

# THE ADVOCATE



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## THE THEORY OF THE CASE INSTRUCTION

CAPTAIN VINCENT S. GREEN

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## ILLEGAL PRETRIAL CONFINEMENT- RELIEF FOR THE MILITARY ACCUSED

CAPTAIN JOHN E. BAKER

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United States Army Defense Appellate Division

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## TABLE OF CONTENTS

	<u>Page</u>
Opening Statements	148
<u>The Theory of the Case Instruction</u>	149
CPT Vincent S. Green & CPT Mary C. Hutton	
<u>Illegal Pretrial Confinement-- Relief for the Military</u>	157
<u>Accused</u>	
CPT John E. Baker	
***	
Side Bar	176
Case Notes	180
USCMA Watch	187
Last Minute Developments	190
***	
On the Record	194

## OPENING STATEMENTS

In their lead article, The Theory of the Case Instruction, Captains Green and Hutton discuss a powerful but often unused weapon of the defense bar. A properly drafted theory of the case instruction provides the court members with a judicially approved basis for acquittal. It is a tool with which every defense attorney should be familiar. In our second article, Captain John Baker discusses the manner in which defense counsel can help clients who have been illegally confined before trial. Too often, this problem is overlooked by counsel. This important article will assist the defense in obtaining relief at trial and in perserving this issue for appeal.

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The Advocate is pleased to publish articles submitted by its reader. We encourage your contributions and urge you to share your expertise with your colleagues in the military defense bar.

### Preview

The next issue of The Advocate will be our special issue, "Project: The Administrative Consequences of Court-Martial (Part II)". The Project will continue the desk book begun in Volume 14, Number 4 on the consequences of court-martial. It will include new chapters on the Jespen Amendments, Veteran's Benefits, and the civil disabilities incident to court-martial and will update previously published chapters to reflect changes in the law.

### Erratum

Footnote 19 on page 86 of Volume 15, Number 2 of The Advocate which reads:

14 M.J. 104 (CMA 1982) (summary disposition)

should read:

4 M.J. 298 (CMA 1978) (summary disposition).

## THE THEORY OF THE CASE INSTRUCTION

by Captain Vincent S. Green\* & Captain Mary C. Hutton\*\*

### I. Introduction

A "theory of the case" instruction is a cogent statement of the defense theory of innocence which requires the factfinders to find the accused not guilty because that theory, supported by the evidence, creates a reasonable doubt. As military defense lawyers, we spend hours developing and then arguing to a court how the facts of our client's case are consistent with a theory of innocence. Unfortunately, we do not capitalize on this effort by requesting an instruction<sup>1</sup> which equates our theory of the case with a basis for reasonable doubt.<sup>2</sup> We request the pattern instructions in alibi, self defense or entrapment cases. In other cases, however, we fail to utilize this powerful weapon by requesting the military judge to instruct the court that it must acquit the accused if his theory of the case causes them to have a reasonable doubt. This article will set out the applicable military and federal case law justifying an instruction on the accused's theory of the case.

### II. Qualifying For The Instruction

Before an accused can qualify for a "theory of the case" instruction, he must raise the issue by introducing evidence which, if believed, would

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1. Fed. R. Crim. P. 30.

2. Address by James Doherty, Director, Cook County Public Defender Office, National College for Criminal Defense Trial Practice Institute (Jul. 18, 1982). See also Fletcher, Instructions-An Underutilized Opportunity for Advocacy, 10 The Advocate 7 (1978).

establish a defense.<sup>3</sup> A mere denial of guilt, without more, does not entitle the accused to a theory of the case instruction.<sup>4</sup> His testimony alone<sup>5</sup> or introduction of evidence solely through cross-examination, however, is sufficient. The strength of the evidence is irrelevant. Although inconsistent, of doubtful credibility,<sup>6</sup> or contradicted by other

3. United States v. Vole, 435 F.2d 774, 777-78 (7th Cir. 1970); United States v. Holly, 18 USCMA 413, 416, 40 CMR 125, 128 (1969); United States v. Shufford, 7 M.J. 716, 719 (ACMR 1979); United States v. Martin, 7 M.J. 613, 615 (NCFMR 1979).

4. United States v. Vole, 435 F.2d 774, 776 (7th Cir. 1970); Laughlin v. United States, 474 F.2d 444, 455 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973), rehearing denied, 414 U.S. 882 (1973); Baker v. United States, 310 F.2d 924, 930 (9th Cir. 1962), cert. denied, 372 U.S. 954 (1963). In Baker, the Court commented:

Appellant had no theory of the case other than a denial of the charge, putting the Government on its proof. That theory was adequately presented when the court gave the usual instructions concerning the presumption of innocence and the necessity of the Government proving each element of the crime beyond a reasonable doubt.

310 F.2d at 930.

5. Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951); United States v. Ferguson, 15 M.J. 12, 17 (CMA 1983); United States v. Staten, 6 M.J. 275, 277 (CMA 1979); United States v. Rodriguez, 8 M.J. 648, 650 (AFCMR 1979).

6. Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951). Accord, United States v. Vole, 435 F.2d 774, 778 (7th Cir. 1970); United States v. Davis, 14 M.J. 628, 629 (AFCMR 1982); United States v. Head, 6 M.J. 840, 843 (NCFMR 1979) (accused, convicted of robbery, claimed knife and victim's wallet inexplicably "appeared" in his hand. The Court noted: "However incredible this version of the incident is, there is evidence to support it, and appellant was entitled to appropriate instructions. The credibility of the evidence was for the members to decide."). Contra, United States v. Franklin, 4 M.J. 635 (AFCMR 1977), pet. granted on other grounds, 5 M.J. 83 (CMA 1978), proceedings abated, 10 M.J. 18 (CMA 1980) (accused convicted of AWOL; claimed was drugged and kidnapped. Statement was so inherently improbable and uncertain so as not to require an instruction on physical inability to return to military control.).

evidence,<sup>7</sup> the instruction must be given. The rationale underlying this rule is that the factfinders must be given an opportunity to evaluate all available defenses though they may be "fragile" and may be ultimately rejected.<sup>8</sup>

The military judge's personal belief in the accused's version of the facts is not a prerequisite to the requirement for an instruction.<sup>9</sup> If the accused adduces evidence which would amount to a defense, the military judge may not refuse to instruct on those facts because the refusal would amount to a determination by an authority other than the factfinders that the defense is not worthy of belief.<sup>10</sup> Vague references by the

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7. United States v. Grimes, 413 F.2d 1376, 1377-78 (7th Cir. 1969); United States v. Staten, 6 M.J. 275, 277 (CMA 1979).

8. In Strauss v. United States, 376 F.2d 416 (5th Cir. 1967), defendant's complex financial maneuvers lead to prosecution for tax evasion. He claimed certain funds were loans, not income. Though skeptical of his claim, the Court ruled: "The jury did not have to believe the defenses, but it should have been given the opportunity. This is true even if the defense is fragile. A defendant cannot be short changed nor his jury trial truncated by a failure to charge." Id. at 419. See also United States v. Holly, 18 USCMA 413, 416, 40 CMR 125, 128 (1969); United States v. Shufford, 7 M.J. 716, 719 (ACMR 1979); United States v. Martin, 7 M.J. 613, 615 (NCMR 1979).

9. Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967).

10. Id. The Court commented:

If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

Id. See also United States v. Mason, 14 M.J. 92, 95 (CMA 1982); United States v. Moore, 16 USCMA 375, 378, 36 CMR 531, 534 (1966); United States v. Burns, 9 M.J. 706, 708 (NCMR 1980) (error for military judge to rule that prosecutrix' verbal protests were sufficient to show lack of consent to sexual intercourse; this was either a misstatement of law or a factual determination which should have been decided by jury).

trial judge to matters which might relieve the accused of responsibility for his acts are insufficient for this purpose.<sup>11</sup>

### III. Failure To Instruct As Error

It is reversible error for the military judge to refuse a request to instruct on the accused's theory of the case if there is evidence to support it and if the theory has not been addressed adequately in other instructions.<sup>12</sup> Any doubt whether the instruction should be given must be resolved in favor of the accused.<sup>13</sup> Although failure to instruct on the accused's theory of the case may result in reversible error, not every failure to instruct is cause for reversal.

The first hurdle for an accused who requests a theory of the case instruction is that there must be some evidence to support the theory.<sup>14</sup> Secondly, the accused's statement of the law governing the facts must be correct.<sup>15</sup> Further, the judge's instruction need not be in the form

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11. United States v. Grimes, 413 F.2d 1376 (7th Cir. 1969). That Court ruled that the trial judge's casual references to "good faith" in an instruction on willfulness would not alert the jury that if it believed defendant's version of the incident, he was entitled to use force to defend another and, therefore, must be acquitted.

12. Bird v. United States, 180 U.S. 356, 361-62 (1901); United States v. Swallow, 511 F.2d 514, 523 (10th Cir. 1975); United States v. Leach, 427 F.2d 1107, 1112-13 (1st Cir. 1970); Speers v. United States, 387 F.2d 698, 702 (10th Cir. 1967), cert. denied, 391 U.S. 956 (1968).

13. United States v. Steinruck, 11 M.J. 322, 324 (CMA 1981); United States v. Staten, 6 M.J. 275 (CMA 1979); United States v. Jacobs, 14 M.J. 999, 1002 (ACMR 1982); United States v. Davis, 14 M.J. 628 (AFCMR 1982).

14. United States v. Swallow, 511 F.2d 514 (10th Cir. 1975); United States v. Grimes, 413 F.2d 1376 (7th Cir. 1969); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); United States v. Mason, 14 M.J. 92 (CMA 1982); United States v. Staten, 6 M.J. 275 (CMA 1979); United States v. Verdi, 5 M.J. 330 (CMA 1978).

