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BRIEFLY WRIT

Overview

This edition's lead article addresses the attorney-client privilege defined in Military Rule of Evidence 502. In several respects, the privilege differs from prior military law and from the common law applied in federal courts; the article outlines these variances, explores several collateral matters, and suggests that an explanation of the privilege be incorporated into the initial attorney-client interview.

With this issue, the staff of The Advocate begins its seriatim review of search and seizure law. During the coming year, each of the judicially-recognized exceptions to the Fourth Amendment's warrant requirement will be explored. The first installment pertains to consent.

The official approval of the Trial Defense Service (TDS) as a formal military organization prompted our staff to interview Colonel Robert Clarke, its Chief. His candid responses provide an inside look at the origin, as well as the destiny, of the military's criminal defense structure.

Preview

The staff of The Advocate is preparing a symposium on the guilty plea, which will be published early next year. The symposium will address a variety of issues related to the client's decision not to contest criminal charges pending against him, and should assist counsel in advising clients who are contemplating that course of action.

Solicitation

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

THE ATTORNEY-CLIENT PRIVILEGE
UNDER MILITARY RULE OF EVIDENCE 502

By Captain Kenneth Gale*

Military Rule of Evidence 502¹ defines the attorney-client privilege formerly enunciated in paragraph 151b(2) of the Manual for Courts-Martial.²

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1. Mil. R. Evid. 502 provides:

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) Definitions. As used in this rule:

(1) A "client" is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member: (a) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding; (b) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or (c) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

The Rule describes the privilege in detail, and thereby offers a degree of guidance to practitioners which could previously be gleaned only through a close examination of case law and commentary. The evidentiary provision also modifies prior military law, and departs in several respects from federal and common-law practice.

1. Continued.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) Who may claim the privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

2. See para. 151b(2), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

I. Background

The attorney-client privilege is one of the oldest bases for excluding testimony in Anglo-American jurisprudence.³ Dating from the earliest days of testimonial compulsion, the privilege was originally premised upon the attorney's "oath [of secrecy] and honor."⁴ The modern counterpart to this "honor doctrine" is embodied in Canon 4 of the American Bar Association Code of Professional Responsibility.⁵ When that doctrine yielded to a developing judicial tendency to broaden the scope of admissibility in the Eighteenth Century, the attorney-client privilege was sustained by the pragmatic realization that full disclosure by clients improves legal representation. The public interest in preserving the truth-seeking function of our judicial system continues to justify the privilege today.⁶ Rule 502 was adopted from an evidentiary provision on the attorney-client privilege which the Supreme Court proposed in 1972. Congress rejected that version, and instead enacted Federal Rule of Evidence 501, which allows courts to apply common law pertaining to privileges. The legislative history of the Federal Rules reflects Congress'

3. The traditional attorney-client privilege, as defined and outlined by Professor Wigmore, provides:

(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such (3) the communications relevant to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser (8) except the protection be waived.

8 Wigmore, Evidence §2290 (McNaughton Rev. 1961). See United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954). See also 2 Wharton, Criminal Evidence §556 (Torcia 13th Ed. 1973). For an early application of the privilege, see Chirae v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826).

4. Wigmore, supra note 3, at §2290. Indeed, it may be argued that the "first duty of an attorney is to keep the confidences of his client." Id., citing Taylor v. Blocklow, 3 Bing. NC 253, 299, 132 Eng. Rep. 401, 406 (C.P. 1836).

5. ABA Canons of Professional Ethics No. 4.

6. See, e.g., Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956), cert. denied, 352 U.S. 833 (1976); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Application of Doe, 464 F.Supp. 757 (D.C.N.Y. 1979); In re Colocotronis Tanker Securities Litigation, 449 F.Supp. 828 (D.C.N.Y. 1978).

belief that the Supreme Court's proposal would erode the states' authority to protect the status of communications among their citizens.⁷ Congress was also hesitant to approve modern, relatively specific rules which might eliminate unincorporated common law protections and constrain the more flexible, ad hoc analytic approach endorsed by most jurisdictions.⁸

Although the specific privileges defined in Military Rules of Evidence 502-509 were adapted from prior military law or the Supreme Court's proposals, the military provision defining the basic rule of privilege differs considerably from the Supreme Court's version of Rule 501. The latter rule would recognize only those privileges specifically provided for by statute or required by the Constitution.⁹ Military Rule of Evidence 501, however, expressly allows military courts to apply the common law of privileges "insofar as the application of such principles . . . is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice or [the] Manual."¹⁰ Defense counsel should therefore assert traditional common law privileges even though they are

7. See H.R. Rep. No. 650, 93d Cong., 1 Ses. 8 (1973). See also Advisory Committee's Note, Fed. R. Evid. 501, Sup. Ct. Version.

8. See S. Rep. No. 1277, 93d Cong., 2d Sess. 70 (1974).

9. The Supreme Court Version of Rule 501 provides:

Article V. Privileges

Rule 501. Privileges Recognized Only AS Provided. Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

- (1) Refuse to be a witness; or
- (2) Refuse to disclose any matter; or
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Fed. R. Evid. 501, Sup. Ct. Version.

10. Mil. R. Evid. 501(a)(4). Although the Advisory Committee adopted the specific approach recommended by the Supreme Court as to particular privileges in order to "provide the certainty and stability necessary for military justice," a more flexible version of the basic privilege rule was adopted in order to "recognize those privileges recognized in common law pursuant to Federal Rule of Evidence 501" Analysis, Mil. R. Evid. 501.

not specifically enumerated in the Rules. Additionally, Rule 501(a)(4) specifically incorporates federal court interpretations of Federal Rule of Evidence 501; current federal practice is therefore relevant to court-martial procedure.¹¹

II. Defining the Scope of the Privilege

a. Attorney-Client Relationship

The privilege protects only those disclosures made during an attorney-client relationship. When the accused expressly acknowledges the employment of an attorney, the latter's "future faithfulness in the same transaction will be enforced by the courts regardless of whether the attorney had received privileged confidences."¹² If, on the other hand, employment of a legal representative has not been specifically contracted, an attorney-client relationship will be implied by operation of law upon a showing that information was revealed to and received by an attorney "with full understanding by both [parties] that the matters revealed [were] intended as confidences."¹³ The subjective impressions of the parties are not dispositive of this issue, however,¹⁴ since the "existence . . . of the attorney-client relationship is [ultimately] a question of fact to be inquired into by the court preliminary to the admission or rejection of the proffered testimony."¹⁵ Since the client benefits from the protected status conferred on communications conducted pursuant

11. Since Mil. R. Evid. 501 does not specifically recognize court-martial precedent, conflicts between federal court interpretations of Fed. R. Evid. 501 and military rulings on the privilege announced prior to the new rules should be resolved in favor of federal precedent. The most important source for interpreting Military Rules of Evidence 501 and 502 is the text of the rules. The next most persuasive authority is the Analysis, followed by federal court decisions interpreting Fed. R. Evid. 501. Military precedent may be cited as common law expressions consistent with federal court interpretations. See United States v. Brooks, 2 M.J. 102, 105-106 (CMA 1977).

12. United States v. Brown, 20 CMR 823, 832 (AFBR 1956).

13. Id.

14. United States v. Brownell, 17 CMR 741 (AFBR 1954).

15. United States v. Gandy, 9 USCMA 355, 361, 26 CMR 135, 141 (1958).

to the relationship, only he has standing to assert the privilege.¹⁶ The privilege may also be invoked by the client's guardian or conservator, by the designated representative of a deceased client, or by the lawyer or agent who received the protected communication; absent evidence to the contrary, a lawyer's authority to assert the privilege in his client's behalf is presumed.¹⁷

b. Form of Communication

The form of the communication will normally have no bearing on the scope of the attorney-client privilege set forth in Rule 502. The privilege defined in the Rule applies to statements conveyed over the telephone or through other "electronic means of communication," provided those media are "necessary and in furtherance of the communication."¹⁸ In this regard, the necessity for the communication itself is irrelevant; instead, the "only relevant question is whether, once the individual decided to communicate, the means of communication was necessary and in furtherance" of the conveyed information.¹⁹ This aspect of the Rule is similar to paragraph 151b(1) of the Manual. In both instances, no privilege is created; instead, the status of protected communication is safeguarded against any infringement stemming from the method of transmittal the client employs. While the form of the communication is thus of marginal importance in most cases, the nature of the communication is, in several respects, relevant to a judicial determination of whether the privilege should be applied.

c. Nature of Communication

In order to fall within the protection of the attorney-client privilege, the communication must have been made "for the purpose of facilitating the rendition of professional legal services to the client."²⁰

16. Mil. R. Evid. 502(c). See United States v. Partin, 601 F.2d 1000 (9th Cir. 1979); United States v. Green, 5 USCMA 610, 18 CMR 234 (1955).

17. Mil. R. Evid. 502(c). Thus, the lawyer receiving the communication "may claim the privilege on behalf of [his client] unless authority to do so has been withheld from the lawyer or evidence otherwise exists to show that the lawyer lacks the authority to claim the privilege." Analysis, Mil. R. Evid. 502(c).

18. Mil. R. Evid. 511(b).

19. Analysis, Mil. R. Evid. 511.

20. Mil. R. Evid. 502(a).

One court held that this prerequisite enabled an attorney to testify that a client transferred counterfeit bills to him, in the absence of a showing that the client sought legal advice with respect to the bills.²¹ The prerequisite also renders an attorney "amenable to subpoena to produce documents such as checks, deposit slips, passbooks, and the like, which entered his possession in the course of routine business transactions for an accused, and the acquisition of which by the attorney was unconnected functionally with the rendition of legal services."²² For analogous reasons, matters included within an accused's service record, including evidence of prior convictions, are not entitled to the privilege's protection, since such information is a "matter of independent knowledge on the part of the defense counsel and [is] derived from a source other than the accused."²³ Nor does the privilege apply to purely administrative information such as the client's address or identity, unless he intended to preserve the confidentiality of those matters.²⁴

d. Confidentiality

The attorney-client privilege only protects confidential communications.²⁵ Thus, if the client conveys a communication to his attorney "with the intention that the matter [will] be passed on to others," the privilege will not apply.²⁶ The Court of Military Appeals relied on this principle to exclude from the privilege information relayed to an attorney retained to forestall legal proceedings by paying off creditors to whom his client had presented worthless checks. According to the court, this "prospect of negotiation of the checks in suit seems . . .

21. See *United States v. Strahl*, 590 F.2d 10 (1st Cir. 1978).

22. *United States v. Marrelli*, supra note 3, at 283.

