. R. Evid. 801(d)(1)(A).
80. See 93d Cong., 2d Sess., 120 Cong. Rec. 39941-42 (1974).

hearing, no further comment was addressed to its purpose."⁸¹ One court⁸² has liberally interpreted the phrase to include immigration interrogations conducted at border patrol stations, although the legislative history of the hearsay rules suggests that a judicial hearing subject to an oath and the penalty of perjury is more likely to guarantee the degree of reliability the drafters sought in all hearsay exceptions.

Prior consistent statements of a witness whose testimony was attacked as recent fabrication or the product of improper motivation or influence were widely recognized as probative at common law. Rule 801(d)(1)(B) extends this exception by allowing the statements to be introduced as substantive evidence; previously they were not so admitted, and the opponent was entitled to a limiting instruction.⁸³ If the statements are not offered to corroborate a witness impeached on the grounds indicated, the rule presumably does not apply, and the statements are subsumed under the hearsay definition set forth in Rule 801(c), and, absent some exception, are inadmissible as substantive evidence.⁸⁴

Rule 801(d)(2)(E) restates prior federal practice⁸⁵ and provides that a statement is not hearsay if it is issued by a "co-conspirator of a party during the course and in furtherance of the conspiracy."⁸⁶ The rule does not indicate who decides the preliminary question of whether

81. Note, United States v. Castro-Ayon: An Interpretation of Federal Rule of Evidence 801(d)(1)(A), 10 SW. U. L. Rev. 985, 987 (1978).

82. United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976), cert. denied, 429 U.S. 983 (1976).

83. 4 J. Wigmore, Evidence §1132 (Chadbourn rev. ed. 1972).

84. See Mil. R. Evid. 802.

85. See United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

86. Mil. R. Evid. 801(d)(2)(E).

the declarant and the co-defendant were jointly involved in a conspiracy, and it fails to address the burden of proof the government must meet in this regard, or the nature of independent evidence sufficient to satisfy that requirement. Prior to the promulgation of the Federal Rules, the prevailing view was that the prosecution had to produce "substantial, independent evidence of the conspiracy" sufficient to "take the question to the jury."⁸⁷ Typically, the trial judge determined whether a prima facie case of conspiracy had been presented; if that threshold was met, the issue was presented to the jury, which could consider the statement on the ultimate issue if it found conspiracy beyond a reasonable doubt.⁸⁸ Judicial interpretations of Rule 801(d)(2)(E) depart from this practice. Under the majority rule, the judge decides whether a conspiracy existed by applying the "preponderance of the evidence" standard.⁸⁹ Independent proof of the conspiracy was uniformly required under prior law, and that view appears to represent the current majority opinion,⁹⁰ although there is some support for the proposition that the trial judge may properly consider the statements sought to be admitted in ascertaining the existence of the conspiracy.⁹¹

Rule 803(18) of the Military Rules of Evidence significantly revises prior law by allowing the admission of learned treatises as substantive evidence in some circumstances.⁹² Previously, the prevailing practice in

87. United States v. Nixon, supra note 85, at 701 n. 14, 94 S.Ct. at 3104, 41 L.Ed.2d at 1060.

88. See, e.g., United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978).

89. United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

90. United States v. James, supra note 88, at 113; United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

91. See United States v. Martorano, 557 F.2d 1 (1st Cir. 1977).

92. Mil. R. Evid. 803(18) provides:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable

both federal and state jurisdictions admitted treatises only as a tool for cross-examining expert witnesses;⁹³ this limited use did not violate the hearsay rule since the purpose of introducing the scholarly work was not to demonstrate its truthfulness, but to test the expert witness' knowledge and credibility. The substantive admission of treatises may be accompanied by misunderstanding and misapplication on the part of the court members, particularly if counsel exploit the opportunity and attempt to cite passages out of context. The rule's limitation upon physically receiving the treatise into evidence, and its requirement that an expert witness be "available to explain and assist in the application of the treatise if desired" are both designed to minimize the potential for jury confusion.⁹⁴ Further, the adversary process itself should insure that the defendant's interests are protected through cross-examination and the introduction of opposing evidence, and the military judge possesses discretion to exclude evidence which is substantially more confusing than probative.⁹⁵

Especially within the context of criminal law, one of the primary questions regarding Rules 803(6), 803(8)(B) and 803(8)(C) appears to involve the admission of police reports. Since the law enforcement function clearly falls under the expansive definition of "business" set forth in Rule 803(6), these documents qualify as records of a regularly conducted business activity under that provision.⁹⁶ The immediate issue to be resolved in applying this rule is when the source of information

92. Contintued

authority by the testimony or admission of the witness or by other expert testimony or by judicial notice [may be admitted]. If admitted, the statements may be read into evidence but may not be received as exhibits.

93. *Reilly v. Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949); *Dolcin Corp. v. FTC*, 219 F.2d 742 (D.C. Cir. 1954), cert. denied, 348 U.S. 981 (1955); *Briggs v. Zotos Int'l Inc.*, 357 F. Supp. 89 (E.D. Va. 1973); *Atlanta Corps. v. Olesen*, 124 F. Supp. 482 (S.D. Cal. 1954).

94. See 56 F.R.D. 183, 316 (1973).

95. See Mil. R. Evid. 403.

96. See *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975).

lacks trustworthiness, since such a deficiency renders the provision inapplicable. Prior to the enactment of the Federal Rules of Evidence, "the courts had consistently held that in order for a business record to be admissible, its preparation had to be based upon the personal knowledge of the maker of the record, or based upon information supplied to the maker by another person who was acting in the regular course of his business."⁹⁷ The rule does not explicitly incorporate the requirement that third party hearsay be issued by an individual under a reportorial duty, although judicial interpretations of the provision continue to recognize the applicability of that criterion.⁹⁸ The courts have interpreted the rule's exclusion of reports prepared under untrustworthy circumstances to mean that business records prepared in anticipation of litigation are inadmissible.⁹⁹ Thus, police reports are typically excluded in criminal trials unless they are introduced by the defense.¹⁰⁰

Indeed, the inadmissibility of police reports offered by the prosecution in criminal cases is asserted in Rules 803(8)(B) and 803(8)(C).¹⁰¹ The former provision excludes police reports in criminal trials regardless of which party attempts to introduce them; the latter provision only excludes police reports which the prosecution seeks to introduce in a criminal trial. Arguably, however, Rule 803(8)(B) was never intended to preclude the defense from introducing such statements.¹⁰² The

97. Note, The Admissibility of Police Reports Under the Federal Rules of Evidence, 71 NW. U.L. Rev. 634, 692 (1976).

98. See, e.g., United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976).

99. See Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

100. See, e.g., United States v. Frattini, 501 F.2d 1234 (2d Cir. 1974).

101. Thus, while Rule 803(8)(B) recognizes the admissibility of reports obtained as a result of observations by a public official under a duty to observe the particular event, it explicitly excludes from criminal trials matters witnessed by police officers. Similarly, Rule 803(8)(C) enables the admission against the government of results of investigations conducted pursuant to law.

102. See United States v. Smith, supra note 96; 93d Cong., 2d Sess., 120 Cong. Rec. 2387-89 (1974).

prosecutor's use of the statements has been curtailed in light of possible constitutional problems under the Sixth Amendment's confrontation clause.¹⁰³

Despite its ostensible clarity, Rule 804(b)(3) is seriously ambiguous in its failure to address the admissibility of the inculpatory statement against the declarant's penal interests which also implicates the defendant. The legislative history of the rule is convoluted and inconclusive in this regard. The original Advisory Committee draft explicitly stated that this type of inculpatory evidence was inadmissible.¹⁰⁴ This statement was dropped when the Supreme Court promulgated the official Advisory Committee draft of the Rules in November of 1972.¹⁰⁵ When the Rules were submitted for congressional approval and amendment one year later, the House reinserted the provision.¹⁰⁶ The Senate subsequently deleted it,¹⁰⁷ and the Conference Committee ultimately adopted the Senate version.¹⁰⁸ Arguably, inculpatory statements against the declarant's penal interests which implicate the defendant are admissible against the latter, since the rule in its final form does not suggest exclusion of this type of evidence. In addition,

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103. For a survey of the confrontation problems generated by applying hearsay exceptions at criminal trials, see Baker, The Right to Confrontation, the Hearsay Rules, and Due Process--A Proposal for Determining When Hearsay May Be Used in Criminal Trials, 6 Conn. L. Rev. 529 (1974).
104. The final sentence of the draft provided that the hearsay exception did not apply to statements or confessions "offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused." Proposed Fed. R. Evid. 804(b) (4)(1969 draft), 46 F.R.D. 161, 378 (1969). The rule was renumbered as 804(b)(3) before it was finalized.
105. Fed. R. Evid. 804(b)(3)(1972 draft), 56 F.R.D. 183, 321 (1972).
106. House Comm. on the Judiciary, Report on Federal Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess. 16 (1973).
107. Senate Comm. on the Judiciary, Report on Federal Rules of Evidence, S. Rep. No. 1277, 93d Cong., 2d Sess. 21-22 (1974).
108. Comm. of Conference, Report on Federal Rules of Evidence, H.R. Rep. No. 1597, 93d Cong., 2d Sess. 12 (1974).