15. In United States v. Leach, 427 F.2d 1107 (5th Cir. 1970), defendant was charged with three counts of providing false statements in an application for a Federal Housing Administration (FHA) loan. He requested an instruction stating that he must be found not guilty if the jury determined there were misrepresentations on the application, but that the

(Continued)

requested by the defense counsel<sup>16</sup> nor closely approximate his closing argument.<sup>17</sup> The accused is not entitled to have particular facts singled-out or given undue emphasis.<sup>18</sup> Every evidentiary factor raised by the defense does not have to be the subject of an instruction.<sup>19</sup> The judge

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15. Continued.

defendant had left items blank and it was the responsibility of the bank official to complete them. The Court ruled this was an incomplete and therefore incorrect statement of the law. Id. at 1113. Accord, United States v. Rodriguez, 8 M.J. 648 (AFCMR 1979). In Rodriguez, the accused was convicted of an unlawful killing by culpable negligence in the shooting of his wife. The accused testified he held the pistol, raised it in the air, checked to see if there was a clip in it, lowered it near his wife's head and somehow pulled the trigger. Defendant requested an accident instruction which was refused. His claim that these acts constituted an accident was rejected because the facts did not demonstrate he had done a lawful act in a lawful manner, free of negligence. His statement of the law was incorrect, and thus, no instruction was required.

16. United States v. Nance, 502 F.2d 615, 619 (8th Cir. 1974); United States v. Mack, 466 F.2d 333, 338-39 (D.C. Cir.), cert. denied sub nom., Johnson v. United States, 409 U.S. 952 (1972); Sparrow v. United States, 402 F.2d 826, 829 (10th Cir. 1968).

17. United States v. Long, 449 F.2d 288, 299 (8th Cir. 1971).

18. United States v. Mathis, 535 F.2d 1303, 1305 (D.C. Cir. 1976); Laughlin v. United States, 385 F.2d 287, 294 (D.C. Cir. 1967); United States v. Brooks, 15 M.J. 539, 541 (AFCMR 1982); United States v. Speer, 2 M.J. 1244, 1249 (AFCMR 1976).

19. In United States v. Perry, 12 M.J. 920 (NMCMR 1982), the accused was convicted of rape. He claimed the intercourse was consensual. The Navy Court of Military Review held there was no error in the trial judge's failure to give an instruction regarding the mistake of fact defense because the instructions adequately covered issue of consent. Accord, United States v. Lewis, 6 M.J. 581 (ACMR 1978). In Lewis, the accused was charged with rape and claimed that the intercourse was consensual. The defense requested an instruction on the unchaste character of the victim, which the judge inadvertently omitted. The Army Court held that his oversight was harmless error because the instructions as a whole adequately covered the issue of consent, and thus, the victim's prior sexual conduct did not need additional emphasis.

will look at the instructions as a whole to determine if the defense's theory is covered adequately.<sup>20</sup>

Equally important is the defense counsel's role in requesting and formulating instructions. Although the military judge has a duty to instruct fully and fairly on the evidence,<sup>21</sup> counsel has the burden to request additional instructions if an issue has not been addressed to the

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20. United States v. Nance, 502 F.2d 615, 619 (8th Cir. 1974).

21. This general rule has been expressed numerous times by the courts. In United States v. Hill, 417 F.2d 279, 281 (5th Cir. 1969), the Court commented: "[T]he primary purpose of [jury] instructions is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them." Accord, United States v. Thomas, 11 M.J. 315, 317 (CMA 1981); United States v. Verdi, 5 M.J. 330, 333 (CMA 1978). The expression of this rule in United States v. Graves, 1 M.J. 50, 53 (CMA 1975) is enlightening:

The trial judge is more than a mere referee, and as such he is required to assure that the accused receives a fair trial. Advocacy leaves the proceedings at the juncture of instructing the court members. Irrespective of the desires of counsel, the military judge must bear the primary responsibility for insuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. Simply stated, counsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial.

See also United States v. Jefferson, 13 M.J. 779, 781 (ACMR 1982).

satisfaction of the defense.<sup>22</sup> Failure to do so and acquiescence to the given instructions frequently results in waiver of the issue.<sup>23</sup>

#### IV. Sample Instructions

The facts of each case will dictate the form of the instruction submitted by the defense. The applicable law, the evidence adduced by the defense at trial and the defense counsel's creativity will enter into the framing of an instruction which adequately addresses the defense theory of the case.

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22. United States v. Nance, 502 F.2d 615, 619 (8th Cir. 1974). In United States v. Leach, 427 F.2d 1107 (1st Cir. 1970), the Court wrote:

[T]he defendant must tender an instruction that is appropriate in form and substance. [Citation omitted]. Where he fails to accomplish this, the court is not obligated to give an instruction unless a particularly sensitive defense is involved, [citation omitted] or the facts adduced at trial are so complex and confusing that an understanding of the issues would be beyond the grasp of the jury.

Id. at 1112-13. Accord, United States v. Mason, 14 M.J. 92, 95 (CMA 1982); United States v. Salley, 9 M.J. 189 (CMA 1980); United States v. Kauble, 15 M.J. 591, 593 (ACMR 1983); United States v. Sponseller, 10 M.J. 783 (AFCMR 1981).

23. Sparrow v. United States, 402 F.2d 826, 829 (10th Cir. 1968) (defense tendered instruction on good faith which court considered but did not give; defense then requested court give its own good faith instruction, which it did without objection; defense acquiescence waived issue); United States v. Steinruck, 11 M.J. 322 (CMA 1981); United States v. Salley, 9 M.J. 189 (CMA 1980); United States v. Sponseller, 10 M.J. 783 (AFCMR 1981); United States v. Head, 6 M.J. 840, 843 (NCOMR 1979) (where the trial record clearly indicates that the defense, for tactical reasons, did not want an instruction on lesser included offense then there was no error not to give the instruction); United States v. Lewis, 6 M.J. 581, 585 (ACMR 1978) (defense counsel conceded that the instruction given was a "fair compromise" to the one requested; constituted waiver). These rules on waiver apply only to matters which are unrelated to the elements of the offense. See United States v. Mitchell, 15 M.J. 214, 217 (CMA 1983) where the Court ruled there could be no such waiver when the issue was proper instructions on a specific versus general intent crime.

Such an instruction was submitted in United States v. Vole,<sup>24</sup> where the accused claimed he had been "framed". The proffered instruction read as follows:

You are instructed that it is the defendant Vole's theory of this case that Charles Masini conspired with other persons to frame him for a counterfeiting conspiracy. If the facts adduced in support of the defendant Vole's theory, create in your mind a reasonable doubt of his guilt of these charges, then you must find the defendant Vole not guilty of these charges.

Similarly, in United States v. Rowe,<sup>25</sup> the accused offered the following instruction to support his theory of innocent possession of drugs:

If you find that the accused was merely returning items in evidence that he believed belonged to another individual and claimed no right of ownership in those items you must acquit the accused as to those items.

Following these general statements of the defense theory, counsel then listed the supporting evidentiary factors.

As one can see, these concise statements leave no doubt in the minds of the jury that if the defendant's evidence supporting his theory creates a reasonable doubt, then he must be acquitted.

#### V. Conclusion

A theory of the case instruction is an excellent tool to reinforce defense counsel's closing argument on reasonable doubt. By having the military judge instruct that the defendant's theory can form a legal basis for acquittal, defense counsel's argument is legitimized. What may have been viewed by the members as mere rhetoric, will now be a judicially-approved basis for an acquittal.

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24. 435 F.2d 774, 776 (7th Cir. 1970).

25. 11 M.J. 11, 12 (CMA 1981).

ILLEGAL PRETRIAL CONFINEMENT —  
RELIEF FOR THE MILITARY ACCUSED

by Captain John E. Baker\*

Upon the whole, if the offense be notailable or the party cannot find bail, he is to be committed to the county gaol. . . . But this imprisonment . . . is only for safe custody, and not for punishment; therefore in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only. . . .<sup>1</sup>

I. Introduction

The philosophy underlying pretrial confinement for military defendants is remarkably similar to that espoused by Lord Blackstone more than two hundred years ago.<sup>2</sup> To be legal, military pretrial confinement must not only be initiated by proper authority<sup>3</sup> and upon legally sufficient grounds,<sup>4</sup>

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1. 4 W. Blackstone, Commentaries on the Laws of England 300 (9th ed. 1978).

2. One distinction which should not go unmentioned is that in military practice there is no provision for bail. *Courtney v. Williams*, 1 M.J. 267, 271 (CMA 1976).

3. While any commissioned officer may order an enlisted man into confinement only a commander may order a commissioned officer, warrant officer or civilian into confinement. Para. 21, Manual for Courts-Martial, United States, 1969 (Revised edition).

4. The Court of Military Appeals recognizes two valid predicates: (1) assuring the accused's presence for trial and (2) preventing future, foreseeable serious misconduct. *United States v. Heard*, 3 M.J. 14 (CMA 1977). No other considerations are of import. See e.g. *Berta v. United* (Continued)

but also must not punish the accused while he is incarcerated.<sup>5</sup> The scope of this article is limited to the potential for violations of the latter requirement.<sup>6</sup> After examination of military and civilian precedent, the article will focus on potential grounds for relief. Procedural mechanisms for assertion of the illegal pretrial confinement issue shall also be explored. The relief for an accused soldier can be substantial.

## II. The Military Standard

In his treatise on military law, written in 1896, Colonel William Winthrop advanced the view that:

[A] prisoner is to be presumed to be innocent till duly convicted, and till thus convicted, he cannot legally be punished as if he were guilty or probably so. The arrest by confinement of an enlisted man with a view to trial and for the purposes of trial is wholly distinguished from a confinement imposed by sentence. It is a temporary restraint of the person, not a punishment, and should be so strict only as may be necessary properly to secure the accused. Anything further is unauthorized. . . .<sup>7</sup>

This philosophy is presently codified as Article 13 of the Uniform Code of Military Justice:

Subject to the provisions of Article 57, no person, while being held for trial or the results of trial,

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4. Continued.

States, 9 M.J. 390 (CMA 1980) (personal safety of petitioner improperly considered). A neutral and detached individual (usually a military magistrate appointed for this purpose) is required to review the decision to confine. *Berstein v. Pugh*, 420 U.S. 103 (1975); *United States v. Malia*, 6 M.J. 65, 66 (CMA 1978).

5. *United States v. Bayhand*, 6 USCMA 762, 21 CMR 84 (1956).

6. One commentator distinguishes this form of illegal confinement by labeling it "illegal pretrial restraint." D. Schlueter, *Military Criminal Justice: Practice and Procedure* § 5-3(c) (1982).