23. *United States v. Thomas*, 18 CMR 610 (AFBR 1955).

24. See, e.g., *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977). Such information may be protected "where the person invoking the privilege can show that a strong probability exists that disclosure . . . would implicate that client in the very criminal activity for which legal advice was sought." Id. at 1353.

25. See Mil. R. Evid. 502(a).

26. *United States v. Winchester*, 12 USCMA 74, 78, 30 CMR 74, 78 (1961) (communications to be used in negotiation of pretrial agreement are unprotected) (dicta). But see Fed. R. Evid. 410 and Mil. R. Evid. 410 (statements made during plea negotiations are inadmissible).

to constitute the very antithesis of confidentiality -- with the result that we can scarcely consider that payment and acquisition of the checks by [the attorney] brought into play the attorney-client privilege."²⁷ Similarly, communications conducted between lawyer and client in the presence of third parties are not confidential and are consequently beyond the scope of the privilege.²⁸ Accordingly, one court held that the privilege does not extend to communications conveyed between a client and his attorney in the presence of another attorney who was not associated with the case;²⁹ an Air Force Board of Review reached a contrary result, however, in a case in which it was "clearly apparent from the record that [the third party] was either an agent or colleague" of the defense counsel.³⁰

Confidentiality may also be vitiated if the client relates the communication, or perhaps even a portion of it, to a third party.³¹ For example, in United States v. Reynolds,³² the defense counsel declined to introduce confidential information conveyed to him by an accused during the court-martial proceedings. When the same information was subsequently revealed during a post-trial interview between the accused and a chaplain, the attorney confirmed it, and indicated that he did not regard it as advantageous to the accused's defense. Because the accused voluntarily disclosed the information to the chaplain, the court declined to recognize any testimonial privilege. In addition, the court noted that the attorney-client privilege would not foreclose the attorney from

27. United States v. Marrelli, supra note 3 at 283, 15 CMR at 283.

28. See United States v. Bigos, 459 F.2d 639 (1st Cir. 1972). According to the court, "the presence of a third party . . . destroys the privilege . . . only insofar as [such presence] is indicative of the intent of the parties that their communication not be confidential." Id. at 643.

29. United States v. Landof, 591 F.2d 36 (9th Cir. 1978).

30. United States v. Kellum, 23 CMR 882, 891 (AFBR 1957).

31. See generally Handgards, Inc. v. Johnson and Johnson, 413 F.Supp. 926 (D.C. Cal. 1976). There, the court noted that "[v]oluntary disclosure of part of a privileged communication is a waiver as to the remainder of the privileged communication about the same subject." Id. at 929.

32. 19 CMR 850 (ACMR 1955).

vindicating his professional decision not to use the information in the defense of the accused, since "[n]either law nor good conscience demands that the lawyer's lips be sealed under such conditions."³³ Clients should therefore be advised from the outset of their responsibilities in preserving the confidentiality of communications otherwise within the ambit of the privilege.

e. The "Agency Provisions of Rule 502

In some respects, Military Rule of Evidence 502 articulates a position contrary to common law. For example, the Rule not only protects confidential communications from the client to his lawyer, but also confidential communications between the client's representative and the lawyer or the lawyer's representative; between the lawyer and his representative; between the client or the client's lawyer and a lawyer representing another in a matter of common interest; between the client's representatives; between the client and his representative; or between the lawyers representing the client.³⁴ This expansive interpretation of the privilege broadens its scope to such an extent that its application in federal courts would probably change the disposition of cases arising under Federal Rule of Evidence 501. In Attorney General v. Covington and Burling,³⁵ for example, the court discussed the basic requirements of the privilege in an effort to identify those documents in a law firm's possession which were entitled to protection from disclosure:

[i]t is clear, of course, that confidential communications from the client to the attorney or the attorney's agents are privileged . . . [B]ut . . . [the law firm] has suggested that the privilege applies with equal force to other communications as well -for example, to those from the attorney to another in furtherance of the rendition of legal services to the client and to those from the attorney to the client. The general rule is, however, that the privilege only protects these other communications to the extent that disclosure would tend to reveal a confidential communication from the client.³⁶

33. Id. at 853.

34. See Mil. R. Evid. 502(a).

35. 430 F.Supp. 1117 (D.D.C. 1977).

36. Id.

The subject communications in Covington and Burling were conducted between the law firm and a public accounting organization hired to provide technical assistance in the legal representation of one of the firm's clients. These communications appear to fall within that provision in Rule 502 which extends protection to information relayed between a lawyer and his representative.³⁷ The provision eliminates both the need to preliminarily reach a finding of fact as to the precise source of the subject communication, and the need to discover, through interrogatories, whether communications conducted between parties other than the client and his attorney nevertheless contain protected information.

f. Appellate Review

The manner in which appellate courts resolve issues stemming from an alleged breach of the attorney-client privilege is also relevant to a discussion of the scope of protection the privilege accords. Under the modern view, the privilege exists "for the protection of the client -- not the attorney -- [in that it enables] the former to communicate to his counsel information necessary for professional representation."³⁸ The courts recognize the importance of encouraging candor between an accused and his attorney, and conclude that public policy supports the "inclusion of a doubtful communication within [the] folds [of the privilege]."³⁹ Analogous interests compel the application of a similar principle of appellate review in cases involving the closely related but somewhat broader issue of inconsistent conduct by the defense counsel. Thus, the Court of Military Appeals noted that:

[i]t may be accepted as settled law in this Court that, since a lawyer is bound by professional duty to avoid divulgence of a client's confidences to the disadvantage of the latter, doubts concerning equivocal or apparently inconsistent conduct on the part of the attorney must be resolved against him -- that is, it must be regarded as having been antagonistic to the best interests of his client.⁴⁰

37. See Mil. R. Evid. 502(a)(2) and 502(b)(3).

38. United States v. Green, supra note 16 at 613, 18 CMR at 237.

39. Id. See also United States v. Gandy, supra note 15 at 361, 26 CMR at 141.

40. United States v. McCluskey, 6 USCMA 545, 550, 20 CMR 261, 266 (1955).

The judicial protectiveness reflected in this language is equally apparent when the manner of assessing prejudice is analyzed. For example, in United States v. Bryant,⁴¹ the trial defense counsel was excused from representing an accused before a court-martial. After the trial, the same attorney prepared the accused's "post-trial clemency report" in his capacity as Assistant Staff Judge Advocate. In the report, the attorney made recommendations adverse to the client. Although the attorney was excused from the case only 11 days after it was assigned, and the record was unclear as to whether the attorney and the accused ever exchanged confidential communications, the reviewing court stated:

We are constrained, in the interests of justice and absent a firm showing to the contrary of record, to presume that between 9 December 1953 — the date when charges were referred to trial — and 21 December 1953 — the date of trial — [the attorney] acted in some fashion as defense counsel.⁴²

After inferring the existence of an attorney-client relationship from the fact that the attorney was appointed to represent the client, the court held that former's actions were presumptively prejudicial.⁴³

An appellate court's application of an irrebuttable presumption that prejudicial error has occurred is known as the doctrine of "general prejudice." This method of appellate review constitutes a judicially-imposed limitation upon the mandate of Article 59(a), Uniform Code of Military Justice, which provides that a court-martial should not be reversed "unless the error materially prejudices the substantial rights of the accused,"⁴⁴ and thereby suggests that a showing of prejudice must be made. Generally, there are two circumstances which call for the application of the "general prejudice" rule: first, where the error involves a recognizable departure from a constitutional precept and, second, where it arises from a violation of an express legislative enactment.⁴⁵ Thus, the application of the "general prejudice" rule is limited to

41. 16 CMR 747 (AFBR 1953).

42. Id. at 751.

43. Id. at 753.

44. Article 59(a), Uniform Code of Military Justice, 10 U.S.C. §859(a) (1976). See United States v. Green, supra note 16 at 610, 18 CMR at 234.

45. See United States v. Lee, 1 USCMA 212, 216, 2 CMR 118, 122 (1952).

situations in which the implicated policy considerations are "so overwhelmingly important in the scheme of military justice as to elevate it to the level of a creative and indwelling principle."⁴⁶ Based on Bryant, therefore, defense counsel can argue that the "general prejudice" rule should apply where the attorney-client privilege is violated; the need for an accused to make a specific showing of prejudice is thereby obviated.

The decision in United States v. Wilson,⁴⁷ however, suggests a contrary conclusion. In that case, the attorney who served as defense counsel during the accused's pretrial investigation later performed duties as trial counsel. Because the accused pled guilty, the court concluded that he could not have been prejudiced by the attorney's dual role in the proceedings.⁴⁸ While it appears to undermine the "general prejudice" rule applied in Bryant, the Wilson decision does not have to be interpreted so expansively. Instead, the decision can be regarded as standing for nothing more than the proposition that when the totality of the circumstances conclusively demonstrates that prejudice could not have resulted from the alleged error, the court will not presume prejudice.

Defense counsel should also argue that the court in Wilson did not need to reach the question of prejudice, in view of its apparent conclusion that the attorney's ministerial role in the proceedings did not amount to a breach of an existing attorney-client relationship. Indeed, in Bryant, the court stated in dictum that if the record clearly showed that no attorney-client relationship existed in fact, the mere appearance of such a relationship would be insufficient to establish a presumption of prejudice.⁴⁹ Finally, defense counsel may argue that Wilson is no longer good law. In United States v. McCluskey,⁵⁰ the Court of Military Appeals confronted a fact pattern similar to that in Wilson. An attorney briefly served as defense counsel, and then assumed duties as trial counsel. The attorney, however, did not try the case, although he did draft a memorandum requesting that depositions be taken. The Court

46. Id. at 124.

47. 19 CMR 426 (ABR 1955).