no congressional committee determined that these types of inculpatory statements are not sufficiently reliable to be introduced under a hearsay exception.¹⁰⁹ Finally, two federal courts have concluded, in dicta, that such statements are admissible.¹¹⁰

Another ambiguity in the rule involves the extent to which a statement must be disserving before it may be regarded as against penal interest. One approach is to receive statements under the rule if they contain evidence of probative value in a future trial against the declarant.¹¹¹ A much more restrictive alternative is to exclude such statements if there are possible explanations which are inconsistent with the declarant's culpability.¹¹² The extent to which the admission of independent corroborative evidence constitutes a precondition to introduction of the statement is also unclear. The military judge may weigh all surrounding circumstances himself, and admit only those statements he believes to be credible.¹¹³ Alternatively, the judge may apply a less rigorous threshold standard, and allow the members to balance all relevant factors once the trial counsel has made a preliminary showing of corroboration.¹¹⁴

The legislative history of Rules 803(24) and 804(b)(5) reveals a conflict between two important objectives underlying the Federal Rules. Especially in the context of these "residual exceptions" to the hearsay rule, the need to affirmatively plan for development in the law is antagonistic to the desire for certainty expressed by the practitioners

109. See Note, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Calif. L. Rev. 1189, 1198 (1978).

110. See United States v. Hyde, 574 F.2d 856 (5th Cir. 1978); United States v. Barrett, 539 F.2d 244 (1st Cir. 1976).

111. See United States v. Thomas, 571 F.2d 285 (5th Cir. 1978); United States v. Barrett, supra note 110, at 249.

112. See United States v. Pena, 527 F.2d 1356 (5th Cir. 1976).

113. This approach was followed in Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975), aff'd mem., 532 F.2d 750 (4th Cir.), cert. denied, 429 U.S. 919 (1976).

114. See United States v. Barrett, supra note 110.

involved in drafting the rules. Indeed, both residual exceptions were deleted by the House since they arguably injected an unacceptable degree of ambiguity into evidentiary law.¹¹⁵ The Senate appreciated this concern, and clearly articulated its intent:¹¹⁶

The committee does not intend to establish a broad license for judges to admit hearsay statements that do not fall within one of the other exceptions It is intended that . . . the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In view of this expression of legislative intent, a finding of admissibility under the residual exceptions should be accompanied by a convincing demonstration of trustworthiness.¹¹⁷ Several factors may be considered in assessing this quality, including the declarant's motivation,¹¹⁸ the nature and extent of corroborative evidence,¹¹⁹ and the circumstances under which the statement was made.¹²⁰ The federal circuits have adopted divergent approaches to the problem of systematically analyzing these criteria. In the Fifth Circuit, the importance of the evidence apparently bears on the standard of trustworthiness applied by the court: as the probative value of the contested matter increases, the

115. H.R. Rep. No. 650, 93d Cong., 1st Sess. 6, reprinted in [1974] U.S. Code Cong. & Ad. News 7075, 7079.

116. S. Rep. No. 1277, 93d Cong., 2d Sess. 20, reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7065.

117. See generally, Weinstein & Berger, Weinstein's Evidence §803[03] (1976).

118. United States v. Bailey, 581 F.2d 341 (3d Cir. 1978).

119. United States v. West, 574 F.2d 1131 (4th Cir. 1978).

120. United States v. Medico, 557 F.2d 309 (2d Cir. 1977), cert. denied, 434 U.S. 986 (1977).

standard of trustworthiness becomes more onerous.¹²¹ The Second Circuit, on the other hand, endorses a less restrictive standard, and will more likely find the statement to be trustworthy if it is highly probative and necessary.¹²²

SECTION X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

The "best evidence rule" evolved from a comparatively liberal doctrine which merely required courts to receive "the best proof that the nature of the thing will afford."¹²³ This doctrine was eventually expanded to require litigants to produce the best evidence available, and although commentators consistently argued that the principle applied to all evidence, the courts at common law interpreted the rule only as requiring the production of original writings if the contents of written statements were to be proved.¹²⁴ The current version states that "in proving the terms of a writing, where the terms are material, the original must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent."¹²⁵ Rule 1002 essentially restates this modern "best evidence" rule. It does, however, extend the requirement of producing originals to photographs and recordings as well as writings. Accurate copies of any of these forms of evidence are tantamount to duplicates¹²⁶ and are admissible under Rule 1003 unless the opponent raises questions of authenticity or shows that the admission of the copy would be unfair in the particular case.¹²⁷

Although the purpose of Rule 1002 is to compel the production of the original writing when the contents of the document are in issue, the rule

121. See, e.g., *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977); *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976).

122. Compare *United States v. Medico*, supra note 120, with *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977).

123. *Ford v. Hopkins*, 91 Eng. Rep. 250 (1700).

124. *McCormick*, supra note 30, at 559.

125. Id. at 560.

126. *Mil. R. Evid.* 1001(4).

127. *Mil. R. Evid.* 1003.

does not delineate those circumstances in which this threshold requirement is satisfied. The rule should apply whenever an event is sought to be proved by the writing rather than through available non-documentary evidence. Thus, it is inapplicable when a witness refreshes his memory with a document, or asserts that examined writings do not contain a particular entry, or when an expert relies on written material to support his opinion. In borderline cases, the military judge should admit the secondary evidence and allow the jury to consider the proponent's failure to produce an original in its assessment of the weight to be accorded the evidence.

"SIDE BAR"

or

Points to Ponder

1. IMMUNITY FOR DEFENSE WITNESSES.

In Virgin Islands v. Smith, 26 Crim. L. Rptr. 24 (3d Cir. 1980), the Third Circuit rendered a significant ruling on the availability of immunity for defense witnesses. Although a right to immunity for defense witnesses has been upheld in the past, United States v. DePalma, infra, Smith is the first case dealing with a judge's right to resolve the issue at trial.

In Smith, the accused and four co-actors were ultimately convicted of assault. One of the co-actors, Sanchez, made a pretrial statement implicating himself and others, but exculpating Smith. The counsel for Smith moved unsuccessfully for the admission of Sanchez' statement at trial. He then sought immunity for Sanchez to testify (Sanchez refused to testify without immunity). The Virgin Islands' Attorney General offered to grant Sanchez immunity if the U.S. Attorney consented.¹ He refused and Sanchez did not testify.

In reversing Smith's conviction, the Appellate Court established the procedure and basis for obtaining immunity for defense witnesses.² Procedurally, the defense should first seek immunity for witnesses from the convening authority. That failing, the issue should be litigated before the trial judge.³

The Court, in Smith, set forth two bases to be used in judicially determining a defense request for immunity. The first basis is grounded in government misconduct. If the court determines that the government's refusal to grant immunity is an attempt to keep highly relevant, and possibly exculpatory, evidence from the court, misconduct exists. In

1. Sanchez, a juvenile, was under the jurisdiction of the Virgin Islands Courts.

2. The following analysis is adapted to military practice.

3. If unsuccessful, counsel should consider filing a writ with the appellate courts seeking a stay in the trial and a ruling on the military judge's action on the defense motion.

Smith, the existence of a weak prosecutorial case and, more importantly, the absence of justification for refusing a grant of immunity were factors of import to the Court in reaching its conclusion that the government's refusal to grant immunity amounted to misconduct. Where governmental malfeasance lies, the defense need only show that the witness' testimony would be relevant to entitle the witness to immunity.

The second theory upon which immunity may be granted is founded in the Supreme Court's decision of Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and a defendant's due process right to an effective presentation of his defense. The Third Circuit Court of Appeals in Smith fashioned a multifaceted test to determine the necessity for a grant of immunity predicated on due process grounds. First, the defense must make application to the convening authority naming the proposed witness and specifying the particulars of the witness' testimony. Second, there must be a convincing showing that the witness' testimony is both clearly exculpatory and essential to the defendant's case. Immunity will not be granted if the proffered testimony is ambiguous, not clearly exculpatory, cumulative, or relates only to the credibility of government witnesses. Third, the witness must be available to testify. If the convening authority denies the defense request, the defense must lay out the matters in support of the grant of immunity to the trial court and make it a matter of record that the convening authority, in spite of this showing, failed to grant immunity.