7. W. Winthrop, *Military Law and Precedents* 124 (2nd ed. 1920 reprint).

shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subject to minor punishment during such period for infractions of discipline.<sup>8</sup>

The first extensive judicial treatment of Article 13 occurred in 1956. In United States v. Bayhand,<sup>9</sup> the United States Court of Military Appeals held that ordering an accused soldier to work under guard, alongside a sentenced prisoner with a pick and shovel in a drainage ditch and several days later to work with another prisoner in a rock quarry carrying heavy rocks, was illegal.<sup>10</sup> The court overturned the conviction for disobedience of these orders.<sup>11</sup> The opinion also specified six questions to assist in future determinations of whether treatment of an accused amounts to punishment:

- (1) Was the accused compelled to work with sentenced prisoners?
- (2) Was he required to observe the same work schedules and duty hours?
- (3) Was the type of work assigned to him normally the same as that performed by persons serving sentences at hard labor?
- (4) Was he dressed so as to be distinguishable from those being punished?
- (5) Was it the policy of the stockade officers to have all prisoners governed by one set of instructions?
- (6) Was there any difference in the treatment accorded him from that given to sentenced prisoners?<sup>12</sup>

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8. 10 U.S.C. § 813 (1976) [hereinafter cited as UCMJ]. For an extensive treatment of the background of Article 13 see United States v. Bayhand, 6 USCMA 762, 21 CMR 84, 87-89 (1956).

9. Id.

10. Id. at 93-94.

11. Id. at 95.

12. Id. at 92.

A civilian might bridle at the suggestion that a pretrial detainee can be required to do any work. But military status continues when a soldier enters pretrial confinement, as does pay.<sup>13</sup> Performance of duties not imposed as punishment can be required, as long as such duties are commensurate with rank.<sup>14</sup>

The only bright-line rule to emerge from Bayhand is that compelling an accused to work with sentenced prisoners constitutes illegal punishment.<sup>15</sup> An argument that an exception should be created for combat conditions was rejected during the Vietnam era.<sup>16</sup> A loophole created by the lower military courts--which permitted the government to establish that the accused had waived his right not to work alongside sentenced prisoners<sup>17</sup> -- was rejected by the Court of Military Appeals in 1982.<sup>18</sup>

The remedy in Bayhand was fact specific. The nature of the work ordered to be performed gave rise to a viable defense of illegal orders; hence the charges were dismissed. In subsequent cases the remedy of blanket dismissal of all charges was rejected.<sup>19</sup> Instead, the practice of bringing the fact and circumstances of the illegal pretrial confinement to the court's attention for appropriate consideration on sentencing was endorsed.<sup>20</sup> More recently, the Court of Military Appeals has determined

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13. Department of Defense Military Pay and Allowances Entitlements Manual, Para. 10316 (1983).

14. R. Everett, Military Justice in the Armed Forces of the United States 120 (1956).

15. The importance of this requirement should not be underemphasized. Separation of detainees from convicted prisoners is recognized as an essential first step in bettering the treatment of detainees. See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 24 (1967).

16. United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969).

17. See, e.g. United States v. Wiseman, 46 CMR 1100 (NCOMR 1973); United States v. Feeley, 47 CMR 581 (NCOMR 1973).

18. United States v. Bruce, 14 M.J. 254 (CMA 1982).

19. See, e.g., United States v. Pringle, 19 USCMA 324, 41 CMR 324 (1970); United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969).

20. Id.

that "the only legal and adequate remedy [is] to adjudge and to affirm an otherwise appropriate sentence, but to judicially order administrative 'credit' thereon for the number of days served illegally in pretrial confinement."<sup>21</sup> This remedy can be applied by the trial judge<sup>22</sup> or by the appellate court during appellate review.<sup>23</sup>

Two goals are served by crediting the period of illegal confinement. First, the accused is compensated for the punishment he has received.<sup>24</sup> Second, since the trial court must still give subjective credit for the time spent in pretrial confinement (in addition to the time ordered credited)<sup>25</sup> a prophylactic goal is apparent. By forcing approval of a less than appropriate sentence the judiciary hopes to influence the convening authority and confinement officials to remedy illegal practices. The alternative remedy of pretrial release, arguably available through extraordinary writ,<sup>26</sup> would serve a similar purpose.

### III. Treatment of the Illegal Pretrial Confinement Issue in the Civilian Sector

While military precedent is grounded on a statutory foundation - presently Article 13 - most civilian cases challenging pretrial confinement have constitutional underpinnings. As these precedents provide some insight into the fundamental principles underlying Article 13, it is helpful to analyze the various constitutional attacks upon pretrial confinement conditions within the civilian system.

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21. United States v. Larner, 1 M.J. 371, 372 (CMA 1976).

22. United States v. Heard, 3 M.J. 14, 27 (CMA 1977).

23. United States v. Larner, 1 M.J. 371 (CMA 1976); United States v. Malia, 6 M.J. 65 (CMA 1978).

24. "The theory behind any crediting of a sentence for illegal pretrial confinement is that the illegitimate nature of that period of incarceration somehow converts it into confinement served pursuant to the sentence eventually served." United States v. Larner, 1 M.J. 371, 373 (CMA 1976).

25. See United States v. Clark, 17 USCMA 26, 37 CMR 290 (1967). See also Paragraph 76a, Manual for Courts-Martial, United States, 1969 (Revised edition).

26. See notes 81-82 infra and accompanying text.

A. Eighth amendment

Serious mistreatment of pretrial prisoners has been alleged to violate the eighth amendment's proscription of cruel and unusual punishment.<sup>27</sup> Generally, though, the eighth amendment is considered more appropriate for challenges of particular sentences and as a standard for the treatment of convicted prisoners.<sup>28</sup>

B. Equal protection

Equal protection challenges of pretrial confinement conditions proceed in two directions. First, rights enjoyed by an accused who is not in pretrial confinement should not be denied to the pretrial detainee absent some compelling state necessity.<sup>29</sup> Second, conditions under which pretrial detainees are confined should be equal to or better than conditions for convicted prisoners.<sup>30</sup> Equal protection analysis by itself may fall short in both approaches, however, since the liberty interests of pretrial detainees have not been recognized as a fundamental right and pretrial detainees have not been recognized as a suspect class.<sup>31</sup>

C. First, Fourth and Sixth amendments

Limitations on visitation rights<sup>32</sup> and scrutiny or censorship of mail<sup>33</sup> may violate association freedoms assured by the first amendment.

27. See, e.g. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 678 (D. Mass 1973), aff'd, 494 F.2d 1196 (1st Cir.), cert. denied, 419 U.S. 977 (1974).

28. The Conditions of Pretrial Confinement, 17 Houston L. Rev. 873, 881-883 (1980).

29. See, e.g. Brenneman v. Madigan, 343 F. Supp. 128, 138-49 (N.D. Cal 1972).

30. See, e.g. Moore v. Janing, 427 F. Supp. 567, 571 (D. Neb. 1976). See also Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L. J. 941, 957 (1970).

31. The Conditions of Pretrial Confinement, supra note 28 at 885.

32. Constitutional Limitations on the Conditions of Pretrial Detention, supra note 30 at 950.

33. The Conditions of pretrial Confinement, supra note 28 at 910-913.

Restrictions on communications with counsel may also violate the sixth amendment.<sup>34</sup> The fourth amendment may be implicated where searches of a prisoner's person or property are more extensive than necessary for legitimate security interests.<sup>35</sup>

*D. Due process*

Due process is the most important ground for challenging pretrial confinement conditions. Even those challenges based on other constitutional considerations rely implicitly on a due process foundation. The approach is straightforward: absent an adversarial determination of guilt an accused must not be punished. Pretrial restrictions of a punitive nature--those which involve retribution and even rehabilitation--are violative of the right to due process.<sup>36</sup>

*E. Remedies for illegal pretrial confinement in civilian courts*

Civilian practice in the area of illegal pretrial confinement differs most from military practice in the approach to remedies for the accused. As in the military, dismissal of the underlying charges has usually been rejected as inappropriate.<sup>37</sup> However, the remedy of additional credit against an adjudged sentence for illegal confinement is seldom ordered. Federal prisoners and prisoners in 46 states are already given automatic

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34. Id.

35. Id. at 913-915.

36. Id. at 886-891. See also Constitutional Limitations on the Conditions of Pretrial Confinement, supra note 30 at 956 (suggests deterrence of future criminal activity is not a valid justification absent the recognition of preventive detention).

37. Gerstein v. Pugh, 420 U.S. 103 (1975).

38. The Federal Bail Reform Act of 1966 included a provision that the "Attorney General shall give [a federal prisoner] credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed." 18 U.S.C. § 3568 (1976). 46 states have similar provisions. Only Arkansas, Colorado, and South Dakota still adhere to the practice of leaving consideration of pretrial confinement to the discretion of the trial judge. Alabama has no provision for credit, mandatory or discretionary.

full credit for every day spent in pretrial confinement.<sup>38</sup> This is in apparent recognition of an argument clearly rejected by the Court of Military Appeals--that any period of incarceration constitutes punishment.<sup>39</sup> Civilian courts are also reluctant to order pretrial release. As one commentator noted: "Courts may be more willing to grant declaratory relief than habeas corpus because the appropriate remedy is not to release the detainee but to cure the infirmities in the detention system."<sup>40</sup>

F. The Supreme Court's decision in Bell v. Wolfish

It was in the context of reviewing declaratory relief imposed by lower federal courts that the Supreme Court first dealt specifically with the rights of pretrial detainees regarding the conditions of their confinement. In Bell v. Wolfish<sup>41</sup> the Court considered conditions at the Federal Metropolitan Convention Center in New York City. Among the challenged conditions imposed on pretrial detainees were double-celling, limitations on receipt of books by mail, proscription on the receipt of packages from family and friends, searches of rooms in the absence of occupants, and visual body cavity searches following contact visits. In an opinion by Justice Rehnquist a majority of the Court found each aspect of the challenged conditions of confinement consistent with due process because each was rationally related to the legitimate purpose of maintaining security in the facility, was not excessive in relation to that purpose, and was not derived from a punitive intent.<sup>42</sup>

The dissenting opinions in Bell v. Wolfish were acrimonious. Justices Stevens and Brennan argued that the majority "had attenuated the detainee's constitutional protection against punishment into nothing more than a prohibition against irrational classifications or barbaric

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39. United States v. Davidson, 14 M.J. 81 (CMA 1982). See J. Baker, Credit for Pretrial Confinement: Is the Military Out of Step? (February 1983) (unpublished manuscript available at The Judge Advocate General's School, Charlottesville, Virginia).