48. Id. at 427.

49. United States v. Bryant, supra note 41, at 751 n.2. Cf. United States v. Danilson, 11 CMR 692 (AFBR 1953).

50. 6 USCMA 545, 20 CMR 261 (1955).

rejected the government's contention that this was a ministerial act. Rather, it concluded that the attorney had prepared a "professional" document, and was aided in that endeavor by the familiarity with the case which he acquired while serving as defense counsel.⁵¹

III. Exceptions to the Privilege

a. Communications Relating to Fraud or Crime

The exceptions enumerated in Rule 502(d)(1-5) are based upon well-recognized common law principles. For example, the Rule provides that the privilege does not attach "[i]f the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."⁵² That provision codifies the common law⁵³ and continues prior military practice.⁵⁴ This exception is fully consistent with the purposes of the privilege and the policies it advances. Indeed, the exception serves as a possible deterrent, and comports with the ethical principle which enables a lawyer to reveal his client's "intention . . . to commit a crime and information necessary to prevent a crime,"⁵⁵ notwithstanding his general ethical obligation to preserve confidences and secrets. The courts do not require a preliminary finding that sufficient evidence other than the communication supports the conclusion that legal services were sought in furtherance of the commission of a crime.⁵⁶

51. Id. at 552, 20 CMR at 268.

52. Mil. R. Evid. 502(d)(1).

53. See, e.g., United States v. Rosenstein, 474 F.2d 705, 715 (2d Cir. 1973).

54. See para. 151b(2), MCM, 1969; United States v. Robbins, 41 CMR 920 (1969).

55. ABA Canons of Professional Ethics No. 4. Cf. DR 4-101(c)(3), ABA Code of Professional Responsibility.

56. See Clark v. United States, 289 U.S. 1 (1933).

b. The Exceptions in Rule 502(d)(2-5)

The exceptions set forth in Rule 502(d)(2) through 502 (d)(5) have no counterpart in the prior Manual; they are instead adopted from the Supreme Court's proposed Federal Rule of Evidence 503(d). The exception pertaining to claimants through a deceased client responds to situations such as a will contest, where the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation; the "choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view."⁵⁷ Considerations of fairness also dictate the principle that a client raising ineffective assistance of counsel or breach of professional duty, on appeal or otherwise, waives the privilege as to all matters pertaining to that issue.⁵⁸ The exception pertaining to communications "relevant to an issue concerning an attested document to which the lawyer is an attesting witness" is justified by the fact that the client in all likelihood approves of that course of action and would waive the privilege as to relevant attorney-client communications.⁵⁹ Finally, Rule 502(d)(5), excludes communications pertaining to matters of common interest between joint clients if the information is conveyed by either client to a lawyer representing both of them; this exception recognizes the importance of full factual disclosure in our judicial system, and applies only to those communications "offered in an action between any of the clients."⁶⁰

c. Waiver

Even if none of the recognized exceptions to the attorney-client privilege excludes the subject communication from the ambit of Rule 502, the client's unilateral actions may negate the privilege. Thus, "where the client voluntarily discloses matter which was formerly privileged, he

57. Advisory Committee's Note, Fed. R. Evid. 503(d)(2), Sup. Ct. Version.

58. See Mil. R. Evid. 502(d)(3). See also United States v. Goo, 10 F.R.D. 332, aff'd 187 F.2d 62, cert. den. 341 U.S. 916 (1950). The same considerations exclude from the privilege, communications relevant to an issue of breach of duty "by the client to the lawyer." Mil. R. Evid. 502(d)(3).

59. Mil. R. Evid. 502(d)(4).

60. Mil. R. Evid. 502(d)(5).

[waives] the privilege, and the attorney is not bound to silence."⁶¹ The fact that an individual capable of asserting the privilege takes the stand as a witness does not constitute waiver.⁶² Nor may the privilege be defeated by "an attorney's voluntary divulgence of facts or documents to an opposing party" when the disclosure "was beyond his authority -- express or implied -- from the client."⁶³ In United States v. Boyce,⁶⁴ the court faced the issue of whether the attorney-client privilege is waived if the client receives testimonial immunity as a prosecution witness. The court rejected the view that a witness' acceptance of testimonial immunity impliedly waives the privilege, and observed that a rejection of the waiver doctrine in that situation "encourages complete disclosure to his attorney by an individual accused of a crime, and, in the military, would serve to increase a soldier's confidence in his counsel, particularly in those cases where individual counsel is not available or is not requested."⁶⁵ In the absence of express or implied waiver, the privilege "might well be classified as eternal because it is [generally] not limited to the duration of the litigation," and does not terminate upon the conclusion of the attorney-client relationship.⁶⁶

IV. Collateral Matters

a. Ethical Duties Under Canon 4

The attorney-client privilege relates to, but should not be confused with, the attorney's ethical duty to preserve his client's confidences and secrets. Canon 4 of the American Bar Association's Code of Professional Responsibility provides that a "lawyer should preserve the

61. United States v. Reynolds, supra note 32 at 853.

62. United States v. Boyce, 8 CMR 434, 441 (ABR 1953).

63. United States v. Marrelli, supra note 3 at 282, 15 CMR at 282. Although "it may be argued that a client must assume the risk of disloyalty on the part of an attorney whom he freely chose," the court recognized "no reason for rewarding perfidious conduct on the part of a faithless attorney, and [believed] the contrary view [is] demanded if the privilege is to receive adequate protection." Id.

64. 8 CMR 434 (ABR 1953).

65. Id. at 442.

66. United States v. Bryant, supra note 41 at 751.

confidences and secrets of a client."⁶⁷ This mandate stems from the view that a client "must feel free to discuss whatever he wishes with his lawyer [since a lawyer] should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."⁶⁸ Thus, Canon 4 is premised upon one of the same considerations underlying the attorney-client privilege: the societal interest in fostering a full and unrestrained interchange between a client and his legal representative.⁶⁹ The respective obligations imposed by Canon 4 and Rule 502, however, are not identical. The behavioral constraints arising from the ethical mandate are imposed without regard to the nature or source of the information, or the fact that third parties may have knowledge of it. Under Rule 502, of course, a communication is not confidential if it is intended to be disclosed to third parties.⁷⁰ However, an attorney is not thereby relieved of his ethical obligation to preserve at all times the confidences and secrets of a client. There is no conflict between Canon 4 and Rule 502 when a lawyer is asked to testify about unprivileged matters which nevertheless fall within the scope of Canon 4, since Disciplinary Rule 4-1 enables an attorney to "reveal . . . [c]onfidences or secrets when . . . required by law or court order."⁷¹

b. The Attorney-Client Privilege and the Confrontation Clause

An accused's confrontational rights under the Sixth Amendment are arguably implicated when an immunized witness successfully exercises the attorney-client privilege. While it is settled that the proper invocation of the privilege against self-incrimination does not in itself violate

67. ABA Canon of Professional Ethics No. 4.

68. Id. at EC 4-1.

69. This interest may, of course, be outweighed by other considerations, such as the deterrence of crime or fraud, see Mil. R. Evid. 502(d)(1), or the concern for justice in cases of multiple representation, see Mil. R. Evid. 502(d)(5).

70. See Mil. R. Evid. 502(b)(4).

71. ABA Canon of Professional Ethics No. 4, DR 4-101(c)(2). Nor would the tactical decision to waive the attorney-client privilege at trial pose ethical problems, since "[a] lawyer may reveal . . . [c]onfidences or secrets with the consent of the client," and otherwise "when permitted by disciplinary rules." Id.

the confrontation clause,⁷² and that an accused generally has no right to immunized defense witnesses,⁷³ confrontational rights may be impermissibly denied if an immunized witness stands on the privilege, since testimony may otherwise be compelled upon a prior grant of immunity.⁷⁴ In this regard, counsel's argument should focus on the concept that the attorney-client privilege, as important as it is, cannot override the constitutional dimension of the accused's right to defend himself.

Shortly after the Supreme Court's decision in Davis v. Alaska,⁷⁵ the Navy Court of Military Review confronted this issue. That court rejected the appellant's assertion that the Davis rationale rendered unconstitutional a rule of law which provides that an immunized witness does not waive his attorney-client privilege when offering testimony pursuant to a grant of immunity.⁷⁶ The court narrowly interpreted Davis, however, and essentially limited that decision to its facts:

The important factor in Davis was, because of the [Alaska statute in question], the prosecutor was permitted to present to the triers of fact a seventeen year old [witness], presumably freshly scrubbed, on an errand for his mother when he saw [the accused]. Without knowledge of [the witness'] prior juvenile record [which was suppressed pursuant to the state statute] the jury members would have accepted his testimony at face value; they did not know he had a motive to falsify his testimony. In the case at bar, [the witness] freely admitted at trial to being a robber and lying to various people concerning the incident. The 'built-in untrustworthiness' of the witness was not secreted from the trier of fact. The facts in Davis are easily distinguished from those before us.⁷⁷

72. See J. Cook, Constitutional Rights of the Accused: Trial Rights 32-33 (1974).

73. See, e.g., United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974).

74. See Gardner v. Broderick, 392 U.S. 273 (1968).

75. 415 U.S. 308 (1974).

76. See United States v. Brunious, 49 CMR 102 (NCOMR 1974).

77. Id. at 104. For a general discussion of the Confrontation Clause, see Lewis, The Accused's Constitutional Right to Defend, 12 The Advocate 299 (1980).

Defense counsel should not be dissuaded by Brunious from raising this issue at trial, especially in view of the court's restrictive interpretation of Davis. No federal court has yet faced the difficult task of balancing the respective interests implicated by the Sixth Amendment's Confrontation Clause and the attorney-client privilege, and announcing a definitive and workable constitutional rule.

Conclusion

The attorney-client privilege defined in Rule 502 conjoins the most desirable features of the Supreme Court's proposed rule on the privilege and Federal Rule of Evidence 501. By adopting the specific, relatively well-defined Supreme Court proposal, the Advisory Committee, responsible for drafting the Rule, insured that the provision would offer meaningful guidance to nonlawyers involved in the military justice system. On the other hand, Rule 501 provides a degree of flexibility by incorporating the common law. The combination of these features renders the military version of the attorney-client privilege a broad and progressive basis for excluding confidential communications. The defense counsel should explain the privilege to his client during the initial interview. He can thereby encourage candid and unrestrained disclosure from the client, and insure that the client is aware of his own responsibilities in preserving the privilege. It is, of course, crucial that the defense counsel remain mindful of his own responsibilities in this regard, and refrain from engaging in conduct inimical to the values underlying the privilege.

SEARCH AND SEIZURE: A PRIMER

Part One - Consent

Evidence obtained from a search conducted pursuant only to the accused's voluntary consent¹ is not per se inadmissible;² consensual searches are valid even in the absence of underlying probable cause or a properly-executed warrant.³ The evaluation of these searches nevertheless requires a careful balancing of competing interests.⁴ On one hand, "approval of such searches without the most careful scrutiny would sanction the possibility of official coercion;" on the other hand, "to place artificial restrictions upon such searches would jeopardize their basic validity."⁵

Analytic Framework

When attempting to support the legality of a consensual search, the prosecution must show by "clear and convincing"⁶ evidence that the consent was freely and voluntarily given.⁷ The consent may not be the product of coercion or duress, either express or implied.⁸ As the Supreme

1. Although this discussion deals with the voluntariness of the accused's consent, the principles also apply to an evaluation of consent granted by third parties.

2. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); see also Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Mayton, 1 M.J. 171 (CMA 1975); United States v. Holler, 43 CMR 461 (ACMR 1970).

3. Schneckloth v. Bustamonte, supra note 2, at 219; see Davis v. United States, 328 U.S. 582, 593-4 (1946).

4. Schneckloth v. Bustamonte, supra note 2, at 227.

5. Id. at 229.

6. Mil. R. Evid. 314(e)5.

7. See e.g., Bumper v. North Carolina, supra note 2, at 548; United States v. Noreen, 23 USCMA 212, 214, 49 CMR 1, 3 (1974).

8. See Schneckloth v. Bustamonte, supra note 2; United States v. Mota Aros, 8 M.J. 121 (CMA 1979); United States v. Decker, 16 USCMA 397, 37 CMR 17 (1966); United States v. Barden, 9 M.J. 621 (ACMR 1980).

Court stated in United States v. Watson,⁹ it must result from the accused's "essentially free and unconstrained choice," without his "will [being] overborne and his capacity for self-determination critically impaired." The accused's consent must amount to more than a mere submission or acquiescence to a claim of authority.¹⁰

No factor is dispositive in the determination of whether consent was freely and voluntarily rendered. The evaluation of voluntariness is instead based on a consideration of the totality of surrounding circumstances.¹¹ The court's focus is on police conduct;¹² the question which must be addressed is whether the consent resulted from unlawful conduct or was influenced by any declaration or threat made by the law enforcement officials.¹³ Thus, the fact that consent resulted from the accused's subjective beliefs¹⁴ or rationalizations;¹⁵ or was based on a misunderstanding by the accused¹⁶ does not vitiate consent if the police conduct was otherwise proper. The effects of coercive police conduct, however, are not purged by the fact it was unintentional.¹⁷

9. 423 U.S. 411, 424 (1976).

10. See, e.g., Bumper v. North Carolina, supra note 2, at 548; 319 U.S. at 548; United States v. Mota Aros, supra note 8, at 122.

11. See Schneckloth v. Bustamonte, supra note 2, at 227.

12. See United States v. Watson, supra note 9, at 424; United States v. George, 9 M.J. 607, 611 (ACMR 1980).

13. United States v. Noreen, supra note 7, at 4.

14. Id. at 3.

15. United States v. Rushing, 17 USCMA 298, 307, 38 CMR 96, 105 (1967).

16. United States v. Allison, 27 Crim. L. Rptr. (BNA) 2026 (8th Cir. 1980) (fact that document custodian misunderstood subpoena power not fatal to consent where agents did not misrepresent power).

17. See United States v. Molt, 589 F.2d 1247 (3rd Cir. 1978) (no consent where agents erroneously, but innocently, stated they had statutory authority to search). However, in United States v. Williams, 27 Crim. L. Rptr. (BNA) 3293 (5th Cir. 31 July 1980), the court adopted a "good faith" exception to the Fourth Amendment exclusionary rule. The majority

Factual Circumstances Affecting Consent

The evaluation of voluntariness must be made on a case-by-case basis; precedents are of doubtful value.¹⁸ There are, however, certain general principles which aid in the determination of whether consent was voluntarily extended or instead resulted from a submission to authority or coercion. Although no one factor is talismanic, each of the factors discussed below is part of the "totality of circumstances" which must be examined in assessing the legality of a consensual search.

Knowledge of Rights

Consent to a search differs from a waiver of rights at trial¹⁹ in that it is not "an adjunct to the ascertainment of the truth."²⁰ Rather, consent to search impacts only on the right of each individual to be secure in his person or property and to be left alone.²¹ Therefore, there need not be a "knowing and intelligent waiver of a right" or an "intentional relinquishment or abandonment of a known right or privilege."²² As a result, consent may be valid although the accused was not advised of his right to refuse and did not know of such a right from another source.²³ There is, of course, no need to provide Miranda or Article 31 warnings in

17. Continued.

stated that the rule should not be applied when law enforcement authorities commit a technically improper action in reliance upon a reasonable, good-faith belief in its propriety.

18. See United States v. Justice, 13 USCMA 31, 34, 32 CMR 31, 34 (1962); United States v. Holler, 43 CMR 461, 465 (ACMR 1970).

19. See United States v. Matlock, 415 U.S. 164 (1976).

20. Schneckloth v. Bustamonte, supra note 2, at 242.

21. See Id.

22. Id. at 241-43; see United States v. Allison, supra note 16, at 2027.

23. See Schneckloth v. Bustamonte, supra note 2.

order to validate consent,²⁴ although existence of such warnings or knowledge tends to support voluntariness.²⁵

Custody

A finding that consent was voluntarily given is not inconsistent with a finding that, at the time, the accused was under apprehension or had his freedom restrained.²⁶ The fact that the consenting individual was in custody is merely one factor relevant to an evaluation of voluntariness.²⁷ Indeed, the Army Court of Military Review recently held that consent, granted by a servicemember detained on charges of possessing a firearm and marijuana, was voluntary where the military policeman told the soldier that law enforcement agents wanted to search his car if he didn't mind.²⁸ However, in United States v. Perez-Esarga²⁹ a 3-hour illegal detention tainted the consent to search.

Existence of Search Warrant

Defense contentions that consent merely constitutes a submission to a claim of lawful authority often arise when the government claims to have a warrant or some other authority to search or threatens to obtain such a warrant if the accused does not consent. The courts generally hold that when the police present the accused with a warrant or claim to

24. See, e.g., United States v. Iusani, 10 USCMA 519, 28 CMR 85 (1959); United States v. Nicholson, 1 M.J. 616 (ACMR 1975); Mil. R. Evid. 314(e)4.

25. See United States v. Rothman, 492 F.2d 1260 (9th Cir. 1974).

26. See generally United States v. Watson, supra note 9; United States v. Decker, 16 USCMA 397, 37 CMR 17 (1966).

27. Although it appeared in the past that custody increased the government's burden to prove voluntariness, see, e.g., United States v. Page, 302 F.2d 81 (9th Cir. 1962), the new Military Rules of Evidence make it clear that the burden of proof is not thereby increased. Mil. R. Evid. 314(e)5.

28. United States v. George, supra note 12.

29. 26 Crim. L. Rptr. (BNA) 2204 (9th Cir. 1979).

have a warrant, the accused's refusal to resist the search is not tantamount to consent if the warrant proves to be invalid or nonexistent.³⁰ As noted above,³¹ this is true even if the police honestly believe that they have authority to search.

Where the government merely informs the accused that his refusal to consent would prompt application for a warrant, however, his subsequent consent is not automatically deemed invalid or coerced.³² The police may not misrepresent their ability to obtain a warrant.³³ A threatened application for a warrant remains non-coercive even if the police indicate the warrant application will necessitate the detention of the accused³⁴ or the interim surveillance of his property.³⁵ The consequences of applying for a warrant cannot be misrepresented. Furthermore, threats that a search pursuant to a warrant will be more extensive or destructive have been deemed coercive.³⁶

30. See Bumper v. North Carolina, supra note 2; United States v. Edwards, 6 M.J. 721 (ACMR 1978). However, in Hoover v. Beto, 467 F.2d 516 (5th Cir. 1972) the Court of Appeals ruled that a criminal attorney's consent to a search of his house was valid even though the police presented him with a warrant which later proved to be invalid. That Court held that the accused's express invitation and statement that the warrant was unnecessary reflected voluntariness and showed that the defendant's consent was neither coerced nor compelled by the warrant.

31. See note 17, supra.

32. United States v. Faruolo, 506 F.2d 490 (2nd Cir. 1974); United States v. Culp, 472 F.2d 459 (8th Cir. 1973), cert. denied 411 U.S. 970 (1973); United States v. Savage, 459 F.2d 60 (5th Cir. 1972) (per curiam), cert. denied 415 U.S. 949 (1974). But see United States v. Dennis, 4 M.J. 765 (ACMR 1977).

33. See United States v. Curiale, 414 F.2d 744 (2nd Cir. 1969), cert. denied 396 U.S. 959 (1970).

34. United States v. Nicholson, supra note 24.

35. United States v. Faruolo, supra note 32.

36. United States v. Kampbell, 574 F.2d 962 (8th Cir. 1978) (postal inspector threatened to get warrant and ransack house if accused did not consent).

Scope

Consent, even if freely and voluntarily given, does not constitute an unrestrained license to search.³⁷ Just as a search pursuant to a warrant can be confined to the specific items, places, and times enumerated in the warrant, so too can a consensual search be limited by the terms of the consent.³⁸ When the search exceeds the scope of the consent, it is unreasonable.³⁹ Thus, in United States v. Castro,⁴⁰ the Court of Military Appeals ruled that the confiscation of an address book exceeded the scope of the consent granted by the accused, which was limited to marked money. Moreover, in United States v. Dichiarinte⁴¹ the Court of Appeals for the Seventh Circuit ruled that a voluntary consent to search for drugs did not extend to a search of the accused's business papers, even though it yielded evidence of income tax evasion.⁴²

Consent may also be revoked.⁴³ If the accused revokes consent either prior to or during the course of a consensual search, the search must cease immediately.⁴⁴

37. United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971).

38. United States v. Castro, 23 USCMA 166, 48 CMR 782 (1974); United States v. Cady, 22 USCMA 408, 47 CMR 345 (1973); Mil. R. Evid. 314(e)3.

39. See United States v. Dichiarinte, supra note 37, at 129 n.3.

40. 23 USCMA 166, 48 CMR 782 (1974).

41. 445 F.2d 126 (7th Cir. 1971).

42. The consent to search justifies the law enforcement official's presence at the situs of the search. See United States v. Morrison, 5 M.J. 680 (ACMR 1978). Therefore, items in "plain view" may be seized if they are contraband or if the law enforcement official has independent probable cause to believe they are evidence of a crime. See United States v. Castro, supra note 40, at 784.

43. 48 CMR at 784; Mil. R. Evid. 314(e)3.