These prerequisites satisfied, the trial court then must consider the government's countervailing interests. If the government establishes that the public interest would be disserved by a grant of immunity or that such a grant would entail significant costs, grounds may exist for a denial of the defense request. Traditionally, government opposition stems from a desire to prosecute the witness for whom immunity is sought. The Third Circuit in Smith, however, noted that reasonable accommodations could be made in such cases; for example, by trying the witness first or "sterilizing" his testimony so that no possible taint could occur in his subsequent prosecution.

If the government is unable to rebut a defense showing of necessity or cannot establish significant countervailing interests, immunity should be granted. But, whether the request is granted or denied, the Court stated that the trial judge should make specific findings in the matter.

In holding that a trial judge has the inherent authority to grant immunity, the Appellate Court stated that it was not creating a new or unique constitutional right, but rather it was prescribing a new remedy to protect a well established right, the right to an effective presentation of a defense.

Whether Smith will be generally accepted in other jurisdictions remains to be seen. The Sixth Circuit, in United States v. Lenz, 27 Crim. L. Rptr. 3 (6th Cir. 1980), which, although subsequent to Smith, did not mention that decision, held that judges do not have the authority to grant immunity.⁴ Significantly, Lenz did not exclude the possibility that relief could be granted under a due process theory. The Court noted that such an issue could not be resolved in Lenz since the record did not reveal whether the witness in question would testify or if his testimony would be exculpatory, the two most significant aspects of the second test set forth in Smith. Use of a due process theory for obtaining immunity for defense witnesses finds support in the case of United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), and authorities cited therein. In that case, the Court reversed the defendant's conviction holding that denying immunity to defense witnesses whose testimony was probative was a denial of due process.

It appears that the Third Circuit's reasoning in Smith is well founded and the only issue remaining is whether the trial judge can grant immunity, or whether an accused must wait until appeal to get relief. To this end, the Third Circuit's comment that it was not creating a new right but merely protecting an established one has great merit. As strong arguments can be made for the trial judge resolving the issue at the trial level, Smith may well become the majority rule and defense counsel should aggressively pursue its use.

2. MORE ON CONFESSIONAL STIPULATIONS.⁵

The Army Court of Military Review in United States v. Barden, CM 438377, 9 M.J. ____ (ACMR 14 April 1980), has affirmed the use of confessional stipulations in conjunction with pleas of not guilty as a means of preserving motions and objections to evidence.

In Barden, the defense counsel, in an Article 39(a) session, litigated the legality of a search which had resulted in the seizure of drugs ultimately offered into evidence by the government. The military judge overruled the objection. The defendant then pleaded not guilty and entered into a confessional stipulation that resulted in his conviction.

4. Accord, United States v. Cyr, JALS-ED GCM 1979/4395, 29 Jan. 1979, in which The Judge Advocate General of the Army ruled that military judges do not have the authority to grant immunity. Insufficient information was available in Cyr to determine if the denial of immunity for a defense witness amounted to a due process violation.

5. See 12 The Advocate 87 (1980).

The Court of Review recognized the accused's right to raise the search issue on appeal, stating that "the general rule that a voluntary plea of guilty waives non-jurisdictional defects . . . does not apply to a 'confessional stipulation.'"⁶ Id. slip op. at 2.

Use of confessional stipulations in appropriate cases (e.g., when a conviction is assured if a motion or objection is denied or overruled) has three distinct advantages for the defendant. First, since the government enters into pretrial agreements primarily to save time and money, the defendant may be able to negotiate a favorable pretrial agreement as to the maximum punishment that the convening authority will approve. Second, a confessional stipulation may limit the volume of evidence presented at trial and therefore the facts favorable to the government which will be considered by the appellate courts, e.g., the government may limit its evidence to the minimum necessary to oppose the defense motion during an Article 39(a) session. This precludes further development of the government's case.

Third, use of a confessional stipulation may limit the amount of aggravation the government introduces. A plea of guilty allows the government to introduce matters in aggravation during the sentence hearing. In a not guilty plea, the government is limited to the aggravation, as it pertains to the offense, elicited during the trial on the merits.⁷ Obviously, the limitation of such matters may have a beneficial effect on the appellant's sentence.

If this procedure is pursued, defense counsel should consider requesting an instruction that the appellant's confessional stipulation is a matter to be considered in mitigation, the same as if he had pleaded guilty. While the defendant is not entitled as a matter of law to such an instruction in not guilty plea cases, a strong argument can be made that such an instruction should be given since the effect of the defendant's stipulation is the same as if he pleaded guilty.

6. The Court noted that the military judge had to comply with the requirements of *United States v. Bertelson*, 3 M.J. 314 (CMA 1977), to accept such a stipulation.

7. See *Manual for Courts-Martial, United States*, 1969 (Revised edition), para. 75b(3).

USCMA WATCH

GRANTED ISSUES

The majority of cases which have been granted review in recent weeks involve issues that were left unresolved at Judge Perry's departure from the Court. General deterrence arguments by trial counsel, admissibility of Article 15's received after Booker, and compliance with the Green-King mandate continue to attract attention. Two of the cases argued in April, and reported below, will hopefully clarify the scope of sentencing arguments and use of records of nonjudicial punishment in courts-martial.

REASONABLE DOUBT INSTRUCTION

Three recently granted cases are of particular importance to defense counsel. In United States v. Salley, pet. granted, No. 38,543, 9 M.J. ___ (CMA 23 Apr. 1980), the Court will consider whether the military judge prejudiced the accused by equating substantial doubt and reasonable doubt in his instructions to the members. Problems associated with the standard reasonable doubt instruction in Department of Army Pamphlet 27-9, Military Judges' Guide (May 1969), have been previously addressed in The Advocate. See Ross, Reevaluating the Standard Reasonable Doubt Instruction, 11 The Advocate 64 (1979). Federal appellate courts have concluded that equating reasonable doubt with substantial doubt is erroneous, but have been reluctant to find prejudice. See Young v. Wyrick, 451 F. Supp. 576 (W.D. Mo. 1978), aff'd., 590 F.2d 340 (8th Cir. 1978); United States v. Wright, 542 F.2d 975 (7th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); United States v. Muckenstrum, 515 F.2d 568 (5th Cir. 1975). See also Taylor v. Kentucky, 436 U.S. 478 (1978). The defense in Salley contends the instruction was not only erroneous but also prejudicial because only the accused and the victim were present during the alleged commission of the offenses. As the accused denied committing the offenses and presented an alibi defense, credibility of the witnesses was the key issue. By instructing the court members that they should convict unless they had a substantial doubt about SP4 Salley's guilt, the prosecution's burden was lessened and shifted to the defense. Defense counsel should object to the standard Military Judge's Guide instruction and request an instruction similar to the one at 10 The Advocate 96 (1978).

PRETRIAL AGREEMENT - SUBSEQUENT MISCONDUCT

United States v. Dawson, pet. granted, 9 M.J. 28 (CMA 1980), gives the Court the opportunity to review the protection afforded an accused when the "misconduct provision" of a pretrial agreement is allegedly violated. Pursuant to his pleas, PV2 Dawson was convicted of conspiracy to commit larceny, attempted larceny, and housebreaking. He was sentenced to a dishonorable discharge, confinement at hard labor for five years and accessory penalties. In exchange for this guilty plea, the convening authority agreed not to approve any sentence to confinement in excess of two years. The pretrial agreement also contained a provision that the convening authority would not be bound by the agreement if the accused violated any provision of the UCMJ between the date of trial and that of the convening authority's action.

A military police report reflected that while being processed into the confinement facility in Mannheim, Dawson's packed clothing was searched. Two capsules containing LSD and a small quantity of marijuana were found in this clothing. In his post-trial review, the SJA opined that this misconduct, subsequent to trial, voided the convening authority's obligation to respect the pretrial agreement. The convening authority approved the adjudged sentence, despite denials by the accused in his rebuttal to the post-trial review that he possessed the drugs or knew of their presence in his clothing.

The Court of Military Appeals has agreed to review three issues related to these facts. In the petition for grant of review, appellate counsel conceded that prior cases have upheld the legality of "no misconduct" provisions in the pretrial agreement. See United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973); United States v. French, 5 M.J. 655 (NCOMR 1978); United States v. Alvarez, 5 M.J. 762 (ACMR 1978). Nevertheless, USCMA, in a specified issue, will determine whether the post-trial misconduct provision in the pretrial agreement was void as a matter of public policy or law.

When taking action on the record of trial, the convening authority was presented with the military police report of the alleged post-trial misconduct and the accused's denial of such misconduct. The SJA did not specify the article of the UCMJ allegedly violated, the elements of the offense, or discuss the sufficiency of the evidence as it related to the elements. Whether these omissions in the post-trial review constituted prejudicial error is the second issue for the Court's consideration.