40. Constitutional Limitations on the Conditions of Pretrial Confinement, supra note 29 at 954.

41. 44 U.S. 520 (1979).

42. Justice Powell dissented from that portion of the majority opinion approving body cavity searches. Id. at 563 (Powell, J. concurring in part, dissenting in part).

treatment."<sup>43</sup> Justice Marshall commented that "almost any restriction on detainees, including . . . chains and shackles, can be found to have a rational relation to institutional security or 'effective management.'"<sup>44</sup> Commentators joined in the criticism.<sup>45</sup>

Whatever its shortcomings, Bell v. Wolfish provides an important framework for attacking pretrial confinement and established that the government's burden is to at least articulate legitimate, non-punitive justifications for challenged practices. Derivative cases and subsequent analysis are important resources for the defense.

#### IV. Assertion of Illegal Pretrial Confinement by the Military Accused

##### *A. Grounds for relief*

Whether couched as violations of Article 13 or transgressions of fundamental due process, complaints of illegal pretrial confinement must establish both the predicate of particular conditions and the consequence of unlawful punishment. Military and civilian case law suggest a number of conditions which may meet this standard:

##### 1. Commingling with sentenced prisoners

United States v. Bruce<sup>46</sup> decided on December 6, 1982, appears to establish the per se rule that housing pretrial confinees with sentenced prisoners and requiring them to perform the same work under the same conditions as sentenced prisoners is non-waivable, violative of Article 13, and constitutes illegal pretrial punishment.<sup>47</sup> The Army has chosen to interpret the decision very narrowly and issued the following change to its confinement regulation on January 13, 1983:

A detained prisoner (pretrial) will be segregated from all post-trial prisoners . . . in employment; this segregation may not be waived. . . . Detained

43. Id. at 586 (Stevens, J. dissenting).

44. Id. at 567 (Marshall, J. dissenting).

45. See, e.g. The Conditions of Pretrial Confinement, supra note 27.

46. 14 M.J. 254 (CMA 1982).

47. Id. at 256.

prisoners will also be segregated from all post-trial prisoners in billets to the maximum extent practical.<sup>48</sup>

Billeting pretrial detainees with post-trial prisoners may be grounds for relief notwithstanding the practicalities of the situation. The Court stated in Bayhand and repeated in Bruce that it was not concerned that "it may take some additional man hours of guarding to segregate classes of prisoners."<sup>49</sup>

## 2. Identical work

Bayhand established that, with certain limitations like breaking rocks, a pretrial detainee could be assigned the same details (cutting grass, shoveling snow, etc.) as a prisoner serving a sentence to hard labor<sup>50</sup> as long as there was no commingling. The issue granted in Bruce was whether a pretrial prisoner could be made to perform the same work under the same conditions as sentenced prisoners.<sup>51</sup> Commingling is mentioned only with respect to housing. Thus Bruce arguably stands for the proposition that if a pretrial prisoner is treated no better than a prisoner sentenced to confinement at hard labor, he is being punished.<sup>52</sup> A recent Navy case suggests considerations which may be important in this analysis:

- (1) What similarities, if any, in daily routine, work assignments, clothing attire, and other restraint and control conditions, exist between sentenced persons and those awaiting disciplinary disposition?

48. Army Regulation No. 190-47, Military Police - The United States Army Correctional System (Interim Change 102, 7 January 1983) para. 4-6(d) [hereinafter cited as AR 190-47].

49. United States v. Bruce, 14 M.J. 254, 256 (CMA 1982) quoting United States v. Bayhand, 6 USCMA 762, 773, 21 CMR 84, 95 (1956).

50. 6 USCMA 762, 771, 21 CMR 84, 93 (1956).

51. 14 M.J. 254, 255-256 (CMA 1982).

52. Compare the equal protection argument noted in note 29, supra, with accompanying text.

- (2) If said similarities exist, what relevance to customary and traditional military command and control measures can be established by the government for such measures?
- (3) If such similarities exist, are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing persons awaiting disciplinary disposition?<sup>53</sup>

### 3. Disrespect

While the supervisory authority of an officer or noncommissioned officer may legitimately be withdrawn<sup>54</sup> when he is placed in pretrial confinement, additional stigmatization is unnecessary and improper. In United States v. Snowden<sup>55</sup> an Army lieutenant was confined at the Fort Hood stockade. Along with other facts, the defense established that confinement authorities had directed that he be considered the same as "any other damn prisoner," that he was called by the guards, "Hey, prisoner" or "Luey", and that he was never saluted by anyone in the stockade.<sup>56</sup> The Army Court of Military Review determined that he had been subjected to illegal pretrial punishment and reassessed his sentence.<sup>57</sup> The practice of denying the "privilege" of the military salute apparently continues.<sup>58</sup> Whether that practice by itself unnecessarily stigmatizes is an open issue.

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53. United States v. Southers, 12 M.J. 924 (NMCMR 1982).

54. See AR 190-47, Para. 5-1(a)(3).

55. 43 CMR 569 (ACMR 1970).

56. Id. at 573.

57. Id. at 574.

58. AR 190-47, Para. 4-8.

#### 4. Isolation

While there may be legitimate reasons for the administrative segregation of certain prisoners, e.g. those who are intractable,<sup>59</sup> such segregation must not be imposed as punishment. In United States v. Kirby<sup>60</sup> isolation of a soldier in pretrial confinement for almost three months, to include placing a sign on his cell which read: "Prisoner Kirby is to talk to no one. This includes all guard personnel," was a factor which led to reassessment of sentence.<sup>61</sup> Where administrative segregation is challenged, the government must establish that the initial decision to segregate was reasonable<sup>62</sup> and that the conditions were not unnecessarily harsh.<sup>63</sup>

#### 5. Improper Treatment

Regulatory violations by confinement personnel may support or even establish a case for illegal pretrial confinement. The Army confinement regulation sets out a number of proscribed practices:

- (1) Clipping prisoner's hair excessively close.
- (2) The lock step.
- (3) Requiring silence at meals.
- (4) Breaking rocks.
- (5) Fastening prisoners to a fixed or stationary object.

59. In the Army an intractable prisoner is a soldier who is consistently destructive, displays suicidal tendencies, or consistently and flagrantly refuses to comply with orders and instructions issued by the custodial staff. AR 190-47, Para. 9-9.

60. 41 CMR 701 (ACMR 1970).

61. Id. at 705. All confinement (2 years had been approved) was set aside and forfeitures were substantially reduced.

62. United States v. Hopkins, 2 M.J. 1032 (ACMR 1976), affirmed in part, 4 M.J. 260 (CMA 1978).

63. See United States v. Schultz, 18 USCMA 133, 33 CMR 133 (1969) (rejecting a petition for release and noting that the accused's description of his place of confinement as a "solitary cell" is revealed in papers filed by the command as a regular cell, with adequate natural and artificial light).

- (6) Removing prisoner's clothing or other debasing practices.
- (7) Flogging, branding, tattooing or any other cruel or unusual punishment.
- (8) Domicile in a tent as a means of punishment.
- (9) Any strenuous physical activity or body position designed to place undue stress on the prisoner.<sup>64</sup>

#### 6. Unnecessary restrictions on communications

Restrictions on communications, like censorship of mail and limitations on visitors, must be tied to the sole justification of maintaining control.<sup>65</sup> While Bell v. Wolfish clearly established that incoming mail may be inspected for contraband<sup>66</sup> there is less justification for checks on outgoing mail.<sup>67</sup> Military procedures may be subject to attack in this regard. Although it mandates that restrictions on mail will not be imposed as a disciplinary measure, the Army's confinement regulation does not differentiate between incoming and outgoing mail and permits not only inspection for contraband but reading of mail and limited censorship of contents.<sup>68</sup> Even where confinement personnel are in full compliance with the complicated restrictions on their discretion<sup>69</sup> there is still a potential for challenge.

#### 7. Involuntary rehabilitation

As the Supreme Court has pointed out, "it would hardly be appropriate . . . to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence."<sup>70</sup> A lower

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64. AR 190-47, Para. 9-11.

65. See footnotes 31-35 and accompanying text.

66. 441 U.S. 520, 553, 555 (1979).

67. See, e.g. Johnson v. Lark, 365 F. Supp. 289, 305 (E.D. Mo. 1973).

68. AR 190-47, Para. 5-10.

69. The regulation requires that correspondents must be "approved." In seeming contradiction it strictly limits the reasons for rejection or censorship of mail to or from "unauthorized" persons. Id. at para. 5-10(a).

70. McGinnis v. Royster, 410 U.S. 263, 273 (1973).

federal court noted similarly that the conditions of pretrial confinement must not "derive from punishment rationale, such as retribution, deterrence, or even involuntary rehabilitation. . . ."71 The Army's confinement regulation, on the other hand, permits required participation by pretrial prisoners "in those phases of the correctional orientation or treatment program determined by the facility commander to be necessary to assure their control, custody, employment, training, health, and welfare."72 While many such "phases" may have legitimate purpose, where the principle goal is rehabilitation involuntary participation may raise an illegal pretrial confinement issue.

#### 8. Improper treatment in non-military facilities

The fact that illegal pretrial treatment occurred while a soldier was in a non-military confinement facility<sup>73</sup> does not preclude relief. The issue still is whether there has been punishment before trial. A Navy decision, for example, opined that treatment of an AWOL soldier in a civilian county jail may have constituted cruel and unusual punishment and may have implicated Article 13.<sup>74</sup> The argument is particularly cogent where, as in that case, detention in the civilian facility is at the behest of the military.

#### *B. Mechanics of Relief--Procedures and Remedies*

There are several procedural mechanisms for raising the issue of illegal pretrial confinement. Before a case is referred to trial complaints and requests can be communicated to the convening authority.<sup>75</sup> Such communications may initially be informal and directed to a subordinate staff officer--e.g. the confinement officer, provost marshal, or

71. Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971).

72. AR 190-47, Para. 5-1.

73. At some installations in the United States, e.g. Fort Bragg, military pretrial detainees are routinely incarcerated in civilian facilities pending trial.