44. Id.

Trickery or Deceit

Generally, consent may not be obtained by trickery or deceit.⁴⁵ As noted above,⁴⁶ consent may be deemed coercive if it is motivated by a misrepresentation of the existence of a warrant, the agent's authority to search, or the agent's ability to secure a warrant. However, certain acts of "guile" will not necessarily negate the validity of the resulting consent. In United States v. Lewis,⁴⁷ for example, the court held that a seizure of drugs by a narcotics agent was reasonable even though the agent concealed his identity and posed as a drug buyer. The court determined that the agent did nothing which was not expected of him by the accused as part of the drug transaction.⁴⁸ Moreover, in United States v. Bullock,⁴⁹ the accused's consent was found to be valid even though he had been "tricked" into opening a gun cabinet in the presence of an agent who concealed his identity. The Court of Appeals for the Fifth Circuit ruled that opening the cabinet was voluntary and the lack of knowledge as to the agent's identity did not nullify the consent.⁵⁰ However, in Gouled v. United States,⁵¹ a seizure of papers was held to be unreasonable when they were obtained by an agent who ransacked an office to which he obtained access by concealing his identity and feigning a social call.

45. See Bumper v. North Carolina, supra note 2, at 548.

46. See text accompanying notes 30-33, supra.

47. 385 U.S. 206 (1966).

48. Id. at 210-211.

49. 590 F.2d 117 (5th Cir. 1979).

50. Id. at 120-21. The Pennsylvania Superior Court has ruled that access gained by "ruse" is valid absent threats or coercion. See Commonwealth v. Morrison, 27 Crim. L. Rptr. (BNA) 2084 (1980).

51. 255 U.S. 298 (1921).

Other Factors

Courts have addressed several other factors when evaluating voluntariness. Some courts have been concerned with the degree of cooperation exhibited by the person consenting to the search.⁵² Thus, where a document custodian provided agents with access to records he maintained, a room in which to review the documents, and various other amenities, the Court of Appeals for the Eighth Circuit ruled that the willingness to cooperate reflected voluntary consent.⁵³

The consistency between alleged consent and other conduct on the part of the accused has also been examined as part of the "totality of circumstances." Thus, where the accused freely discusses his criminal actions or makes other incriminating statements, the courts have been more willing to find voluntary consent, inasmuch as the prior conduct was more damaging.⁵⁴ However, if the accused repeatedly professes his innocence, his consent to a search of an area where incriminating evidence would be found would be inconsistent; accordingly, the courts would be less likely to deem it voluntary.⁵⁵ There are, of course, situations where the accused consents to a search because he feels incriminating evidence has been hidden sufficiently to avoid detection. In recognition of this fact, some courts consider the ease with which the evidence was discovered when evaluating the voluntariness of the consent.⁵⁶

52. See, e.g., *Consumer Credit Insurance Agency v. United States*, 26 Crim. L. Rptr. (BNA) 2332 (6th Cir. 1979); *United States v. Gillis*, 8 M.J. 118 (CMA 1979).

53. See *United States v. Allison*, supra note 16.

54. See *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954).

55. See, e.g., id.

56. *United States v. Chase*, 1 M.J. 275 (CMA 1976); *United States v. Glenn*, 22 USCMA 295, 46 CMR 295 (1973).

Finally, various courts refer to the accused's age;⁵⁷ education;⁵⁸ race;⁵⁹ access to counsel;⁶⁰ demeanor;⁶¹ and the nature of the searched premises - i.e., whether business or private,⁶² as elements in the "totality of circumstances" evaluation.

Third Party Consent

The issue of voluntariness generally arises in situations where the alleged consent is given by the one incriminated by the discovered evidence. However, at times the question arises whether evidence discovered pursuant to consent granted by a third party -- a spouse, an employer, a co-tenant, or a landlord -- can be used against the accused. Under certain circumstances a third party's consent does permit the use of subsequently uncovered evidence.⁶³ In United States v. Matlock,⁶⁴ the Supreme Court stated that consent by one who possesses common authority over the premises or effects is valid against an absent nonconsenting person with whom authority is shared. The authority which justifies a third party's

57. United States v. Mendenhall, 27 Crim. L. Rptr. (BNA) 3127 (S.Ct. 1980).

58. Id.

59. Bumper v. North Carolina, supra note 2. In that case, the Supreme Court referred to the fact that an elderly black woman, who allegedly consented to the search, was confronted by white law enforcement officials.

60. Consumer Credit Insurance Agency v. United States, supra note 52. But see United States v. Molt, supra note 17.

61. United States v. Gillis, supra note 52 ("reluctant" agreement); United States v. Vasquez, 22 USCMA 492, 47 CMR 793 (1973) ("despondent" when consenting); United States v. Glenn, supra note 56 (accused not "nervous or reluctant" when consenting); United States v. Corley, 6 M.J. 526 (ACMR 1978) ("reluctant" consent).

62. See United States v. Holler, supra note 18, at 465.

63. Under the new Military Rules of Evidence, the ability of a third party to consent remains unchanged and is governed by the law discussed in this section. See Mil. R. Evid. 314(e)2.

64. 415 U.S. at 170.

consent rests not on the law of property, but on the mutual use of property by persons generally having joint access or control for most purposes.⁶⁵ When one individual allows another to use his property, he generally assumes the risk that the third party will consent to a search of that property.⁶⁶ While the consenting third party must generally be cloaked with actual authority to consent to the search, there is a developing judicial tendency to validate searches conducted pursuant to consent from third parties, if government agents reasonably believe that those parties have authority to consent.⁶⁷

It is not enough that the third party bears some special relationship to the accused. Rather, the courts focus on the third party's relationship with or control over the premises or items searched. In United States v. Mazurkiewicz,⁶⁸ for example, the accused's wife could not consent to the search of a garage to which she did not enjoy equal access.⁶⁹ Even the existence of a right of access by a third party to the searched premises does not necessarily embrace a right to consent. In Stone v. State of California,⁷⁰ the Supreme Court ruled that a hotel clerk could not consent to the search of a guest's room even though the clerk had a right of access. The Court ruled that the guest had consented to the clerk's access only in order to enable the individual to perform his duties as a hotel employee. Courts have also recognized the legitimacy of searches predicated upon consent granted by third parties in an effort to exculpate themselves from criminal liability.⁷¹

65. Id. at 171 n.7. At least one state court, relying on Matlock, has gone so far as to accept the consent of a third party who has "unrestrained access and control over shared premises" over the objection of the accused. People v. Cosme, 26 Crim. L. Rptr. (BNA) 2266 (N.Y. Ct. App. 1979).

66. Frazier v. Cupp, 394 U.S. 731 (1969).

67. See Eisenberg, Hell Hath No Fury Like . . . A Hostile Third Party Granting Consent To Search, The Army Lawyer, May 1979, at 3.

68. 431 F.2d 839 (3rd Cir. 1970).

69. See Eisenberg, supra note 66, for a discussion of the relevance of the third party's motive for granting consent.

70. 376 U.S. 483 (1964).

71. See, e.g., United States v. Diggs, 544 F.2d 116 (3rd Cir. 1976); United States v. Botsch, 364 F.2d 542 (2nd Cir. 1966).

THE TRIAL DEFENSE SERVICE:
FROM PILOT PROGRAM TO FORMAL ORGANIZATION

An Interview with Colonel Robert Clarke

On 7 November 1980, General E.C. Meyer, Army Chief of Staff, approved the Trial Defense Service (TDS) as a formal organization of The Judge Advocate General's Corps. In December 1980, the staff of The Advocate conducted an interview with Colonel Robert B. Clarke, Chief of TDS since its inception. Colonel Clarke has also served as Chief of the Defense Appellate Division, Executive Officer of the Office of The Judge Advocate General, and Chief of Personnel, Plans, and Training Office.

Q: Colonel Clarke, last month the Chief of Staff approved the Trial Defense Service as a permanent organization. What events led up to this decision?

A: The idea of a separate structure for defense counsel is certainly not new. It's a concept that has evolved over many years. As early as the post-World War II hearings on military justice, there were proposals in Congress for a separate defense counsel corps. In the mid-1950's The Judge Advocate General himself appointed an ad hoc committee to explore the possibility. Efforts generally paralleled those which resulted in our independent trial judiciary. In the early 1970's, the Secretary of Defense had a comprehensive "blue ribbon" study made of the administration of military justice in the armed forces. Acting on recommendations from this DOD task force, he directed each service to establish a separate defense counsel organization. The Air Force and the Navy did so in 1974. The Army couldn't, because we just didn't have the resources—our court-martial rates were too high and our retention of field grade JAG's was too low. We simply lacked the middle managers the program required.

Then in 1975 General Wilton Persons became The Judge Advocate General. I guess you'd say he was "military justice-oriented." He recognized that court-martial rates were down and that retention of career Judge Advocates had greatly improved. So together with then Colonel Harvey, Chief of Defense Appellate Division, he revived interest in the concept. Without going into all the details, General Persons initiated a series of measures to improve professionalism at the trial level. One of these was to obtain the Chief of Staff's approval to run a pilot TDS program in the Training and Doctrine Command beginning in May 1978. That's when TDS really started.

Q: Perhaps you could be more specific as to what TDS was designed to achieve. What are the goals of the organization?

A: TDS really has two aims. The first is to improve professionalism, which I've mentioned. Not that our defense counsel weren't doing a good job -- they were, especially when compared to some sectors of the civilian bar. But there was room for improvement, as there always is. We were convinced that direct supervision, completely within a defense counsel chain, was a better way to get the job done. Let's face it, it is difficult for an SJA or one of his staff to get too close to the defense function. There is always the fear that defense counsel might misunderstand motives and intentions. I agree with many of my contemporaries who feel that over the years a supervisory void may have been developing on the defense side of the house. We hope that TDS will reverse this trend by injecting field grade defense supervisors into the system, thus improving professionalism.

Q: You mentioned a second aim.

A: Yes, and that deals with perceptions -- perceptions concerning the independence of defense counsel. Under prior arrangements, defense counsel were assigned to the command at which they performed their duties. They were rated and supervised by the Staff Judge Advocate and, at least theoretically, by the command itself. In the eyes of some people, this gave rise to an apparent conflict of interests, serving the client on one hand and the command on the other. It was the old bugaboo of so-called "command influence." Actual cases involving this phenomenon were rare, but I suppose the potential did exist. Perhaps more significant was the appearance the arrangements gave rise to. In this area, appearances may be every bit as important as realities. In any case, a principal aim of TDS was to remove once and for all doubts, both in and out of the Army, that military defense counsel were not 100 percent loyal to their clients' interests.

Q: How was the pilot program organized?