Finally, the Court will determine what process is due an accused faced with an accusation that will vitiate the pretrial agreement. In United States v. Goode, 1 M.J. 3, 6 (CMA 1975), the Court of Military Appeals held that an "accused is not entitled to a formal hearing before the convening authority on the question of a departure from the terms of his pretrial agreement in the action on the sentence." The defense contends that since retraction of the guilty plea is impossible at this juncture, due process requires more protection than is afforded by the submission of a written denial of the post-trial misconduct, and Private Dawson's liberty interest requires protection similar to the conditional freedoms of a parolee. See Morrissey v. Brewer, 408 U.S. 471 (1972). Although the argument that an accused is entitled to a hearing similar to that afforded by Article 72, UCMJ, was flatly rejected in Goode, the grant of review in Dawson signals an intent by the Court to look at the post-trial misconduct problem anew.

NOTE: When defense counsel are confronted with a situation where the defendant has allegedly violated a "no misconduct" provision in the pre-trial agreement, and the accused denies the misconduct, always ask the convening authority for a hearing and permission to represent your client at the hearing.

SENTENCING INSTRUCTIONS - MAXIMUM PUNISHMENT

The third significant case, certified by The Navy Judge Advocate General, deals with the military judge's sentencing instructions. In United States v. Gutierrez, 8 M.J. 865 (NCMR 1980), cert. filed, 9 M.J. 35 (CMA 1980), the judge instructed the members concerning the maximum punishment which they could impose for each offense as well as the aggregate maximum imposable punishment for all offenses of which they had found Gutierrez guilty. Two members of NCMR found the instructions violative of paragraph 76b(1), Manual for Courts-Martial, United States, 1969 (Revised edition), but not prejudicial error. Senior Judge Baum, concurring in the result, found no proscription in paragraph 76b(1), MCM, against advising the members of the maximum punishment for each offense, so long as the judge instructs as to the one maximum that may be imposed.

The High Court's holding in this case could have significant impact on sentencing procedures in general courts-martial. As Judge Baum correctly notes, the military judge could not instruct the members as was done in Gutierrez if the total sentence authorized exceeded the court's jurisdictional limits or there was a sentence limitation imposed upon a rehearing or other trial. However, in general courts-martial, instructions concerning the maximum punishment for each offense could be helpful

if the sentencing authority would announce the punishment imposed for each finding of guilty, followed by the total sentence awarded the accused. This practice would certainly aid appellate defense counsel, Courts of Review, and convening authorities in reassessing sentences after findings of guilty have been dismissed or set aside during post-trial review.

REPORTED ARGUMENTS

SEARCH AND SEIZURE

On 23 April the Court heard oral argument for the second time in United States v. Middleton, pet. granted, 3 M.J. 425 (CMA 1977). Both defense and government appellate counsel stressed to the three judges the importance of clarifying the law regarding inspections and searches within military barracks. At that point, unanimity of opinion ended.

The facts of Middleton are relatively simple. A company commander conducted a prearranged "health and welfare inspection" of his barracks one morning with a marijuana dog while his troops were engaged in daily PT. Accompanying the marijuana dog were two military policemen, one of whom was the dog's handler and the other an investigator. If the dog alerted on a locker, the soldier to whom the locker was assigned was called out of formation, informed of the dog's alert, and was asked to consent to a search. Specialist Middleton in this case was advised of the dog's alert, and he opened his wall locker.

Appellate defense counsel contended the operation was a search. First, it was argued that the use of a marijuana dog is a search per se since the dog is used as a sense supplanter, not enhancer, and is trained solely to ferret out contraband. The use of a marijuana dog is more akin to the electronic listening device in Katz v. United States, 389 U.S. 347 (1967), than it is to a policeman's use of a flashlight to enhance his night vision, according to the defense.

At this point the Chief Judge asked whether the Court had not already sanctioned the use of marijuana dogs in United States v. Grosskreutz, 5 M.J. 344 (CMA 1978). Counsel distinguished Grosskreutz on the fact that Sergeant Grosskreutz forfeited his expectation of privacy by leaving his car in a public parking area. Any human or canine could sniff the air in a public parking lot, with or without probable cause. However, in Middleton, the accused kept the marijuana in a locked wall locker, an area to which he had a reasonable expectation of privacy. The defense conceded that if the accused had kept such a quantity of marijuana in

his locker and the odor emanating from such could have been perceived by the unaided human sense of smell, any privacy expectation would have been forfeited.

Secondly, the defense contended that the conduct of the avowed inspection showed it to be a search on its face. At trial, the testimony showed that if the dog failed to alert on a locker, that locker was not inspected. This action was not in accord with the commander's reason for conducting the inspection: sanitation, absence of safety hazards, and living conditions that were not harmful to the individuals. The Court questioned the necessity of having two military policemen available if the operation was truly an inspection. In response to one of several questions on this subject, government counsel stated that dog handlers are generally MP's and hypothesized that the criminal investigator might have been present to preserve the chain of custody of any contraband found and to protect the accused's Article 31 rights.

In setting a workable rule for the future, the defense asked the Court to formulate a standard that would balance the privacy interests of the service-person and the need of the government to impinge upon those interests to insure an effective fighting force. Counsel suggested that a concept of administrative probable cause, similar to that required in Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); and Marshall v. Barlow's Inc., 436 U.S. 307 (1978), be adopted.

The government countered with a multifaceted attack. First, counsel noted the difference between United States v. Roberts, 2 M.J. 31 (CMA 1976), and Middleton. In Roberts, unlike Middleton, there was evidence of a drug problem in the unit and the shakedown inspection there was not routine. Secondly, government counsel emphasized that there is no such thing as a "normal inspection" - commanders may look at or for different things at different times. One inspection may focus on the neatness of clothing, another on the cleanliness of window sills, and a third on drugs. Therefore, contended the government the prerogative of what to inspect for must rest solely with the commander.

Next, the government questioned whether CMA was intruding into the powers of Congress via the delegated powers of Article 36 to control drugs. This argument drew several questions from the bench and a statement that CMA has never applied the exclusionary rule to lawful activity. The government again pointed out that an inspection is a command, not a judicial, function, and since the Court has said inspections are lawful, lawful activity should not trigger the exclusionary rule.

In response to the defense argument for an administrative probable cause standard for inspections, government counsel opined that the Court could not promulgate a rule that was expansive enough to enable the commander to meet his needs.

Both counsel were asked several questions regarding Middleton's consent to search his locker. While each side provided support for his respective position regarding the validity of the consent, it was clear that both counsel wanted the case decided on the search versus inspection issue.

DETERRENCE ARGUMENTS

United States v. Lania, pet. granted, 6 M.J. 124 (CMA 1978), argued 24 April 1980, gives the Court another opportunity to address the propriety of general deterrence arguments by trial counsel before court members. In his sentencing argument, the trial counsel stressed the general deterrence of others as a factor the members should consider in arriving at an appropriate punishment. Particularly, the trial counsel asked for a sentence that would be heard throughout the post and for a showing of retribution to the accused as a means of deterring others. Defense counsel objected and asked for a cautionary instruction. The trial judge refused to give one.

Chief Judge Everett initially asked the defense to demonstrate prejudice where the accused was convicted of 38 specifications (most of which were bad check offenses), the court members sentenced him to two years confinement, and the convening authority approved only one year's confinement. The defense opined the argument was per se prejudicial, especially where the trial counsel emphasized retribution and deterrence to the exclusion of rehabilitation as a sentencing factor. In response to questions from Judge Cook, the defense contended that United States v. Mosely, 1 M.J. 350 (CMA 1976), and United States v. Varacalle, 4 M.J. 181 (CMA 1978), can be reconciled. So long as the "focus" of trial counsel's sentencing argument is not directed toward the general deterrence of others, deterrence is an acceptable consideration in any individualized sentence.

Government counsel was not sure Mosely and Varacalle could be reconciled. Counsel did concede that an argument based solely on general deterrence, to the exclusion of all other sentencing factors, would be prejudicial. However, the government emphasized the prosecutor should not be prevented from making a strong deterrence argument, as fits the accused, when the facts call for such.

ARTICLE 15 ADMISSIBILITY - POST-BOOKER

On 24 April 1980, the Court heard argument on the admissibility of an Article 15, UCMJ, given after the decision in United States v. Booker, 5 M.J. 238 (CMA 1977), in a subsequent court-martial. United States v. Negrone, pet. granted, 7 M.J. 6 (CMA 1979). At trial, two Article 15's were admitted without defense objection or inquiry by the military judge. See United States v. Mathews, 6 M.J. 357 (CMA 1979). Both appellate parties agreed that the admissibility of the first Article 15 was controlled by United States v. Syro, 7 M.J. 431 (CMA 1979).