74. United States v. Drew, 2 M.J. 1297 (NCMR 1976) (the requested relief, dismissal of all charges, was not granted).

75. See Department of the Army Pamphlet No. 27-18, Desk Book for Special Court-Martial Convening Authorities (January 1974), Chapter 7.

staff judge advocate. If the request is not satisfied, a formal request to the convening authority should follow. Inaction on the request or refusal to correct improper conditions may form the basis for complaint under Article 138.<sup>76</sup>

An unexplored alternative before trial is to seek relief through the military magistrate.<sup>77</sup> His authority appears limited to ordering release where the initiation of pretrial confinement is illegal and reviewing the necessity of continuing confinement on a periodic basis.<sup>78</sup> Requesting extension of his authority to oversight of conditions of pretrial confinement may be asking too much but just the request may produce the desired result or help preserve the issue for subsequent litigation.

Improper conditions of pretrial confinement can also be raised by extraordinary writ to the appropriate Court of Military Review or to the Court of Military Appeals.<sup>79</sup> The procedures for such writs are included in the courts' respective rules. The current philosophy is not to require exhaustion of remedies before seeking extraordinary relief,<sup>80</sup> although counsel should first consider raising the issue with the convening authority or the magistrate.

Finally, the issue can be raised before the military judge at trial. If relief is not achieved at this point the trial defense counsel must at

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76. See, e.g. Dale v. United States, 19 USCMA 254, 41 CMR 254 (1970).

77. Army Regulation No. 27-10, Legal Services - Military Justice (1 September 1982), Chapter 9.

78. Id., Para. 9-5.

79. See, e.g. Berta v. United States, 9 M.J. 390 (CMA 1980). The authority of military courts to issue writs is the All Writs Act--28 U.S.C. § 1651(a) (1970).

80. Rule 21, Rules of Practice and Procedure--Courts of Military Review, 10 M.J. LXXIX (1980); Rules 27 & 28, Rules of Practice and Procedure for United States Court of Military Appeals (1 July 1983); See also Pepler, Extraordinary Writs in Military Practice, 15 The Advocate 81 (1983).

least insure that the record is complete and the issue preserved for appellate review.<sup>81</sup>

The procedure selected and the timing for challenge may depend on the remedy sought. The following remedies--or some combination thereof--are possible where a case for illegal pretrial confinement is established:

### 1. Correction of improper conditions

The ostensible goal of the defense in pretrial confinement practice is the elimination of punitive conditions. Correction of improper conditions or regulatory violations can be undertaken voluntarily by confinement officials or directed by the convening authority or higher commander.

### 2. Pretrial release

Where confinement officials can't or won't correct improper conditions pretrial release may be possible. This may result from action by a convening authority who is frustrated in his efforts to remedy confinement conditions or from judicial intervention. Given the potential for relief at trial this option will probably be reluctantly invoked in extraordinary situations only.<sup>82</sup>

### 3. Withdrawal of particular charges

Where particular charges are interwoven with the illegal confinement --as in Bayhand--the relief sought may include withdrawal of those charges before trial. While this is the prerogative of the convening authority he may be willing to take such action, particularly if the Article 32 Investigating Officer can be persuaded to make such a recommendation.<sup>83</sup>

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81. The appellate courts have generally refused to consider evidence of illegal pretrial confinement not raised at trial. See, e.g. United States v. Hopkins, 2 M.J. 1032, 1035 n.4 (ACMR 1976); United States v. Moore, 1 M.J. 856 (AFCMR 1976). But see United States v. Ross, 19 USCMA 51, 41 CMR 51 (1969) (the illegality may assume such serious proportions as to justify post-trial consideration).

82. See note 40 and accompanying text.

83. See, e.g. United States v. Bayhand, 6 USCMA 762, 773, 21 CMR 84, 94 (1956) (in Bayhand the Article 32 officer's recommendation was rejected).

#### 4. Dismissal of all charges

While the military courts have consistently refused to order dismissal of all charges for reason of illegal pretrial confinement<sup>84</sup> it is conceivable that particularly outrageous government conduct could merit such relief. Deliberate imposition of pretrial confinement for punishment purposes, for example, was considered by one appellate court to constitute a "flagrant violation, requiring significant corrective action."<sup>85</sup> In another case the Court of Military Appeals approved a drastic reduction in sentence and noted that merely returning the record to the Board of Review for reassessment:

would rightfully suggest that this court is prepared to wink at such grossly illegal treatment of men in pretrial confinement. The disastrous effects of such a situation upon the system of military justice itself are so manifest as to require us to eliminate that possibility.<sup>86</sup>

In a subsequent Army case, defense appellate counsel argued that they withheld remedy of dismissal even more appropriate since the services were not on "notice" of the seriousness of violations of acceptable pretrial confinement conditions.<sup>87</sup>

#### 5. Credit against sentence

Day-for-day credit against the sentence to confinement was endorsed by the Court of Military Appeals in 1976.<sup>88</sup> In United States v. Suzuki,<sup>89</sup> a 1983 decision, the Court permitted three-for-one credit for an airman improperly confined in administrative and disciplinary segregation at an Army facility in Korea. The court noted that:

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84. See note 19 supra and accompanying text.

85. United States v. Alonzo, 1 M.J. 1044 (NCOMR 1976).

86. United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969).

87. United States v. Jackson, 41 CMR 677 (ACMR 1970).

88. United States v. Lerner, 1 M.J. 371, 372 (CMA 1976).

89. 14 M.J. 491 (CMA 1983).

The remedial rule allowing for administrative credit for illegal pretrial confinement utilized in United States v. Lerner was not framed in concrete. Instead, the concern in that case was that the remedy for illegal pretrial confinement be effective. Here, where pretrial confinement is illegal for several reasons and the military judge concludes the circumstances require a more appropriate remedy, a one-for-one day credit limit is not mandated.<sup>90</sup>

The court also left intact its rule that administrative credit must be given even where a pretrial agreement already results in a significant reduction in sentence.<sup>91</sup>

While unlikely, it is not impossible that a court may consider confinement inappropriate in sentencing a soldier who has spent time in pretrial confinement. Credit in such circumstances has not yet been resolved. The Army Court of Review, acting in a case where post-trial confinement was completed before review, took the unusual action of disapproving an adjudged Bad Conduct Discharge.<sup>92</sup> Meaningful relief is important if the punishment imposed on the accused is to be recognized and the authorities influenced to remedy improper practices.

#### 6. Appropriate instructions

Whether or not administrative credit is directed for illegal pretrial confinement, the length and condition of pretrial confinement must still be taken into account on sentencing.<sup>93</sup> It is appropriate to relitigate the conditions of pretrial confinement before the members during the sentencing phase of the trial<sup>94</sup> and to request appropriate instructions. Where the military judge has ruled the confinement was illegal, he should be requested to advise the members of the nature of the illegal pretrial

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90. Id. at 493.

91. Id. at 494 (Cook, J. dissenting).

92. United States v. Franklin, 41 CMR 431 (ACMR 1969).

93. United States v. Davidson, 14 M.J. 81 (CMA 1982).

94. Id.

confinement, the seriousness of the Government's violation of the individual's fundamental rights, and the necessity that they give meaningful relief in their sentence for the Government's violation.<sup>95</sup> Such an instruction will insure that appropriate credit will be given even if no confinement is considered appropriate.

#### V. Conclusion

While his altruistic goal may be to take every case to trial and win on the merits, at some point in most cases the military defense counsel's goal becomes damage control. Raising illegal pretrial confinement may be an important consideration in this regard. While it would take singularly egregious circumstances to merit dismissal on all charges, those intertwined with the illegal confinement might fall. Appropriate sentence credit could significantly reduce the period of confinement adjudged.

The military defense counsel truly represents his clients even while they are in pretrial confinement.<sup>96</sup> Protecting them from abuse at the hands of the government both before, as well as at trial, is one of his most important duties.

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95. United States v. Kimball, 50 CMR 337 (ACMR 1975).

96. See Department of the Army Pamphlet No. 27-10, Military Justice Handbook for the Trial Counsel and the Defense Counsel (October 1982), Chapter 2, Para. A97).

## SIDE BAR

### ARMED FORCES INSTITUTE OF PATHOLOGY

Private S is charged with murder and relates the following story to his defense counsel: "I was in a garage with Specialist V in the early morning. We were talking and doodling on a scratch pad on a desk between us. Two .45 caliber semi-automatic pistols were also on the desk. Specialist V says, 'How would you like to play Russian Roulette?' I declined and Specialist V says, 'What would you do if I shot myself?' I continued to doodle at the time, did not look up, and said, 'You wouldn't do anything like that.' I heard the gun fire and saw Specialist V pitch forward, strike the desk, and fall to the floor. I ran out of the garage to get help."

The Government's case against Private S consists of scientific evidence that shows the significant presence of firearms residue (antimony and bismuth) on the hands of Private S but none on the hands of Specialist V. This evidence strongly implies that the accused fired the death weapon. A military pathologist conducts an autopsy and reports that the gunshot wound is consistent with either a suicide or a homicide. The trial defense counsel is in a quandry as to where he can obtain, without monetary expense to his client, an unbiased second opinion on the results of the autopsy and forensic evidence examination to gain support for his client's version of the incident. What should he do?

A valuable resource of which many trial defense counsel do not take advantage is the Armed Forces Institute of Pathology (AFIP). The AFIP reviews all autopsy materials forwarded by military pathologists involving sudden and unexpected natural deaths, violent deaths (e.g., homicides, suicides, and accidents), and mysterious and unexplained deaths. Para. 6-1a 2 (b), Army Reg. 40-31, The Armed Forces Institute of Pathology (15 Sep. 1980); See Para. III A, Department of Defense Directive Number 5154.24, Armed Forces Institute of Pathology (14 Jan. 1977). Although forensic autopsies must be forwarded to AFIP as soon as the pathologist completes his analysis, many cases are not timely received by AFIP to assist defense counsel in their trial preparation.

In the case involving Private S, unfortunately, the trial defense counsel did not avail himself of an AFIP review. The military pathologist who performed the autopsy testified that the gunshot wound was consistent with a suicide, but also consistent with a homicide. Based upon the pathologist's testimony and the other evidence at trial, Private S was convicted of murder and sentenced to 50 years of confinement at hard labor. This result could have been avoided if the trial defense counsel had obtained a review of the autopsy reports by the AFIP.