A: The TRADOC test involved 40 counsel at 15 posts; it ran for a year. Based on favorable experience in TRADOC, the test program was expanded to all units in CONUS in September 1979, and to all overseas organizations a few months later. This gave us greater experience in supporting troop units, including those with deployment missions. By 1 January 1980, the test program was operating Army-wide. We now have almost 200 Judge Advocates in TDS located in about 60 different field offices.

Q: Did you encounter any resistance to TDS during the test period?

A: We met with very little resistance. As a matter-of-fact, we met with no resistance to the concept of a "Trial Defense Service."

Q: Weren't SJA's unhappy about losing some of their office strength?

A: A few SJA's initially voiced opposition to the loss of their defense counsel. We tried to convince them that they had not "lost a daughter, but that they had gained a son," and that's exactly what happened. Soon after the test commenced, almost all of those who voiced opposition realized that they gained more than they lost -- they gained effective, field grade supervision of defense counsel; they also gained flexibility in supporting unusual missions, such as multiple accused situations.

Q: How did commanders react?

Some commanders voiced basically the same objection, usually couched in complaints about "stovepipe" organizations. When a commander complains about "stovepipes," what he's really saying is, "I don't want anything on my post that I don't control." Once again, there are legal restraints on commanders who try to "control" defense counsel. Trial Defense Service was a way for the commander to "loose the bonds" of those legal restraints. Most of them soon realized that, and I think they are pleased with our product.

Q: You travel extensively and have visited most, if not all, of the TDS offices throughout the world. In your opinion, what do defense attorneys in the field think of TDS?

A: They think TDS is great. Everywhere I go I see fine spirit and morale and a very positive view of TDS. Quite frankly, that is something we have not had in our defense offices in the past. Before TDS, it could be lonely being a defense counsel. Sometimes you didn't really have anybody to talk to. Now we have a world-wide network of defense counsel, and they're talking to each other about their cases -- their problems. In my view, there has been a very real increase in professional satisfaction. We have a supervisory chain that can give a "pat on the back" as well as supervise.

Q: In view of your comments, one might question just how separate TDS personnel are from the unit to which they are attached.

A: TDS is a separate organization, and our counsel in the field think of themselves as members of a separate organization. I would ask you to recall that we are the Trial Defense Service. We provide a service to the units and they provide administrative and logistical support services to us. In that kind of arrangement, members of the organizations develop bonds of one kind or another with each other, and that's only proper. After all, we are still members of the Army. We're still in The Judge Advocate General's Corps. You might think of us as the son who grows up, goes to college, and goes out on his own. We're still members of the family -- our supervision just comes from another source. We're as separate as we hoped to be. We meet the uniform codes, PT requirements, and training requirements of the commands we support. We identify with their mission, because we also support that mission. But we don't wear their patch, and we are not supervised by that command.

Q: When a tour of duty with TDS expires, will counsel be transferred to another duty station or assigned to the SJA's office at his or her current post?

A: That depends on a lot of things, such as from where he or she came when assigned to TDS. For example, if he had been in the SJA office for a year and then was assigned to TDS for a year and a half or two years, he probably would go to a new duty station -- not because there would be any impropriety in moving him or her back to the SJA. It would simply be time for him or her to leave that post.

Q: Do you assign TDS officers?

A: No. Bear in mind that TDS officers are assigned by the Personnel, Plans, and Training Office, OTJAG, as are all Judge Advocates. A tour with TDS is part of normal career development. Our people go to the Graduate Course, get promoted, go overseas, and get reassigned as other Judge Advocates do. Many go back to SJA offices when they leave TDS. When that happens, the SJA is pleased because he knows he's getting an experienced lawyer, confident of his or her ability, who is often ready for work outside the military justice area.

Q: Every attorney assigned to TDS regularly completes management reports indicating, among other things, hours worked each month, time spent on administrative, judicial, and nonjudicial activity, and current caseload. How are these forms utilized?

A: In every conceivable way. I think we have the most comprehensive Management Information System of any JAGC element, with the exception of the U.S. Army Claims Service. We now have computerized our reports, and every month I receive a printout of the management information for the preceding month. I can tell who is busy and who is not. I can tell you with current information which SJA offices are trying the most cases. When we get requests for additional counsel in multiple-accused cases, I can tell, literally in a heartbeat, who can best afford to send counsel. Having the information provided in that form is almost like having another officer in the headquarters.

Q: Has TDS achieved its goals?

A: In terms of improving the professionalism of defense counsel, I would say yes. We've been successful at getting good senior captains and majors to fill our Senior Defense Counsel (SDC) and Regional Defense Counsel (RDC) slots. Through these experienced officers, our counsel have access to a great store of available advice and assistance. This experience factor is important in dealing with technical legal matters, of course, but we've also found it to be invaluable in helping our counsel through ethical problems. We have also come a long way in our efforts to put in place a system to keep our counsel abreast of current developments in the law and to provide them with regular CLE training. For example, our training officer now provides timely updates on appellate decisions and important changes in the law. Almost all our counsel attended one of the seminars on the new Military Rules of Evidence before the rules went into effect, and, they received a handbook prepared at Headquarters, TDS to help them through the transition to the new rules. We also regularly send TDS counsel to Continuing Legal Education (CLE) courses at the JAG School and other places.

Q: Other than these standard programs, do you have any other plans for developing the advocacy skills of defense counsel?

A: In this area as in all other areas of our organization, the system is evolving. We're trying to implement new ideas. Soon, for example, we want to begin workshops at regular intervals within each TDS region that will emphasize the improvement of basic advocacy skills. The important thing now is that we've regularized our procedures to provide for supervision through the experienced eyes of the SDC and RDC and for regular update and CLE training. Over the long run I expect this program to substantially improve the professionalism of Army defense counsel.

Q: Commanders, SJA's, and military judges evaluated the program after the test period ended. What did these evaluations show?

A: They showed that the Trial Defense Service concept worked. For example, in response to the question, "Was the DC mission accomplished effectively under USATDS?", 98% said "yes." Of these same commanders, 90% said that USATDS was responsive to the needs of the command and military community. One hundred percent of the SJA's said the mission was accomplished effectively during the USATDS test. Of the military judges responding, 98% stated that defense counsel's general courtroom performance improved under TDS. One of the most often verbalized concerns prior to the test was that unless defense counsel were "reined in" by an SJA or a commander, they would look like hippies in green -- their appearance and fitness would deteriorate; however, 99% of the commanders said that USATDS counsel had complied with command standards regarding appearance, bearing, and fitness. After all was said and done, 74% of the commanders, 87% of SJA's, 93% of military judges, and 99% of defense counsel recommended that TDS be implemented permanently. There were some expressions of concern -- there had to be. But when all was said and done, it was clear the program had worked and worked well.

Q: As the test programs have progressed, have you observed or uncovered any significant problem areas that you and your staff need to address?

A: Yes, I have. The staffing of my offices is probably most critical. For years, SJA offices have been manned under TOE's and TDA's which were prepared to meet the personnel surge which came with the Vietnam war. When Vietnam ended, the Judge Advocate General's Corps lost very few spaces; yet we had difficulty keeping them filled after the draft ended. The result was that SJA's were always "understrengthened" in terms of their manning documents. At the time TDS expanded its test from TRADOC to world-wide, SJA offices, particularly those in CONUS, were approximately 20% understrength, and court-martial rates were low.

Early on I met with the MACOM SJA's to discuss the staffing of TDS offices. As a result of those meetings, we decided that it would lend more credibility to our test program if TDS took its personnel short fall up front. In other words, rather than attempt to test a program that was 20% short on paper, we would reduce the number of spaces transferred to TDS by that amount and then keep our spaces filled — 100% of them. As you know, nothing is ever static. Court-martial rates began to rise, and it looks as though the Corps' strength will very soon reach 100% of its authorized spaces. Staff Judge Advocate offices now have additional people to "plug in" to the military justice business to handle the increased court-martial load. Because we took only those spaces we could then fill, or only those needed to handle the court-martial load at that time, we may not have enough officers in some places. Many of our counsel are working longer hours -- I wouldn't say inordinately longer -- than their SJA office counterparts. We are preparing now to go back to the MACOM SJA's to seek additional spaces due to these changed circumstances.

Q: Your field offices are satellites of the local SJA for administrative and logistical purposes. How well has this worked?

A: There have been a few problems, mostly due, I think, to our status as a test program. For the foreseeable future, at least, we'll continue these arrangements, just as the judges do. It's simply not feasible or economical to establish a totally separate system to support us. In all but a very few places, the system has worked well. It is, however, an area of continuing concern, especially now that we're permanent. I hope that our newly acquired "legitimacy" will aid SJA's in budgeting for our support at a level commensurate with their offices.

Support for TDS generally mirrors what's available to the SJA and the local command. This can vary markedly from post to post. Some smaller garrison offices, both SJA and TDS, seem better supported than some of our large, divisional posts. But these are the exceptions. I would like to see greater uniformity in this area. We're working now on support guidelines, so that both the SJA and our people are more aware of what is expected or what's the norm. Over the past years we've substantially upgraded SJA facilities. I hope that continues and that TDS receives a proportional share of the benefits.

Q: When you were Chief of DAD, you were also Chief of TDS. Do you feel that the separation of these functions will generate conflict between trial and appellate counsel?

A: No. Our bifurcated system of providing different counsel at the two levels does, by its very nature, create certain tensions on appeal. But bifurcation is also a strong point; it's the recommended setup and it certainly benefits the client.

TDS should result in an easing of whatever tensions do exist. It provides counsel in the field with a knowledgeable point of contact in Washington who has face-to-face contact with appellate counsel. We don't interject ourselves between the two, but we can provide advice and assistance to both. Defense Appellate Division counsel, including the Chief, have an ongoing attorney-client relationship with the accused. They are primarily concerned with the client, and properly so. In TDS, on the other hand, only the detailed counsel has an attorney-client relationship with the accused. Our supervisory structure is therefore primarily concerned with the counsel, how they're doing their jobs, their welfare, training, and related matters. Of course, the ultimate aim of both organizations is the same: to provide first class representation for soldiers.

Q: Do you really think TDS has changed perceptions of our military justice system?

A: It's difficult to assess that at this stage of the program. As far as the American legal community is concerned, I can give an unqualified "yes." TDS is viewed very favorably by the civilian bar, especially those bar associations which maintain an active interest in military law. Also, our counsel report that officers and NCO's seem to understand the change and like it. Whether we've made much impact on lower ranking enlisted personnel, such as basic trainees, is hard to say. That will take more education, information, and

training. But TDS is a "soldier" program. It shows the Army recognizes that a well-disciplined force is best achieved when soldiers — whether or not they're in trouble -- have faith in the ultimate fairness of the system in which they serve. I think that is something soldiers will understand.