Despite the lack of objection at trial, defense appellate counsel argued that the document was inadmissible in light of United States v. Morales, 1 M.J. 87 (CMA 1975). As the Article 15 form was not complete (the boxes were not completely checked), the document could not qualify as an official document and therefore was inadmissible evidence.

Regarding the accused's right to consult with counsel, the commander's signature on the Article 15 form clearly showed that Private Negrone had been advised of this right. This, according to the appellant's counsel, was insufficient. The Court should be more concerned with the accused's answers after receiving the advice of counsel and not that legal advice was given. Since the incomplete Article 15 did not show the accused's choices after given the opportunity to seek legal advice, it should have been excluded.

Government counsel contended that the failure to object at trial amounted to waiver. The appellee also pointed out that the trial defense counsel used the Article 15 in argument to explain that the accused's alcohol problem was the basis for his misconduct.

RIGHT TO COUNSEL

Problems associated with the application of United States v. McOmber, 1 M.J. 380 (CMA 1976), surfaced again in United States v. McDonald, 3 M.J. 1005 (ACMR 1977), pet. granted, 4 M.J. 160 (CMA 1977), argued 24 April 1980. The pertinent facts are set forth in the Army Court of Military Review's opinion.

Most of the questions from the bench dealt with the right of the military counsel, detailed to defend the accused on unrelated charges, to be notified of the accused's interview with the secret service agent. The defense contended that while Secret Service Agent Hussey was conducting an independent investigation and did nothing illegal under Federal law, military authorities provided him with ready access to the accused.

Since the CID knew the confined McDonald had military counsel, that counsel had a right to be notified of the interview. Without notification, an intelligent waiver of counsel could not take place under United States v. Turner, 5 M.J. 148 (CMA 1978). The government countered with the fact that the secret service investigation was totally unrelated to the military offenses for which the accused was confined and no right to military counsel attached.

In argument, appellant's counsel pointed out that the criteria of United States v. Penn, 18 USCMA 194, 39 CMR 194 (1969), should apply since the Army had total control over the accused (he was confined) and had provided him with military counsel. Arguing the right to military counsel should apply, no matter how unrelated the military and civilian charges may be, the defense then contended the handwriting exemplars should have been excluded. Since the notice to counsel under McOmber and Article 27, UCMJ, is a prerequisite to a valid waiver of one's Article 31, UCMJ, rights after the appointment of counsel, no legal waiver of Article 31 existed in this case.

Government counsel argued that since this was strictly a civilian investigation, the accused had no right to refuse to give the handwriting exemplars, albeit one of them, his signature on the rights warning statement, was used against him. In rebuttal to the defense's expansive interpretation of McOmber, the government contended that a detailed military counsel is not a house counsel for his client's unrelated civilian accusations.

SOFA - OFF-POST SEARCH AUTHORIZATION

United States v. Bunkley, pet. granted, 2 M.J. 145 (CMA 1976), was argued for the second time on 22 April 1980. At issue is the authority of a commander to authorize an off-post search in Germany under the NATO Status of Forces Agreement and whether the authorization was by a neutral and detached magistrate pursuant to probable cause. At the outset of the argument, the Chief Judge made it clear that there was no majority opinion in United States v. Reagan, 7 M.J. 490 (CMA 1979). Since the Court has not acted upon the government's petition for reconsideration in Reagan, it is evident the military's power to search under the agreement with the Federal Republic of Germany remains unsettled.

SPEEDY TRIAL AND MISAPPREHENSION OF MAXIMUM SENTENCE

United States v. Walls, 3 M.J. 882 (ACMR 1977), pets. granted, 4 M.J. 141 (CMA 1977), and 4 M.J. 196 (CMA 1978), argued 23 April 1980, gives the

Court the opportunity to re-examine the decisions in United States v. Powell, 2 M.J. 6 (CMA 1976) and United States v. Brewster, 7 M.J. 450 (CMA 1979). Private First Class Walls was restricted to his kaserne for 160 days prior to trial, 139 of which were attributable to the government. Similar to the restriction in Powell, PFC Walls could leave the kaserne only after obtaining official permission. At trial, the military judge advised the accused the maximum imposable sentence to confinement at hard labor was 20 years. On appeal, the Army Court of Military Review determined the maximum confinement to be 10 years but held the guilty plea provident since the accused had a pretrial agreement limiting confinement to one year.

During argument, defense appellate counsel stressed to the Court that after the decisions in Powell and United States v. Nelson, 5 M.J. 189 (CMA 1978), the law was clear that restriction of the type in Walls amounted to arrest within the meaning of Article 10, UCMJ. Having been in this status for 139 days, the accused's right to a speedy trial was violated. Several questions were asked concerning prejudice suffered by PFC Walls and whether the seriousness of an offense should affect the outcome of this or any other case. The defense responded that no specific prejudice occurred in this case, but a test for prejudice and the seriousness of the offense had never been considered by the Court in previous cases when granting relief for a speedy trial violation. The government argued that Powell, in equating restriction to arrest, was incorrectly decided and asked that it be overruled.

On the substantial misunderstanding of the maximum sentence issue, the defense argument focused on recent decisions as Brewster, United States v. Castrillon-Moreno, 3 M.J. 894 (ACMR 1977), rev'd, 7 M.J. 414 (CMA 1979), and United States v. Dowd, 7 M.J. 445 (CMA 1979). The defense contended that the ceiling on confinement agreed to by the convening authority prior to trial should not be a factor in determining the providency of a guilty plea where the misunderstanding of the maximum imposable sentence to confinement is substantial. Arguing the majority is wrong in Brewster, the government asked the Court to overrule it and similar cases. Government counsel stated that the Court should consider such factors as the compelling evidence of guilt, remorse and a desire for rehabilitation by the accused, and the apparent desire for leniency in determining whether a guilty plea in such situations is still provident. Although there was no inquiry from the military judge similar to that in United States v. Frangoules, 1 M.J. 467 (CMA 1976), regarding the accused's desire to plead guilty regardless of what the maximum confinement might be, government counsel contended PFC Walls would have persisted in his plea despite a 10 year sentence limitation.

OFF-POST JURISDICTION

During its May term, the Court again heard argument in cases involving issues needing clarification. Two off-post jurisdiction cases, United States v. Cornell, pet. granted, 4 M.J. 355 (CMA 1978), and United States v. Smith, 7 M.J. 327 (CMA 1979) (summary disposition), pet. for reconsideration granted, 8 M.J. 36 (CMA 1979), were argued on 15 May. In Cornell, an undercover MP investigator called SP4 Cornell at his place of duty in an attempt to buy 3 pounds of marijuana. Cornell declined. The policeman then asked to buy a couple of bags for himself and his girlfriend. To this the accused agreed and instructed the purchaser to meet him off-post during off-duty hours to consummate the transaction. The sale occurred in a cafe one mile from Fort Campbell. The defense argued there was no contract to sell until the off-post meeting occurred and a price was set. Questions from the Court indicated that military jurisdiction will be upheld on the facts in Cornell. Previous cases, decided by summary disposition and upholding court-martial jurisdiction, have involved the use of government telephones during duty hours to initiate a drug transaction. The Cornell decision may provide some guidance in the muddled area of service-connection by holding that such telephonic activity involves a flouting of military authority.

In United States v. Smith, the accused was convicted of conspiring to purchase marijuana for resale and possession of marijuana. On 3 August 1979, the Court of Military Appeals reversed the decision of the Army Court of Military Review as to the possession offense and ordered it dismissed. The government's petition for reconsideration was granted the next month.

During argument, the government's primary contention was that the tests of O'Callahan v. Parker, 395 U.S. 258 (1969), and Relford v. Commandant, 401 U.S. 355 (1971), do not apply to special courts-martial, because the six-month confinement maximum make the charges "petty offenses." The defense rebutted this unique theory, and maintained that since both the conspiracy and possession offenses occurred entirely off-post, military jurisdiction vested over neither. After a question by Judge Fletcher as to whether the possession of marijuana was the overt act that makes the defendant guilty of conspiracy and gives the military jurisdiction over both offenses, the Chief Judge ordered both appellate parties to submit additional briefs on the issue.

COUNSEL FOR GOODE* REBUTTAL

United States v. Edwards, pet. granted, 3 M.J. 115 (CMA 1977), vacated, 3 M.J. 385 (CMA 1977) (remanded), affirmed, 4 M.J. 821 (ACMR 1978), pet. granted, 5 M.J. 200 (CMA 1978), concerns the question of who to serve with a second post-trial review for defense counsel comment. Private Edwards was convicted, at a special court-martial in March 1975, of failure to obey an NCO, wrongful appropriation, and assault, in Mainz-Gonsenheim, Federal Republic of Germany. In 1976, the Court of Military Appeals ordered a new review and action. The second review and the action were completed at Fort Hood, Texas, where the accused was then stationed. Prior to the second action, the review was served on a Fort Hood judge advocate, but not on the original defense counsel in Germany.