Private S unnecessarily served five months in prison before AFIP received the autopsy to review. AFIP was immediately able to provide information to assist the defense counsel in supporting his theory that the victim committed suicide. Preliminary firearms analysis had indicated significant levels of firearms residue on the hands of the accused and negative on the hands of the victim. AFIP determined, however, that the firearms residue testing was not dispositive because Private S, a machine gun crew chief, had fired a machine gun within 48 hours and had disassembled a machine gun within 24 hours of the incident. After analysis and consultation with firearms experts, AFIP concluded that it is common for firearms residue to be undetectable on the hands of an individual who fires a semi-automatic weapon, such as a .45 pistol.

Notwithstanding the firearms residue analysis, AFIP presented ample evidence to show that the gunshot wound was self-inflicted. The wound of the head was at contact range. Homicidal contact gunshot wounds are extremely rare. Furthermore, the course of the bullet was angled upward and thus typical of a self-inflicted gunshot wound. In order for Private S to have fired the gun at the victim (who was seated at the time of the shot), Private S would have had to hold the gun in contact with the victim's right temple while he squatted on the right side of the victim's chair. That would be the only way the bullet's course would be upward in the case of a seated victim.

Trial defense counsel should take the following steps to obtain a comprehensive review by the AFIP of forensic evidence:

1. Alert the military pathologist conducting the autopsy that the case is likely to be tried by court-martial and inform him of potential dates for the Article 32(b) investigation and if, known, for trial so that he can arrange for a timely review by AFIP.

2. Request the General Court-Martial Convening Authority to delay referral of a case involving manslaughter or murder until AFIP has reviewed the autopsy report. The chairman of the AFIP Department of Forensic Sciences states that his department can review a case and provide an opinion within 24 to 48 hours of receipt.

3. Personally consult with members of the AFIP Department of Forensic Sciences concerning potential defense theories and ask them to assist in reviewing evidence and interpreting results that may support defense theories. Trial defense counsel should take care to avoid revealing facts disclosed by the client since communications with AFIP are not protected by "work-product" rules.

4. Contact the Director, Department of Forensic Sciences, Armed Forces Institute of Pathology, Washington, D.C., 20306, or phone Commercial (202) 576-3282, Autovon 291-3287 to report any problems in obtaining a timely review of an autopsy report by AFIP.

Review by the AFIP is a significant avenue of investigation by trial defense counsel in homicide cases where a defense may be established by scientific evidence. Obtaining an AFIP review of forensic evidence helps the military defense counsel better represent his client because he is not then limited to the findings of one local expert.

#### TRUE WEIGHTS OF MARIJUANA

Change 7 to the Manual for Courts-Martial substantially changed the maximum punishment for the possession or use of less than 30 grams of marijuana. Trial defense counsel should be alert to obtain an accurate weighing of only the substance considered as contraband. The Controlled Substances Act, 21 U.S.C. §802(15) (1970), defines "marihuana" as

all parts of the plant *Cannabis Sativa* L.; whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

This section further states that the "mature stalks of such plant" are not included. Arguably, the leaf stems of such plants should not be included since the stems may be considered as part of the stalk. The definition of marijuana was intended to include those parts of marijuana which contain the toxic agent "tetrahydrocannabinol", popularly known as

THC, and exclude those parts of the plant which do not. See United States v. Walton 514 F.2d 201, 203 (D.C. Cir. 1975).

When USACID crime laboratories receive for analysis items that contain marijuana seeds, leaves, stems and pieces of the stalk, the laboratories may report only the weight of the entire package and merely estimate the percentage of the prohibited substance contained therein. Such a procedure does not accurately reflect the true weight of the contraband.

Trial defense counsel should insist that an accurate weight of those parts that are actually contraband be measured and those plant parts which do not contain THC be excluded. Laboratory officials should be called upon to testify at trial in appropriate cases where the weighing procedure or analysis is suspect. This pre-trial preparation may mean the difference between an accused facing the maximum penalty of five years of confinement at hard labor as opposed to only two years if he possessed or used less than 30 grams of marijuana.

#### Excusal of a Court Member After Assembly

In the November-December 1982 issue of The Advocate, reference was made to a case which was before the Army Court of Military Review wherein the trial defense counsel alertly objected to the excusal of a court-member by the convening authority after the court had been assembled. The defense counsel's attempt at trial to develop a record as to the grounds for the court-member's excusal was blocked by the military judge. In United States v. Garcia, 15 M.J. 84 (ACMR 1983), the Army Court of Military Review determined that this was error and set aside the findings and the sentence.

## CASE NOTES

*Synopses of Selected Military, Federal, and State Court Decisions*

### COURT OF MILITARY REVIEW DECISIONS

#### SEARCH AND SEIZURE: Terry Stops

United States v. Garrett, NMCM 82 1962, 17 November 1982.

(ADC: Lt Lippman)

Garrett and three other Marines were engaged in conversation at a location frequented by drug traffickers. An MP patrol observed this and approached the group, ordering all four to "freeze." Garrett was then observed slipping a corn cob pipe into his pocket. The MP's then ordered him to hand over the pipe which was found to contain marijuana. The court held that the order to freeze was a valid stop under Terry v. Ohio, 392 U.S. 1 (1968). The MP's, however, had no reason to suspect or fear that any of the four Marines had any weapon or was a threat to their safety. The order to produce the pipe was therefore a search which extended beyond the narrow parameters established in Terry. This search was unsupported by probable cause and all fruits of the search were held to have been unlawfully obtained.

#### WITNESSES: Scope of Cross-Examination

United States v. Hayes, NMCM 82 0981, 18 January 1983

(ADC: MAJ Poirier)

Hayes was convicted of larceny based primarily on the testimony of Mrs. H. He attempted to demonstrate her bias by cross-examination concerning an adulterous relationship. The defense claimed it could establish that: H's husband had been unaware of her relationship with another man until the appellant had informed him of it; that as a result the husband had physically abused H; and that H was aware that Hayes possessed pictures of her in a compromising position with her paramour. This was relevant to her bias and motive in accusing Hayes of larceny. The military judge curtailed cross-examination on this subject and denied a motion to strike her testimony. This was held to violate Mil. R. Evid. 608(c) and required reversal.

#### COMPULSORY PROCESS: Motion for Continuance

United States v. Cover, NMCM 82 - 2744, 25 February 1983

(ADC: LT Shebest)

Cover was convicted of rape in a credibility contest between himself and the complainant. Searles, who was capable of providing testimony

supporting Cover's position, was absent without leave at the time of trial. The government had made no effort to locate him, although it had not encouraged his absence. The defense was compelled to settle for a stipulation of Searles' expected testimony. Error was found in the military judge's failure to direct the government to produce Searles if it could find him and in the judge's failure to allow a continuance until this could be accomplished. The stipulation was held to be an inadequate substitute and the conviction reversed.

#### FEDERAL COURT DECISIONS

WITNESSES: Scope of Cross-Examination  
United States v. Lindstrom, 698 F.2d 1154  
(11th Cir. 1983)

Lindstrom was convicted of mail fraud based primarily on the testimony of a witness who had a history of psychiatric problems. At trial he sought to cross-examine this witness concerning her past periods of hospitalization for these problems and was partially successful. It was determined to be an abuse of discretion, however, to limit this cross-examination to periods not remote from the time of trial when the nature of her mental illness was such that it might manifest itself in manipulative and destructive behavior or vendettas. It was also reversible error to deny the defense access to the witness' medical treatment files in such a situation. The court held that her privacy interest in these materials had to yield to the defense right to cross-examine her and that adequate preparation for cross-examination required access to the files.

WITNESSES: Scope of Cross-Examination  
United States v. Reed, 700 F.2d 638  
(11th Cir. 1983)

Reed was on trial for embezzlement and obstruction of the mail; he testified in his own defense. On cross-examination, the prosecutor asked if he had ever been in possession of marijuana and Reed answered, falsely, that he had not. The government later introduced extrinsic evidence of Reed's marijuana possession. The court held that the government's initial cross-examination was improper under Fed. R. Evid. 608 and 611(b) inasmuch as possession of a small amount of marijuana is irrelevant to truthfulness. Since Reed's false statement came to be only because of the prosecutor's improper question, extrinsic evidence was also not admissible to rebut it.

SEARCH AND SEIZURE: Inevitable Discovery  
Williams v. Nix, 700 F.2d 1164  
(8th Cir. 1983)

The familiar facts of Brewer v. Williams, 430 U.S. 387 (1977), came to the court again after the Iowa Supreme Court affirmed the results of Williams' second trial. The second conviction, a result of the admission of some of the same evidence discussed in the U.S. Supreme Court case, was affirmed by the state courts on an inevitable discovery theory. The Eighth Circuit assumes arguendo that there is such a rule of law, but holds that it is applicable only when the police have demonstrated that they did not act in bad faith in violating the defendant's rights. In this case, the state failed to show that the famous "Christian burial" speech was a good faith act and Williams was awarded habeas corpus relief.

SEARCH AND SEIZURE: Terry Stops  
United States v. Gooding, 695 F.2d 78  
(4th Cir. 1982)

Drug Enforcement Administration agents approached Gooding as he left an airport. They had observed him for some time after he had deplaned there. The district court had concluded that Gooding had been detained by the agents before any contraband was discovered, but that this seizure was based on a "reasonably articulable suspicion" under Terry v. Ohio, 392 U.S. 1 (1967). The appellate court agreed that a seizure had occurred and concluded that the agents observations that Gooding: 1) had arrived from New York, a drug source city; 2) had been dressed casually on a 3:00 p.m. flight; 3) had made a telephone call immediately after deplaning and made two subsequent calls; 4) scanned the concourse after deplaning; 5) played "cat-and-mouse" with agents; and 6) appeared "distracted" and "nervous", were insufficient to provide an articulable suspicion. The holding of the trial court was reversed.

SEARCH AND SEIZURE: Automobile Searches  
United States v. Farinacci-Garcia, 551 F. Supp. 465  
(D.C. P. R. 1982)

Farinacci-Garcia, although not suspected of any crime, was properly arrested as a material witness before a grand jury. He was taken into custody and an agent entered his car to move it so it would not block traffic. While in the car, the agent noticed a gun protruding from a zippered bag and seized it. After parking the car, he also rummaged through the bag and seized a number of documents. The court held that the gun was properly seized because it was in plain view. The other contents of the bag which had not been visible without opening it were, however, inadmissible. The search of the bag was also not lawful as incident to

the arrest, since the car and driver had been separated by the time it occurred. Since the agents had no reason to suspect the remaining contents of the zippered bag and no cause to search the entire vehicle, the search could not be justified under the automobile exception. The court relied upon United States v. Chadwick, 433 U.S. 1 (1977), and United States v. Sanders, 442 U.S. 753 (1979), in suppressing the seized documents.