Q: Where does TDS go from here?

A: TDS goes forward from here. I see TDS moving from an experimental organization, where the emphasis has been on testing and evaluation, to an organization developing a greater maturity in structure, policies, and procedures. For example, we have asked the Criminal Law Division to publish a change to AR 27-10 which we wrote to formalize our charter, just like the trial judge program. We're going to redo our SOP's and institutionalize many of the practices we've found successful. We're looking at our Management Information System to simplify and further automate it, if possible. And we're evaluating our staffing Army-wide to make sure we've got our people where the action is.

In the area of administrative and logistical support, we want to develop specific guidelines, so both SJA's and our people can get a better feel as to what's expected. I'm especially interested in bringing in our Reservists; many have assignments as defense counsel on JAGSO Teams. They have much to offer us, and we can do much for them in both professional development and preparedness planning. These are just some of the items that need to be addressed. There are a good many more. Based on our experience to date, and the positive and cooperative attitudes shown by commanders, SJA's, and our counsel, I am optimistic about the future of TDS. For the past two years we've been looked at, massaged, pushed, and pulled by everybody imaginable. Our efforts have been directed toward completing a meaningful test. We've done that. Now we can concentrate on doing our job better. We've done it well for two years, but we're going to get better.

SIDE BAR

A Compilation of Suggested Defense Strategies

Challenging Gender-Based Offenses

Recent federal court decisions provide a substantial basis for challenging the constitutionality of gender-based offenses on equal protection grounds. The military offenses of consensual carnal knowledge (Article 120) and communication of indecent language to a female of 16 years or over (Article 134) are susceptible to this challenge. While the courts reject sex as a suspect classification,¹ they have held that because gender-based statutes involve certain fundamental rights, judicial review of their constitutionality requires a "more heightened scrutiny than would be applied to completely non-suspect legislation." Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977). The court in Meloon further noted that the application of gender-based criminal statutes requires special sensitivity. The Supreme Court set forth the standard for this "heightened scrutiny" in Craig v. Boren, 429 U.S. 190 (1976), holding that once an equal protection issue is raised, the government bears the heavy burden of proving that "classifications by gender . . . serve important governmental objectives and [are] substantially related to achievement of those objectives." 429 U.S. at 197.

The courts have rejected government attempts to meet the Craig mandate by simply listing a series of legislative rationales. Without exception, the courts require the government to present evidence supporting not only the alleged purpose of gender-based laws, but also the causal connection between the statutory classification and its specified objective. In United States v. Hicks, 625 F.2d 216 (9th Cir. 1980),² the government argued that the carnal knowledge statutes were constitutional because of legitimate governmental interests in protecting young females from injury or pregnancy. Noting, however, that the government presented no evidence to support its contentions, the court said it could not

accept the government's assertions, which
imply the broad generalizations that males of

1. See Frontiero v. Richardson, 411 U.S. 677 (1973).

2. Hicks raised an equal protection argument at his trial for consensual carnal knowledge, contending that the federal statutes under which he was prosecuted, 18 U.S.C. §§1153, 2032 (1976), were unconstitutional.

all ages are larger, stronger, more sexually aggressive, and less likely to suffer physical injury from sexual contact than females We do not question that the government's assertions might be correct But it was the government's obligation to provide us in this case with evidence supporting its claimed justifications. Here the government, having produced no evidence, would have us reject a criminal defendant's constitutional challenge in a factual vacuum. This we cannot do.

625 F.2d at 620-621. The Ninth Circuit affirmed the trial court's dismissal of the charges against Hicks because the government failed to meet the Craig test. In Navedo v. Creisser,³ (8th Cir. 29 Oct. 1980), the court likewise held that, notwithstanding the government's recitation of legitimate governmental objectives in support of a gender-based carnal knowledge statute, its failure to present evidence establishing a factual basis for the stated theories was fatally deficient. See Caban v. Mohammed, 441 U.S. 380 (1979); Meloon v. Helgemoe, supra.⁴

Even if the government presents evidence supporting the legislative basis of gender-based statutes, it must still affirmatively establish that the gender-based distinction closely serves to achieve the objective. In Craig, the state enacted a statute prohibiting the sale of beer to 18-20 year-old males; the statute permitted the sale of beer to females in that age group. The State defended the constitutionality of the statute by contending that the enhancement of traffic safety was the legislative basis of the law. In this regard, the state presented evidence showing that more males were arrested for drunken driving than females in the same age group; that more males were killed in traffic accidents than females; and that young males were more inclined to drink beer while driving.

3. 28 Crim. L. Rptr. (BNA) 2114 (8th Cir. 29 Oct. 1980). For a full discussion of the facts and holding in this case, see the Case Notes Feature in this issue.

4. But see Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979), where the court upheld the accused's conviction of a gender-based carnal knowledge statute. In that case the court found that the government established a legislative basis for the statute supported by medical evidence, although it appears that the medical evidence was presented for the first time on appeal.

The Supreme Court held that the statute was unconstitutional, noting that even if the state's statistical evidence was accepted as accurate, it failed to establish a correlation between the statute and the objective. This conclusion was reached by "looking behind" the statistics. In particular, the Court noted that in all age groups the incidence of male drunk driving was higher. Further, the Court observed that the state failed to correlate the accident and death rates with alcohol consumption. Finally, the Court said that while the state's figures showing that only .18% of females and 2% of males in the 18-20 age group were arrested for drunk driving were "not trivial in a statistical sense, [they] hardly can form the basis for employment of a gender-line as a classifying device." Craig v. Boren, 429 U.S. at 201. In sum, the courts will carefully examine statistical evidence supporting gender-based laws, and determine the validity of the conclusions as well as the substantive impact the challenged law has on the "evil" against which the particular legislation is directed.

Thus, to survive an equal protection challenge, the government must first list the significant rationales justifying the law, and then present evidence to support the validity of those rationales; finally, the government must prove that the ultimate objective can reasonably be achieved through gender-based legislation. The government generally argues that gender-based carnal knowledge statutes are valid because they prevent pregnancies, as well as physical injury and emotional trauma; in addition, the government often relies on the assumption that males are more likely to commit such offenses. To counter these contentions, counsel should argue that there is no rational basis for such a gender-based statute, since a gender-neutral statute would offer a greater measure of protection to all young children in general.⁵ Also, in the absence of conclusive proof of legislative intent, pregnancy prevention can be characterized as merely a hindsight "catch-all" justification for laws promulgated for entirely different purposes. Support for such an argument stems from the fact that criminal liability hinges upon minimal penetration rather than emission, and that the use of contraceptives does not constitute a defense.

5. See Meloon v. Helgemoe, 564 F.2d 602, 606 (1st Cir. 1977).

Accordingly, even though the risk of pregnancy is remote, the accused can still be found guilty.⁶ Moreover, the protected group includes females for whom pregnancy is impossible.⁷ Counsel should also contend that trauma afflicts male as well as female victims, and that there is no rational basis for prosecuting only one class of offenders.⁸ Finally, defense counsel should not permit the government to attempt to establish its case through judicial notice. As the Ninth Circuit stated in Hicks:

On approval, the government asks us to take judicial notice of the fact that "intercourse correlates highly with pregnancy." We do. Still, these naked assertions fail to carry even the government's burden in this case, let alone to prove its contention.

625 F.2d at 220. Offers of proof or judicially-noticed facts, in sum, will generally not be sufficient to satisfy the government's substantial burden.

Defining Jurisdictional Prerequisites For Special Courts-Martial

A footnote in United States v. Smith, 9 M.J. 359 (CMA 1980), implicitly raises a question as to whether it is necessary to establish a service connection in off-post non-military offenses in order to confer jurisdiction to military tribunals sitting as special courts-martial. In Smith, the government argued that it was unnecessary to establish jurisdiction in such off-post cases when the maximum imposable punishment was not more than six months of confinement at hard labor. The substance of this argument was that any non-military, off-post offense could be tried in a military court if referred to a special court-martial.

Though Smith was decided on other grounds, the Chief Judge commented on this argument, noting that

a bad-conduct discharge, which was within the prerogatives of this special court-martial, is itself a severe punishment exceeding the

6. 564 F.2d at 607 n.6.

7. 564 F.2d at 607.

8. 564 F.2d at 608.

equivalent of six months imprisonment. [Citations omitted]. Therefore, the O'Callahan rationale is fully applicable to special courts-martial authorized to adjudge a bad-conduct discharge.

9 M.J. at 360 n.1. These comments imply that the applicability of O'Callahan is determined by the maximum military, as opposed to civilian, punishment which may be imposed by the tribunal. It could further imply that in special courts-martial not empowered to adjudge bad-conduct discharges, the O'Callahan requirements may not apply.

Defense counsel should strongly contest this interpretation of O'Callahan, and argue that the decision is designed to insure that an accused is afforded all constitutional rights except where the military can affirmatively establish a predominant interest in a criminal act. This position is founded on the notion that since military tribunals do not afford defendants the constitutional rights of indictment by grand jury or a trial by a jury of peers, a service connection must be shown before off-post, non-military offenses can be tried in military courts. Accordingly, a service connection must be established for all non-military offenses where these constitutional rights are available -- in other words, all but petty offenses.⁹ In United States v. Sharkey, 19 USCMA 26, 41 CMR 26 (1969), the Court of Military Appeals recognized that the classification of an offense as "petty," and the determination of which constitutional rights may be exercised, is governed by the civilian statute's maximum punishment.

Since it is the availability of constitutional rights in the civilian rather than the military forum that invokes O'Callahan, counsel should examine the forum where those rights are available to ascertain whether a service connection must be demonstrated. Counsel should also argue that the convening authority does not have statutory authority to grant jurisdiction, notwithstanding the government's contention in Smith that he could do so simply by limiting the maximum punishment on an offense not within the jurisdiction of the superior military tribunals. Furthermore, it was not Congress' intent to permit special courts-martial to exercise greater subject-matter jurisdiction than general courts-martial.

9. 18 U.S.C. §1(3) (1976) defines a petty offense as one in which the maximum punishment does not exceed six months of confinement or a fine greater than \$500.00, or both. See United States v. McAlister, 28 Cr.L. Rptr. (BNA) 2119 (10th Cir. 2 September 1980).