Questions posed by the three judges during the lively argument indicate a number of complicated issues. Who "appoints" substitute counsel for purposes of the Goode rebuttal? In Edwards, the Fort Hood counsel was never officially appointed or detailed under Article 27, UCMJ. Who is in the best position to help an accused in this situation, his original counsel who is familiar with the record or substitute counsel who is unfamiliar with the record but can speak with the client face-to-face and aid the serviceman in submitting clemency petitions (as was done in Edwards)? When is an attorney-client relationship severed, and when can it be revived, if ever? One question from the bench noted the fact that most convicted servicepersons are shipped from the situs of the trial to a place of confinement prior to service of the initial post-trial review on the trial defense counsel. It was this precise problem of precluding the chance to discuss the post-trial review face-to-face with the defendant, by his early removal from the situs of the trial, that appellate defense counsel unsuccessfully raised in United States v. Vick, 4 M.J. 235, 236 (CMA 1978) (summary disposition).

CHAIN OF CUSTODY AND FAILURE TO INSTRUCT AT THE BEHEST OF THE DEFENSE

United States v. Fowler, cert. filed, 4 M.J. 143 (CMA 1977), pet. granted, 5 M.J. 77 (CMA 1978), presents the Court with issues involving chain of custody and acceding to a defense objection to instructions on uncharged misconduct. Private Fowler was arrested by German police after allegedly threatening the owner of a bar. He was not prosecuted for this threat but evidence of it was introduced at trial as the basis for his arrest. In response to a defense request, the military judge did not

* United States v. Goode, 1 M.J. 3 (1975).

instruct the court members on uncharged misconduct. On appeal, the Army Court of Military Review applied the decision of United States v. Grunden, 2 M.J. 116 (CMA 1977), retroactively and reversed the conviction.

When he was arrested, marijuana, discovered in a camera bag that Private Fowler was carrying, was field-tested, revealing the presence of marijuana. Custody of the marijuana was unaccounted for until the next morning when it was discovered on the desk of another German policeman, along with a police report, in a different police station. There was no evidence presented as to how the marijuana got to the second police station except for the officer's "normal police procedures" explanation. The policeman who found the marijuana on his desk the morning after Fowler's arrest also field tested the substance and concluded it was marijuana. The defense maintains the gap in the chain of custody and lack of proper safeguarding precludes the admissibility of the marijuana into evidence against Private Fowler.

PENDING ARGUMENT CALENDAR

During June, the Court has indicated it will hear oral argument in four cases that involve the admissibility of Article 15, UCMJ, punishment and summary court-martial convictions received after the decision in United States v. Booker, 5 M.J. 238 (CMA 1977). United States v. Mack, pet. granted, 9 M.J. 42 (CMA 1980), will address the admissibility of an Article 15, admitted without defense objection, but without a Mathews-type inquiry to show that the proceedings complied with the requirements of Booker. United States v. Mathews, 6 M.J. 357 (CMA 1978).

United States v. Cox, pet. granted, 9 M.J. 42 (CMA 1980), will present the same questions as Mack except in Cox the defense objected to the admission of three Article 15's during the sentencing portion of trial. In United States v. Turrentine, pet. granted, 9 M.J. 17 (CMA 1980), the trial judge admitted an order reflecting conviction by summary court-martial. Over defense objection, the military judge asked the accused if he was aware of his rights to see counsel and to refuse trial by summary court-martial. After an affirmative reply, the prior conviction was admitted. United States v. Spivey, pet. granted, 9 M.J. 16 (CMA 1980), will address the admissibility of an Article 15 which was entered into evidence after an inquiry similar to that in Mathews. As in Turrentine, the defense counsel in Spivey objected to the military judge's inquiry and admissibility of the record of nonjudicial punishment. In both Turrentine and Spivey, appellate defense counsel seek to distinguish Mathews. In Mathews, a guilty plea case, the trial defense counsel expressly declined to object to the introduction of the records of nonjudicial punishment and did not object to the judge's questioning of the accused.

CASE NOTES

FEDERAL DECISION

ARGUMENT - CREDIBILITY

McFarland v. Smith, 611 F.2d 414 (2d Cir. 1979).

The prosecutor, in closing argument on findings, in an effort to enhance the credibility of his chief witness, argued that because she was a black and the defendant was also black, "[i]f she's lying, she's lying against a member, a person that is black." The defendant's objections were overruled.

The Second Circuit held that any reference to the race of a defendant to persuade a jury to convict is unfair unless justified by a compelling state interest. The Court rejected, as illogical, the State's argument that a witness' testimony is more likely to be credible because it is given within racial lines. The State should not be entitled to have a witness' credibility enhanced simply because the witness is not a member of a group which might be prejudiced against the defendant.

COURTS OF MILITARY REVIEW DECISIONS

ALLEGING NON-EXISTENCE OF EXCEPTION - PROOF

United States v. Howard, SPCM 14116 (ACMR 22 Feb. 1980) (unpub.) (ADC: CPT Wheeler).

The defendant was convicted of wrongfully making purchases in Korea in excess of ration limits. The specifications alleged that the purchases occurred "while not having a one time exception or an authorization to exceed the prescribed limits" as provided for by local regulation. Having specifically alleged the non-existence of exceptions, the government had a duty to prove that allegation.

The government submitted evidence from a lieutenant that he had received no exceptions to policy for the defendant. However, there was no conclusive showing that the lieutenant had ever received exceptions for anyone, or that he was responsible for maintaining records of exceptions. His testimony, then, was not conclusive of the matter. No other testimony on the point being admitted, the government failed to carry its burden. The Army Court of Review dismissed the charges.

SENTENCING INSTRUCTIONS - SEVERITY OF BCD

United States v. Davenport, NCM 79 0859 (NCMR 13 Mar. 1980) (unpub.)
(ADC: CPT Burnette, USMC).

The defendant was convicted by a court with members. The military judge refused to instruct, pursuant to a defense request, that "as a matter of law, a sentence to confinement at hard labor for one year and forfeiture of all pay and allowances for a like period is a less severe penalty than a bad-conduct discharge." The trial judge based his decision on his belief that one accused might perceive a bad-conduct discharge to be worse than 10 years confinement, while another might perceive it to be not any worse than confinement for one month. The Navy Appellate Court declared the trial judge to be in error, declaring that it is irrelevant how the accused perceives the discharge for instructional purposes. The instructions to the members must inform them of how the relative severity is perceived in the law. Sentence affirmed on other grounds.

VOIR DIRE

United States v. Dixon, 8 M.J. 858 (NCMR 1980) (ADC: LT Durbin, USNR).

In deciding other issues, the Navy Court commented on the manner in which the voir dire had been conducted in this case. The military judge, apparently relying on United States v. Slubowski, 7 M.J. 461 (CMA 1979), conducted a comprehensive voir dire, including some all-inclusive questions, such as "[d]o any of you harbor any thoughts or feelings regarding punishments which might affect your ability to award a completely fair, impartial and appropriate sentence in this case?" The defense counsel then began his voir dire, covering the same area as the military judge, but asking more specific and more probing questions to test the general disclaimer of bias given to the military judge by way of "monosyllables or nods." The trial counsel objected to virtually all voir dire because the questions of the defense counsel had been "asked and answered." The judge sustained the objections.

The Navy Court of Review noted that "[h]umans are not reliable gauges of their own temperatures; counsel voir dire is a thermometer seeking an impartial reading. Efforts to test the members for bias by posing specific questions were, however, repeatedly foreclosed by the trial judge The defense counsel therefore was not allowed to ask a single member if he thought a punitive discharge would be a

necessary element of any eventual sentence. Such truncated voir dire was error." The Court opined that this case did not exemplify the even-handed procedures contemplated by Slubowski, supra.

The Court indicated that, normally, this aborted voir dire, objected to by defense counsel, would constitute a violation of due process and require a rehearing. In the case sub judice, however, at the next meeting of the court a new judge offered defense counsel an opportunity to re-open the voir dire. The defense counsel's declining of that invitation constituted waiver of the error. Sentence modified on other grounds.

PRIOR CONVICTION - IMPEACHMENT

United States v. Bazemore, SPCM 14272 (ACMR 9 Apr. 1980) (unpub.) (ADC: CPT Trant).