#### STATE COURT DECISIONS

##### DUE PROCESS: Voice Identification

Vouras v. State, 452 A.2d 1165 (Del. 1982)

The procedures used in allowing a witness to identify a suspect by voice are subject to the same due process considerations applicable to visual identification under Neil v. Biggers, 409 U.S. 188 (1972). Police suspected Vouras as an unidentified voice on a videotape of the members of a gambling operation. The unidentified voice was referred to by others on the tape as "Cuckoo." The police became aware that another officer, Pennell, knew Vouras as a member of his national guard unit, had identified his voice in another gambling investigation some years earlier, and knew Vouras' nickname to be "Cuckoo." Pennell was asked to listen to the tape and verify whether the voice belonged to Vouras. Since the police had no other ready means to identify the voice, the court held that such a procedure was reasonable. It was not unnecessarily suggestive because Pennell had ample opportunity to observe and listen to Vouras prior to hearing the tape, was familiar with him, and was very attentive to the tape. The possibility of misidentification was held to be minimal and the identification was therefore admitted.

##### DUE PROCESS: Preservation of Evidence

Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alaska App. 1982)

Serrano was convicted for drunk driving based on evidence obtained as a result of a breathalyzer test given at the time of his arrest. No breath sample was preserved at the time of the test, so Serrano was unable to conduct his own test. This severely limited the possibility of impeaching the specific test performed in his case. The court held that before the results of a breathalyzer can be admitted over objection, due process requires that a breath sample be preserved.

DUE PROCESS: Continuance

State v. Jackson, 297 S.E.2d 610 ( N.C. Ct. App. 1982)

Jackson's first two trials ended in hung juries. His third trial began before he received a transcript of the second trial. Such a transcript was held to be necessary for adequate preparation. The 300 page transcript was not available until noon on the day of trial but a continuance was allowed only until 9:30 a.m. the next day. The state opposed a longer continuance because its principal witness would soon be unavailable due to military orders. The court held that a continuance of less than one day was clearly insufficient to allow for review of the transcript of the second trial and comparison of it with that of the first trial for impeachment purposes. Failure to allow a longer continuance was an abuse of discretion requiring a new trial.

EVIDENCE: Expert Testimony on Eyewitness Identification

State v. Chapple, 660 P.2d 1208 (Ariz. 1983)

The Arizona Supreme Court became the first court to conclude that the exclusion of expert testimony concerning eyewitness identification requires reversal. Applying the four-part test of United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973), the court found: 1) a qualified expert and 2) a generally accepted explanatory theory. The court then went on to hold: 3) that the lofty qualifications of Chapple's expert, though certainly prejudicial to the state, were not unfairly so, and 4) that, under the liberal standard of Ariz. R. Evid. 702, such evidence is a proper subject for expert testimony. Chapple's conviction for a number of offenses, including three counts of murder, was reversed.

EVIDENCE: Rape Shield

Winfield v. Commonwealth, 301 S.E.2d 15 (Va. 1983)

Winfield's defense to a charge of sexual assault was that the complainant had agreed to sex for money and was now alleging rape when he refused to pay her after the act. Evidence that the complainant had attempted to extort money from men she had sex with in the past was excluded at trial under a rape shield rule. This ruling led to reversal of the conviction. Other evidence which had been offered at trial was held to have been properly excluded, including evidence of past acts of prostitution which involved no after-the-fact extortion. The court makes clear that there either must be a nexus between the proffered evidence and the theory of the defense as explained by the accused or the evidence must tend to establish a motive to fabricate a charge against the accused. If this is shown, however, exclusion is error.

SEARCH AND SEIZURE: Terry Stops  
State v. Broadnax, 654 P.2d 96 (Wash. 1982)

Police properly entered a private residence belonging to Broadnax to search for narcotics. Thompson was present, but there was no reason to suspect him of any offense. Both men were told to put their hands on their heads and they complied. Thompson was patted down by a policeman, even though there was no reason to suspect he had a weapon. The officer felt a bulge which did not feel like a weapon. The bulge turned out to be a balloon of heroin. The court held that there was no justification for a pat down of Thompson's clothing, citing Ybarra v. Illinois, 444 U.S. 85 (1979), and went on to hold that, even if a pat down were lawful, the more extensive exploration necessary to discover the heroin was not lawful when the possibility that a weapon was present had been removed.

SEARCH AND SEIZURE: Terry Stops  
People v. Thomas, 660 P.2d 1272 (Colo. 1983)

Police officers, on routine patrol, observed Thomas standing in a parking lot. They did not suspect him of any illegal activity. They made eye contact with him and he immediately began to run toward a nearby building. The police gave chase and one of them saw Thomas throw something into a water pitcher. The court held that flight from police alone, when the fleeing person is not at the scene of an offense and is not a suspect, does not warrant an investigative stop. Moreover, the suspicious discarding of the object in the water pitcher (later discovered to be cocaine) did not change the result because the chase had already been initiated without justification. An investigatory stop was held to be violative of the fourth amendment.

SEARCH AND SEIZURE: Roadblocks  
Ekstrom v. Justice Court of Arizona, 663 P.2d 992 (Ariz. 1983)

The defendants were stopped at a surprise police roadblock and, as a result, convicted of drunk driving. The purpose of the roadblock was to discover intoxicated drivers and to check vehicle registration and licensing. Vehicles were detained for up to five minutes while officers checked the documents, attempted to smell alcohol on the breath of drivers and shone flashlights into the vehicles interior. The court held that, at least where the state had produced no evidence of an especially severe problem with drunk driving in the area and had not shown that roadblocks were more effective than traditional moving patrols, the extent of the intrusion into privacy interests outweighed the interest in stopping

drunk drivers, citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and United States v. Brignoni - Ponce, 422 U.S. 873 (1975). The government lost its appeal from adverse rulings in a number of similar cases.

## USCMA WATCH

*Synopses of Selected Cases In Which  
The Court of Military Appeals Granted  
Petitions for Review*

### MULTIPLICITY: Lesser Included Offenses

In United States v. Holt, AFCMR 23514, pet. granted, No. 44,833/AF (CMA 4 April 1983), the Court has specified the question whether an offense may be a lesser included offense of another offense, even though the two specifications do not contain the same elements where a motion to make more definite and certain would have resulted in government admissions showing that the elements of one offense are in fact embraced by the other offense under the government's theory of the case. In this case a question exists as to whether wrongful use of a military identification card with intent to deceive would have been fairly embraced by specifications alleging larceny under the government's theory of that case.

The resolution of this issue could result in a tactical procedure whereby questions of multiplicity for findings could be resolved at trial, rather than forcing the Court of Military Appeals to resolve the question in each case by summary disposition, which is the current practice.

### CRIMES: Principals

In United States v. Bretz, ACOMR 17215, pet. granted, No. 45,108/AR (CMA 6 April 1983), the appellant gave an associate access to a store of marijuana and told him that he could take what he could sell and split the proceeds of any such sales with the appellant at a later date. The associate was a confidential informant who led his CID supervisor to the marijuana and turned it over to him. The appellant was convicted of sale of the marijuana as a principal in the transfer of the marijuana from the informant to his CID supervisor. The Court will decide whether the appellant can be liable as a principal to a sale of marijuana when the actor with whom he must share a criminal intent was in fact a government agent acting upon the orders of his supervisor.

### CRIMES: Principals

In United States v. Banks, 15 M.J. 723 (ACMR 1983), pet. granted, No. 46,180/AR (CMA 8 June 1983), the appellant, an undercover agent, and a third individual traveled to a town outside Fort Dix, New Jersey, where the appellant procured some marijuana for the undercover agent. On the return trip to Fort Dix, the agent transferred a small portion of the marijuana to the third member of the group. Although the military judge granted a motion for a finding of not guilty of conspiracy to introduce, because no agreement to introduce the marijuana was found to exist, the appellant was found guilty of aiding and abetting the introduction of the drug. The Court will decide whether the finding was proper in light of the fact that the appellant transferred the drugs to a government agent while away from Fort Dix.

### CRIMES: Manslaughter

In United States v. Sargent, ACMR 442231, pet. granted, No. 46,010/AR (CMA 12 May 1983), the Court will apparently reexamine the holding of United States v. Maglia, 3 M.J. 216 (CMA 1977). Maglia decided that an accused could be convicted of manslaughter for unlawful killing "while perpetrating . . . an offense . . . directly affecting the person," under Article 119(b)(2), when he sold drugs to another who died from a subsequent overdose. More recently, in United States v. Mazor, 13 M.J. 143 (CMA 1982), the Court decided that similar facts allowed conviction of manslaughter by culpable negligence under Article 119(b)(1). In Sargent, the arguments of both sides focus on the construction of the statutory language "directly affecting the person," and on whether proximate cause exists where there is no evidence that the accused knew that the victim would use the drug.

### CRIMES: Gender-Based Classifications

In United States v. Johnson, ACMR 441840, pet. granted, No. 45,485/AR (CMA 4 April 1983), the Court of Military Appeals will decide whether the offense of indecent assault is permissibly gender-based in the military in light of the analysis applied in Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981). In that case the Supreme Court upheld the constitutionality of statutory rape as a gender-based offense on the basis that women suffer disproportionately from the consequences of consensual sexual activity and would be less likely to report the offense were they also subject to prosecution.

DEFENSES: Insanity

In United States v. Roberts, NCMR 80-2833, pet. granted, No. 45,407/NA (CMA 11 April 1983), the Court of Review directed a hearing in accordance with United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967), to determine whether the appellant was sane at the time of his offense. The Court of Military Appeals has specified the question of whether the Navy Court should have instead ordered a new trial, since a determination by the trial court that the appellant was not sane would have resulted in a finding of not guilty.

PROCEDURE: Posttrial Review

In United States v. Bland, ACRM 18599, pet. granted, No. 46,250/AR (CMA 15 June 1983), the appellant raised the defense of entrapment and the staff judge advocate failed to advise the convening authority that the government had the burden of proving the appellant's predisposition to commit the crime beyond a reasonable doubt. The Court will decide whether this is reversible error similar to a failure to advise the convening authority of all the elements of an offense.