The defendant was charged, inter alia, with aggravated assault with a revolver. Following a plea of not guilty, the defense requested a ruling concerning the admissibility, for impeachment purposes, of a prior civilian conviction of the defendant for "intimidation by firearms" (a "gross misdemeanor" in the state of Washington, although punishable as a felony under the U.S. Code). The judge ruled that if the defendant took the stand to testify, the conviction would be admissible for impeachment. The defendant did not thereafter testify and was convicted.

While the Manual provides that a witness may be impeached by a previous conviction for a felony or an act which affects credibility, the presiding judge must determine, even if the conviction is technically admissible, whether its probative value outweighs any danger of prejudice. United States v. Weaver, 1 M.J. 111 (CMA 1975). The Army Court of Military Review determined this conviction was not properly admissible for impeachment purposes.

The primary issue at trial was credibility of witnesses. The erroneous ruling of the military judge inducing, as it did, the defendant not to testify was clearly prejudicial. The findings and sentence were set aside and a rehearing was authorized.

The government has requested reconsideration of the decision, arguing that the prior conviction was admissible, not as a "gross misdemeanor," but as the equivalent of a felony under the U.S. Code. The defense response was predicated on the prejudice factors delineated in Weaver rather than the felony/misdemeanor question. Because of the

very close similarity between the prior conviction and the major offense charged, the risk of prejudice outweighed its probative value.

VICED JUDGE PRESIDING - NO JURISDICTION

United States v. Edge, CM 438704 (ACMR 23 Apr. 1980) (unpub.) (ADC: CPT Schon).

The defendant's case was referred for trial by general court-martial; however, subsequent to the referral, the convening authority substituted judges. An appropriate amending order was published but evidently forgotten. The original judge, apparently uninformed of the amendment, presided at the trial.

Because the judge who presided at trial had previously been formally relieved, the court-martial lacked jurisdiction and was void ab initio.

OFFENSES DURING PRIOR ENLISTMENT - NO JURISDICTION

United States v. Stiles, CM 438934 (ACMR 27 Mar. 1980) (unpub.) (ADC: CPT Lukjanowicz).

The defendant pleaded guilty to conspiracy to commit fraud by submitting fraudulent claims for travel and lodging expenses, presenting false claims, and larceny by way of the false claims.

On appeal, the defense claimed lack of jurisdiction. The offenses occurred between July and November 1977. The defendant was discharged and re-enlisted on 17 April 1978. Although the maximum punishment for each offense includes confinement for five years, each offense was triable in a U.S. District Court as a violation of the U.S. Code. Therefore, pursuant to United States v. Ginyard, 16 USCMA 512, 37 CMR 132 (1967); Article 3(a), UCMJ; and para. 11b, MCM, there was no jurisdiction. The charges were dismissed and the proceeding declared void.

PUNITIVE DISCHARGE - ARGUMENT

United States v. Spiker, NCM 79 1345 (NCOMR 31 Mar. 1980) (unpub.) (ADC: LT Durbin, USNR).

The defendant, after pleading and being found guilty, made an unsworn statement before a judge alone asking to be discharged, even

if with a bad-conduct discharge. Trial defense counsel, in closing argument on sentence, argued against a bad-conduct discharge. The Navy Court, citing United States v. Weatherford, 19 USCMA 424, 42 CMR 26 (1970), held that absent either a showing that the defendant is aware of alternatives to his defense counsel's closing argument or that he acquiesces in the argument, there is substantial doubt as to whether the defendant received effective assistance of counsel on sentencing. Sentence reassessed.

SANITY MOTION - STANDARD OF PROOF

United States v. Wright, CM 438488 (ACMR 26 Mar. 1980) (unpub.) (ADC: CPT King).

At trial the defense moved to dismiss the charge on the ground of lack of mental responsibility at the time of the offense; he specifically requested that the military judge utilize the standard of "beyond a reasonable doubt" in deciding the question. The military judge, in denying the motion, utilized a preponderance standard. The Court of Military Review held that this was error, but found that the military judge used the correct standard (beyond a reasonable doubt) when he decided the question of mental responsibility in connection with his general findings of guilt on the case-in-chief. The Court concluded that the appellant, therefore, suffered no prejudice by the earlier erroneous ruling.

FIELD FORUM

In response to your inquiries about the USARB, Captains Meyer and Parrish have provided us with this article which answers commonly asked questions. For further information contact USARB, Office of the SJA, Trial Defense Service, Fort Riley, Kansas 66442 (AV 856-6229/6112).

THE UNITED STATES ARMY RETRAINING BRIGADE: WHAT'S IT ALL ABOUT?

Captain Robert C. Meyer, JAGC*
Captain Patrick J. Parrish, JAGC**

INTRODUCTION

Based upon the number of inquiries we receive from defense counsel throughout the world, as well as from the trainees at the U.S. Army Retraining Brigade (USARB), it appears that there are many misconceptions about current policies and practices. This article, in its question and answer format, hopefully, will fill this void to some extent. It is not intended to analyze the Whitfield¹ decision or other legal issues concerning the Brigade. Those issues have previously been discussed in a well-reasoned article in The Army Lawyer.² This article is intended solely as a "nuts and bolts" explanation of The Retraining Brigade.

1. WHAT IS THE U.S. ARMY RETRAINING BRIGADE?

The Retraining Brigade is one of two Army correctional facilities. Stated simply, it is an organization designed to help soldiers identify

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1. United States v. Whitfield, 4 M.J. 289 (CMA 1978).

2. Ross and Zimmerman, The U.S. Army Retraining Brigade: A New Look, The Army Lawyer, June 1979, at 24.

and resolve problems. Viewed in that light, its mission is two-fold: to prepare individuals to return to duty as competent, motivated soldiers, or for return to civilian life.³

The Brigade consists of three battalions supported by special staff elements. At the heart of the Brigade is the "Leadership Team," capable of teaching and evaluating 55-60 soldiers each. There are eight teams in the Brigade, under the command of a military police or combat arms captain, and each includes four drill sergeants and two correctional specialists.

Supportive staff elements are composed of professionals, organized and dedicated to expeditious support and resolution of problems which may impede participation in the training program. Staff elements include lawyers, chaplains, social workers, and personnel and finance specialists.

The physical plant at USARB is comprised primarily of World War II wooden barracks buildings, and has its own training courses (obstacle course, leadership reaction course, and confidence course), and recreational facilities (gymnasium, theatre, bowling alley, sports fields, tennis courts, swimming pool and club).

2. PLEASE DESCRIBE THE USARB TRAINING PROGRAM.⁴

The USARB training program is designed to place the soldier under physical and mental stress in a stringent military environment. Mental stress results from constant observation and evaluation by cadre, peer feedback, and constant pressure to perform. Physical stress is produced through a daily program of increasing physical training, coupled with rappelling, obstacle and confidence courses, road marches, and a three day field training exercise. An intensive, sustained emphasis is placed upon personal development. In this regard, trainees attend approximately 230 hours of classes on Coping in a Military Setting and Appropriate Personal Behavior. Additionally, numerous personal and barracks inspections highlight the importance of paying close attention to detail.

Trainees are assigned primary counselors who monitor their progress and help to resolve problems. Other problem solving assistance is available in the form of lawyers, social workers, chaplains, and personnel and finance specialists. Team cadre, consisting of drill sergeants and

3. Army Reg. 190-47, Military Police - The United States Army Correctional System, para. 13-2 (1 Oct. 1978) [hereinafter cited as AR 190-47].

4. USARB, "Program of Instruction," Operations and Training Section.

correctional specialist NCO's, make on-the-spot corrections and arrange appointments on a continuous basis.

The Pride Center at USARB conducts basic educational skills training for both trainees and cadre. The program is mandatory for all trainees who have not received a high school diploma or its equivalent. The aim of the program is to assist those individuals who have received a high school diploma to raise their GT score to at least 100, and to enable non-graduates to receive their GED's.

Throughout the training program, trainees are billeted in World War II open-bay barracks buildings, which tends to intensify the social pressures experienced within any given group of trainees. Pass policies and privileges are similar to those in most Army training programs.

3. WILL MY CLIENT BE SENT TO USARB?

Under AR 190-47, all soldiers who are sentenced at a court-martial to confinement at hard labor for 6 months or less, without a punitive discharge, or with a suspended punitive discharge, are sent to USARB.⁵ However, the regulation further provides that local confinement facilities have up to 15 days to ship a prisoner to USARB and a prisoner should have at least one day of confinement remaining on his sentence upon arrival at USARB.⁶ Thus, it is possible, in certain cases, for personnel not to be sent to the Retraining Brigade.