PROCEDURE: Article 32 Investigating Officer

Article 32, UCMJ, and Paragraph 34, MCM, 1969, require that no case be referred to a general court-martial without an impartial investigation in which the officer appointed to conduct the investigation is unbiased and uninvolved in the case. In United States v. Davis, NCMR 82-3822, pet. granted, No. 45,569/NA (CMA 13 April 1983), the Court will determine whether the legal standard for impartiality was met when the investigating officer was the department head involved in seeing that commanders were satisfied with the legal services they received in the area of military justice and who was also the executive officer superior in the chain of command to the detailed defense counsel.

## LAST MINUTE DEVELOPMENTS

### OKAY, SOLDIER - EXCRETE

Two extensive articles appeared in past issues of The Advocate dealing with the practical problems confronted by trial defense counsel representing clients identified as marijuana users during a mandatory urinalysis/drug screen. Those articles discussed the lawfulness of the seizure of the urine sample, the issue of service connection, and the scientific reliability of the biochemical testing procedures used in the mandatory urinalysis program.

On 25 July 1983, after the last issue went to the printers but before it was circulated, the Court of Military Appeals decided the case of Murray v. Haldeman, 16 M.J. 74 (CMA 1983). In that case the accused, Boatswain's Mate Second Class (BM2) Victor R. Murray, applied for an extraordinary writ from the Court of Military Appeals seeking to prohibit his prosecution on a charge of wrongful use of marijuana. The petitioner had been identified as a user of marijuana as a result of biochemical testing of a urine sample he had been compelled to provide upon his return to a military installation after a lengthy leave.

The Court of Military Appeals, per Chief Judge Everett for the majority, first addressed the issue of whether the Court should consider the merits of BM2 Murray's petition. After concluding that they should, the Court went on to discuss the substantive issues raised by Murray's petition. Judge Fletcher concurred in the result but did not feel it appropriate to join in the Court's disposition of the substantive issues.

The Court first discussed the issue of service connection as it relates to subject matter jurisdiction over the offense. After first echoing the language from United States v. Trottier, 9 M.J. 337 (CMA 1980), Schlesinger v. Councilman, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975), and Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975), which discussed the serious and deleterious impact of drug use in the military, the Court of Military Appeals concluded that the jurisdiction issue was not ripe for adjudication at that time. The Court reaffirmed its position that the ruling in United States v. Trottier did not mean that every drug offense is ipso facto service connected.

The Court did note, however, that no matter how long a service member may be away from the military installation, that service member is under an obligation to ensure that he or she is fit for duty upon return. Thus, if the service member returns to the place of duty while subject to the physiological or psychological effects of a psychoactive drug such as marijuana, service connection may exist.

The Court then turned to a discussion of the lawfulness of the seizure of BM2 Murray's urine sample. The Court analyzed this issue from a number of perspectives. First, the Court concluded that body fluids do not fall within the protective ambit of the Fifth Amendment, relying on South Dakota v. Neville, \_\_\_ U.S. \_\_\_, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) and Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The Court then held that urine samples, like blood samples, are not protected by Article 31, UCMJ, relying on United States v. Armstrong, 9 M.J. 374 (CMA 1980). Further, the Court held that the manner in which the urine sample was taken from BM2 Murray did not violate due process, unlike the forcible extraction of stomach contents condemned in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

After thus disposing of the Fifth Amendment aspects of the seizure of BM2 Murray's urine sample, the Court proceeded to examine whether the obtaining of his urine sample violated the Fourth Amendment. First, the Court noted that the compulsory urinalysis to which Murray was subjected constituted a "seizure" within the meaning of the Fourth Amendment. Noting that a substantially identical issue was resolved in the government's favor in Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975), the Court opined that the seizure of BM2 Murray's urine was reasonable.

The Court examined the seizure of Murray's urine sample in light of the Military Rules of Evidence. They held that where a service member gives a urine sample pursuant to an order to do so, Military Rule of Evidence 312 does not apply. Military Rule of Evidence 312 provides the requirements for a lawful "extraction" of body fluids, but the Court held that the term "extraction" does not "encompass compelling someone to provide a urine specimen through the normal process of excretion." The Court also held that furnishing a urine sample does not constitute an intrusion into a body cavity or an intrusive search of the body within the meaning of Military Rules of Evidence 312(c) or 312(e), respectively. The Court compared the process by which the petitioner was compelled to provide his urine sample with Military Rule of Evidence 313 which deals with inspections. Although the Court noted that the procedure was similar to an inspection, the Court specifically refused to "pigeon-hole" the mandatory urinalysis into the provisions of Military Rule of Evidence 313.

The Court's ultimate ruling was that given the particular needs of the military and the serious impact that drug use in the military has on military readiness, coupled with the fact that the urine sample was not obtained in an offensive manner or under circumstances which would tend to humiliate or degrade BM2 Murray, the seizure of his urine was reasonable. This is true, according to the majority, even when the authority of a military order or command is used to procure the sample.

### Impact on Defense Trial Tactics

In two previously published articles (see 14 The Advocate 402 (1982) and 15 The Advocate 114 (1983)), The Advocate explored the defense aspects of the mandatory urinalysis program. At 14 The Advocate 402, et seq., Captain Maizel discussed the search and seizure aspects of the urinalysis program. It would appear that the decision of the Court of Military Appeals in Murray v. Haldeman narrows the available avenues of attack that the trial defense counsel may take against a government case built upon the results of a urinalysis. It must be noted, however, that the Court was careful to link the needs of the military with the non-intrusive means by which the urine sample was obtained from Murray in holding that the seizure was reasonable. It may be that circumstances will arise in particular cases where the minimal intrusion experienced by Murray is exceeded, thus making the seizure "unreasonable". Likewise it is possible that a particular seizure may be so intrusive as to "shock the conscience" and thus mandate suppression as a violation of due process. See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

In all other respects, however, it seems that Murray v. Haldeman forecloses many of the possible arguments for suppression articulated by Captain Maizel. It may be worthwhile, however, for the trial advocate to attempt suppression using some of the arguments suggested in Captain Maizel's article since a ruling by the military judge granting the motion to suppress would be susceptible to attack only as an abuse of discretion. See United States v. LaBella, 15 M.J. 228 (CMA 1983).

The article at 15 The Advocate, 114, et seq., discusses the evidentiary aspects of the biochemical tests and briefly mentions the service connection issue. In this article, Captain Wiesner thoroughly discusses the problems of reliability of the tests and other ways in which the validity of the biochemical tests may be impeached. Murray v. Haldeman does nothing to limit the validity of this portion of the article since this issue was not presented to the Court.

Trial defense counsel should be aware of the Court's concern about the psychological and physiological effects of marijuana as they relate to service connection. The opinion of the Court indicates that they expect the government to be able to prove a nexus between the presence of the THC metabolite in the accused's urine and an impact on military readiness. If there is an insufficient showing that the presence of the metabolite affects military readiness, service connection should not be found to exist. These comments presume that the government is relying solely on the results of biochemical testing of a urine sample. The more ordinary analysis of service connection found in United State v. Trottier, 9 M.J. 337 (CMA 1980), will likely be followed if there is direct evidence of drug use (e.g., an eyewitness).

#### Conclusion

The opinion of the Court of Military Appeals in Murray v. Haldeman has been decried by many defense advocates as an alarming retreat from the traditional protections afforded to the expectation of privacy. Whether or not this is true, trial defense counsel should not hesitate to attack vigorously prosecutions of soldiers which are based upon the results of mandatory urinalysis.

ON THE RECORD

or

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

MJ: Why did they pick on you?

ACC: I do not know, sir.

MJ: Just out of the clear blue, they came and asked you to pull your pants down for no reason on the 16th of January?

ACC: Yes, sir.

MJ: And, the same thing on the 5th of February, out of the clear blue. You hadn't said anything that would encourage them on either of these days to even suggest that you pull your pants down? I mean, if that is the case, say it. I'm not looking . . . I haven't spoken to the girls. I don't know the girls. I don't even know the lieutenant. I don't know anybody.

\* \* \* \* \*

(Testimony of expert witness)

WIT: At that time [the Article 32 Investigation] I had all of my files available and now my files are in boxes somewhere in Fort Bragg and I haven't been able to refresh my memory. I can't get it out of the boxes.

\* \* \* \* \*

DC: The question, if it please the court, Your Honor, is somewhat compound and if I may dissect it, bifurcate it . . .

MJ: You may hack it apart -- but at some point I want you to answer my question.

\* \* \* \* \*

TC: Excuse me, Your Honor. Prior to entering findings would it be possible to take a brief recess?

MJ: How long do you want?

TC: It depends on how long the line is, Your Honor.

MJ: How long the line is?

TC: We've only got one latrine in the building, as you know.

MJ: We're in recess.

\* \* \* \* \*

DC: How many times do you get fed a day?

ACC: Two.

DC: How many times [a week] do they let you shower?

ACC: Well, see, some people say it's twice a week right. I consider it only once a week cause we only shower on Wednesdays and Saturdays.

\* \* \* \* \*

TC: Is it a fact that you intended to retain this package of hashish for your own personal benefit?

ACC: No, no. I don't see it that way. I thought about having a big party or something for everybody.

\* \* \* \* \*

TC: Directing your attention to the morning of 28 April at 0800. Was there a formation at that time?

WIT: Yes, sir, there was.

TC: Where was this?

WIT: At the 0830 formation.

\* \* \* \* \*

Q: Where did the accused hit?

A: His head on the concrete ---

Q: Did he appear to be seriously injured?

A: No sir, 'cause a matter of fact, I was scared and I just froze up and then KO-WOW, KO-WOW, KO-WOW.

Q: What was that?

A: Punches.

\* \* \* \* \*

(Military Judge prefaces imposition of sentence with an explanation)

MJ: I rarely do so, but for whatever purpose it may serve, I will indicate for the record that I approached this case with a completely open mind.

\* \* \* \* \*

MJ: As you may know, Captain S \_\_\_\_\_, from practicing in front of me several times, I have several -- well, let's say, two instructions on reasonable doubt. One is a long one, and one is a short one. Do you have a preference or do you have your own instruction you'd like?

DC: Your Honor, if you would just say something to spark my memory as to which one is the long one and which one is the short one.

MJ: Well, the short one has fewer words.