4. BUT MY CLIENT IS PREGNANT, HAS A PROFILE AND IS BEYOND HER ETS?

Even if a defense counsel were to have such a client, those conditions would not prevent her from being shipped to USARB. Female trainees who are pregnant can request a Chapter 8 Discharge if they desire. Otherwise, they will participate in training commensurate with their physical abilities. Trainees who have current profiles also train to the extent they are able. Defense counsel can assist their clients who have profiles by insuring that the client has a current, valid copy of the profile in his possession upon his arrival at USARB. Personnel who are tried after reaching their ETS will serve their confinement at USARB and, upon reaching their Minimum Release Date (MRD), will be discharged from the service. In meritorious cases, the Command may remit the remainder of the sentence to permit earlier discharge.

5. AR 190-47, para. 4-2b.

6. AR 190-47, para. 4-9.

5. HOW LONG WILL MY CLIENT BE AT USARB?

When your client arrives at USARB, he, or she, will be assigned to the 5th Unit, which is classified as a confinement unit. The 5th Unit is the only confinement unit at USARB. The average length of confinement in 5th Unit currently runs about 30 days. However, a trainee who shows high motivation to return to duty may have his confinement deferred after approximately two weeks. These evaluations are made on a case-by-case basis. Normally, a trainee can expect to spend up to one-third of his sentence to confinement in 5th Unit. Those trainees who continue to be discipline problems serve their confinement in the Fort Riley Installation Confinement Facility. While trainees are in confinement in 5th Unit, they undergo extensive inprocessing and evaluation. The rigorous physical training program also begins.

It should be noted at this point that the term confinement is somewhat of a misnomer when applied to 5th Unit. Billeting is the same as all other USARB units - open-bay wooden barracks. However, 5th Unit is separated from the other units by an eight foot high fence, a "hold-over" from the pre-Whitfield days. The 5th Unit is the only unit which is enclosed by the fence.

After leaving confinement, via deferment, MRD, or suspension (if promulgating orders have arrived), the trainee enters a seven week training cycle. If a soldier has less than 53 days remaining to his ETS after confinement, he will not participate in the Retraining program. Rather, he will be assigned to the Duty Soldier's Unit until his ETS. Thus, the average length of assignment to USARB, including confinement, works out to approximately three months.

Upon graduation, if your client's promulgating orders have arrived, he will be assigned to a new CONUS duty station. It is highly unlikely that your client will be reassigned to the same post from which he came.

6. WHAT IS THE DUTY SOLDIER'S UNIT?

Duty Soldiers Unit (DSU) is a unit at USARB where some trainees are assigned after graduation from the retraining course. Basically, DSU operates as a holding unit. Trainees who have less than 120 days to their ETS are assigned to DSU, rather than to a new CONUS post. Additionally, trainees whose promulgating orders have not arrived must be assigned to DSU. Once their orders arrive, those trainees can then be assigned to a new post. Soldiers in DSU generally work in the various staff elements at USARB.

7. WHAT ARE THE MOST RECENT STATISTICS ON USARB?

During FY79, approximately 65% of the 2875 trainees assigned to the Brigade graduated from the course, or reached their ETS without participating in the course. Approximately 23.3% (550) trainees were discharged under AR 635-200. Of those discharged, 12.5% (69) were discharged for unsuitability and 87.5% for misconduct. Of the misconduct discharges, all but 3 were under Other Than Honorable Conditions. During FY79, 2 trainees received EDP discharges, 9 received hardship discharges and 105 received either Chapter 10 or bad-conduct discharges (either vacated suspended discharges or from courts-martial). Trainee strength at the close of FY79 was 501. As of 1 June 1980, the Brigade strength was 749 trainees.⁷

8. CAN MY CLIENT BE DISCHARGED WITHOUT GOING THROUGH THE TRAINING PROGRAM?

One of the most frequent complaints that we hear from trainees is that they were told at their last duty station that if they wanted out of the Army, all they had to do was to ask for a discharge when they arrived at Fort Riley, and they would be out within two weeks. This is absolutely not true. In a very few cases a trainee will be administratively eliminated from the service while in 5th Unit. However, the general rule is if the trainee has at least 53 days left in the Army, the retraining program is mandatory. Refusal to participate is punishable under the UCMJ.

9. WHAT CAN I DO TO ASSIST MY CLIENT UPON HIS ASSIGNMENT TO USARB?

As we all well know, our duties toward our clients do not end with the trial.⁸ Many of the problems encountered by trainees at USARB can be alleviated or avoided with the assistance of defense counsel. The key to successful completion of the program is motivation. Explain what USARB is all about. Explain the practical effect of his sentence to confinement and what will be expected of him once in the training program. Closely monitor the government's processing time. Promulgating orders are of vital importance to your client. Without them, your client cannot be assigned to a new duty station upon graduation, cannot be promoted, and cannot straighten out his pay after forfeitures. All too often the progress a trainee has made in the program is negated by a delay in receiving his promulgating orders. He is then left to languish in DSU until his orders arrive.

7. Statistics supplied by Research and Evaluation Section, USARB.

8. United States v. Palenius, 2 M.J. 86 (CMA 1977).

Insure that your client receives a copy of the inventory of his property from his old unit. USARB prefers that a trainee not ship his property to the Brigade in as much as storage space is at a minimum. If your client has a POV, make sure that he has made arrangements with someone to store the vehicle, as trainees are not permitted to have a POV at USARB.

Advise your client against moving his family or girlfriend to the Fort Riley area. Housing is limited and expensive. Further, trainees do not have liberal pass privileges and many trainees have difficulty returning from pass at 2200 or 2300 hrs. Pass violations are the quickest way for a trainee to get in trouble at USARB.

10. WILL YOU FILE MY CLIENT'S COURT-MARTIAL APPEAL?

Appeals in cases of mandatory review under Article 66, UCMJ, should be filed by the Defense Appellate Division, USALSA, Falls Church, Virginia 22041. While we do not file appeals from this office, we may request relief from TJAG, under the provisions of Article 69, UCMJ. Fully one-third of all trainees are at the USARB as a result of summary courts-martial. Our defense resources are best utilized by only assisting those trainees with summary court-martial convictions in their petition under Article 69 (when we are able to obtain a copy of the record of trial).

In all other cases, we prefer that the original defense counsel prepare the Article 69 request, since that counsel was present at the trial and has a far more thorough knowledge of the case than we could have merely by reading the record of trial. If the request for relief is forwarded to our office, we will have the trainee placed under oath and then forward the petition to TJAG.

11. WHAT HAPPENS TO TRAINEES WHO GO AWOL FROM USARB?

Contrary to popular belief, trainees who go AWOL from USARB and are dropped from the rolls are not transferred to a Personnel Control Facility (PCF) upon their return to military control. Simply put: all USARB AWOL's return to USARB. Upon their return, such trainees may face either administrative discharge or court-martial.

Conclusion

This article has not attempted to deal with the various legal issues concerning the status of USARB. Instead, we hoped to provide some insight to defense counsel so that your client is more aware upon his arrival at USARB. Motivation is the key to success at USARB. To the extent that your client knows what is in store upon his arrival, he will be that much further ahead.

ON THE RECORD

or

Quotable Quotes From Actual Records of Trial Received in DAD

(Defense counsel's examination of the roommate of the CID confidential informant, Specialist X).

Q: During that time, did you ever have occasion to observe Specialist X's off duty activities?

A: Yes.

Q: Could you describe those for the court please?

A: Some of his off duty activities were, he would ah -- he was a good pickpocket for one.

* * * * *

DC: The accused, Private ___ pleads: to all four specifications and the charge: Guilty.

ACC: Not guilty.

MJ: Perhaps we can take a recess.

* * * * *

WIT: The next thing I know [the accused] screamed something and then he hit Radar and Radar fell down and [the accused] continued to hit on him and I got up and asked them to stop and quiet the noise down, so that I could finish my report.

* * * * *

DC: Objection, that's a compound question.

MJ: Overruled. Overruled.

* * * * *

(Defense counsel questions the accused).

Q: As a result of your observation of Private _____ on these occasions, did you form or do you have an opinion as to his character for violence?

A: Yes, sir.

Q: And, what is that opinion?

A: He's a thug.

Q: Okay. Now, could you please tell the panel why you feel he's a thug?

A: Because after we had gotten into it at 2d AD, he come down to my unit and shot me.

* * * * *

(Witness testified that a set of four automobile tires cost \$164.00).

DC: Do you remember in that statement made to the CID that the value of the tire was approximately \$32.00?

WIT: Yes, sir. He took the money that I payed [sic] for the tires and divided it by four.

MJ: The wonders of modern math.

* * * * *

(Trial counsel questions government witness).

TC: When you're firing a weapon, the times when you fire a weapon within what you would say is the maximum . . . what you might expect it to leave detectable residues

MJ: Counsel, do you want to start that question over? You lost me.

TC: I sure do, your honor.