Moreover, no matter what the maximum punishment, a finding of guilty by a special court-martial is a felony conviction, and it is attended by the stigmas pertaining to felonies rather than to petty offenses. Counsel should alternatively argue that, even accepting a military punishment theory as a basis for establishing jurisdiction, all punishments should be considered cumulatively in order to ascertain whether the military punishment renders the crime the equivalent of a petty offense. This argument is buttressed by Chief Judge Everett's consideration of a punitive discharge in ruling that the maximum punishment imposable by a court-martial empowered to adjudge a bad-conduct discharge invokes O'Callahan.

Contesting Pretrial Confinement

The Court of Military Appeals recently held that pretrial confinement is illegal if it is justified solely by a perceived need to protect an accused. In Berta v. United States, 9 M.J. 390 (CMA 1980), the accused was pending assault charges under Articles 91 and 128, UCMJ, when he was seriously assaulted by other marines. After release from the hospital, he was placed in pretrial confinement. The military judge determined that continued pretrial confinement was warranted since the accused might flee to protect himself against further assaults. The decision suggests in securing the release of clients incarcerated for their own protection while awaiting trial, counsel should argue that the accused's release would not endanger the community. The danger created by an accused's release must result from affirmative acts, rather than the community's reaction to the termination of his confinement. When appropriate, counsel should also note that the accused's record does not establish a pattern of provocative acts. The third line of argument pertains to the command's ability to provide protective measures which do not entail a deprivation of liberty. The duration of the proposed confinement is also relevant. If a lengthy period is involved and other protective means are therefore unreasonable, counsel should argue that the accused could be transferred elsewhere. The Court implies that this alternative is preferable to pretrial confinement, noting that such a result would occur if the accused were acquitted.

Whether the accused is a flight risk is also pertinent, and the accused's AWOL record must be considered. Counsel should also contend that confinement necessarily interferes with the attorney-client relationship and hinders attempts to communicate with the accused, particularly when civilian counsel is involved. Finally, when both counsel and the accused are presumably aware of the threat to the latter's personal safety, and nevertheless press for his release from confinement, to retain him in pretrial confinement under these circumstances involves governmental paternalism, which is seldom appropriate. If counsel is unsuccessful in obtaining the release of an illegally confined accused, he should

consider filing a writ before the military appellate courts. Counsel are encouraged to call Defense Appellate Division, Branch 4 (Auto 289-2246/ 2247 or (202)-756-2479/2490) for assistance in preparing writs. If the military judge rules that an accused was illegally confined, counsel should urge the court to consider the appellant's illegal confinement and offset part of the accused's sentence. United States v. Lerner, 1 M.J. 371 (CMA 1976).¹⁰

Urging Consideration of Co-Actors' Disparate Sentences

In United States v. Kent, 9 M.J. 836 (AFCMR 1980), the court held that a staff judge advocate's post-trial review must include a discussion of the law pertaining to consideration of disparate sentences between criminal co-actors, where that issue is reasonably raised by competent evidence of record. In United States v. Perkins, 40 CMR 885 (ACMR 1968) and United States v. Capps, 1 M.J. 1184 (AFCMR 1976), the courts held that in the interest of fundamental fairness and justice, it was necessary to consider sentences of confederates in ascertaining the appropriateness of an accused's punishment. The accused is entitled to such consideration if he establishes (1) a direct correlation between the criminal associates and their offenses; (2) the existence of highly disparate sentences; and (3) the absence of cogent reasons justifying that disparity.

In Kent, the court concluded that where the convening authority could find that the Perkins test was met, the staff judge advocate must set forth the law concerning consideration of confederates' sentences as well as the specific facts and extenuation and mitigation evidence introduced in each trial. The court specifically rejected the approach of merely noting the co-accused's sentence, advising the convening authority that he should consider defense counsel's comments on the issue, and concluding with recommendations. When representing a client who receives a sentence significantly more severe than that adjudged for a co-actor, counsel should utilize the Goode review to argue the accused's case for sentence reduction. Initially, counsel should note any failure to advise the convening authority fully as to the law on disparate sentences and the pertinent facts in each case. Second, counsel should set forth the appellant's entitlement to the protections enunciated in Perkins and

10. This motion should be submitted prior to sentencing in a trial with members and after sentencing in a trial by judge alone. This practice eliminates the appearance that the military judge merely increased the sentence he would have normally adjudged in order to eliminate any requirement that he offset the adjudged sentence.

Capps. Third, counsel should set forth specific facts in the record which warrant sentence reduction. If the co-actor was tried by a non-verbatim court, a certified copy of that record should be attached.

Raising the "Abandonment of Office" Defense

An analysis of United States v. Allen, SPCM 14613, 10 M.J. ____ (ACMR 20 Oct. 1980), provides guidance to defense counsel alleging the defense of abandonment of office by officer or NCO personnel when dealing with subordinates.¹¹ In that case, the defense counsel requested alternative instructions on self-defense and abandonment of office. The trial judge declined to give the "abandonment" instruction. The Army Court of Military Review upheld the trial judge's ruling, stating that the accused's testimony establishing self-defense indicated that he did not regard the use of the word "boy" as a racial slur, and that he did not strike the NCO as a result.

The court also concluded that "one would not demean his own race," and that the NCO's expression referred to appellant's youthfulness rather than his race; the appellant was nearly 30 years old at the time of the offense. In this regard, counsel should present evidence establishing that intra-racial use of derogatory remarks is as offensive as the inter-racial use of those terms. This can be accomplished through the accused's testimony, by analyzing his immediate response to the demeaning language or by calling expert witnesses such as race relations officers, or Equal Employment Opportunity Office personnel. An accused is, of course, permitted to plead alternative defenses. Accordingly, when confronted with a problem similar to that in Allen, counsel should argue that if the court disbelieves the accused, the testimony of the victim and other witnesses provides sufficient evidence to raise the issue of abandonment. In Allen, for example, the accused's immediate verbal and physical response to the term "boy," given his race, can circumstantially raise the defense. In support of this contention, counsel should cite United States

11. Allen, a black soldier, was charged, inter alia, with assaulting an NCO in the execution of his office. Allen affirmatively raised self-defense, testifying that the NCO was knocked to the ground by another soldier and that when Allen attempted to help him up, the sergeant hit him. He returned the blow. Allen testified that immediately prior to this incident, the NCO called him a "boy." The NCO, who was also black, testified that in response to a disrespectful answer from Allen, he referred to him as a "boy." The accused then said, "I am not your boy. I'm not your --- boy. I have a wife and kids just like you have." He then hit the NCO.

v. Clark, 22 USCMA 576, 48 CMR 83 (1973). See also United States v. Jackson, 6 M.J. 261 (CMA 1979); United States v. Verdi, 5 M.J. 330 (CMA 1978); United States v. Graves, 1 M.J. 50 (CMA 1975); United States v. Bairos, 18 USCMA 15, 39 CMR 15 (1968); United States v. Evans, 17 USCMA 238, 38 CMR 36 (1967); United States v. Bellamy, 15 USCMA 617, 36 CMR 115 (1966); United States v. Judd, 11 USCMA 164, 28 CMR 388 (1960); and United States v. Hunt, 5 M.J. 804 (AFCMR 1978). These decisions indicate that instructions on lesser-included offenses must be presented if some evidence of record supports such offenses. Neither the quantity or probativeness of such evidence need be sufficient to sustain a finding of guilty as to the lesser charge. Only the possibility of a lesser charge need be raised in order to require an instruction. Since appellate courts recognize that a court-martial can choose to believe some evidence while rejecting other testimony, if a reasonable theory finds support in any of the evidence, the military judge must present appropriate instructions.

USCMA WATCH

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

During September and October, the United States Court of Military Appeals granted petitions for review in approximately 45 cases. Twenty-five of these cases involved issues pertaining to the admissibility of records of nonjudicial punishment administered pursuant to Article 15, Uniform Code of Military Justice [UCMJ]. Following the decisions in United States v. Goodwin, 9 M.J. 216 (CMA 1980), and United States v. Mack, 9 M.J. 300 (CMA 1980), 17 of these 25 cases were affirmed by summary disposition. In fact, the Court summarily disposed of approximately 150 pending cases on the basis of these two decisions. Although it is now clear that a properly completed Department of the Army Form 2627, Record of Nonjudicial Punishment, is admissible during the presentencing stage of the trial, the Court noted in Mack and United States v. Negrone, 9 M.J. 171 (CMA 1980), that an incomplete or illegible record of punishment is inadmissible, except where the omission has been accounted for elsewhere in the form or by independent evidence, United States v. Blair, 10 M.J. 54 (CMA 1980), or is not essential to the validity of the Article 15 proceedings, United States v. Carmans, 10 M.J. 50 (CMA 1980). The Court emphasized this principle in several brief decisions in which it reversed as to sentence and remanded to the Army Court of Military Review (ACMR) for reassessment because the signatures and other essential information on the proffered documents were "indiscernible," "dimly visible," or "badly smudged." The summary dispositions following the Court's decisions in Goodwin, Mack, Negrone, and United States v. Spivey/Turrentine, 10 M.J. 7 (CMA 1980), together with those that followed United States v. Salley, 9 M.J. 189 (CMA 1980) (reasonable doubt instruction), have substantially reduced its pending docket. In addition, no recently granted issues appear likely to generate a large number of "trailer" cases.

GRANTED ISSUES

SEARCH AND SEIZURE: Warrantless Apprehension in Barracks Room

In United States v. Phinizy, CM 438655 (ACMR 30 May 1980), pet. granted, 9 M.J. 421 (CMA 1980), the Court will consider the legality of a warrantless entry into a barracks room in Germany by an Army Criminal Investigation Command (CID) agent; the agent apprehended the appellant shortly after the latter sold cocaine to a confidential informant. A

search of the appellant upon his apprehension disclosed the twenty-dollar bill the informant used to consummate the controlled purchase. The appellant now contends that the CID agent obtained the twenty-dollar bill in contravention of his Fourth Amendment rights, because no exigent circumstances justified the agent's warrantless entry into his room. In resolving this issue, the Court must determine whether a barracks room is a "dwelling place" or "home" within the meaning of the Fourth Amendment. The appellant will urge the Court to apply Payton v. New York, 100 S.Ct. 1371 (1980), where the Supreme Court held that a warrant is generally required to authorize entry into a "home." Although military courts have applied a similar rule to a "private dwelling" in a military setting, they have never clearly declared that a barracks room is a "home" or "dwelling place" for constitutional purposes. United States v. Jamison, 2 M.J. 906 (ACMR 1976); United States v. Davis, 8 M.J. 79 (CMA 1979). The appellant will also urge the Court to apply Payton retroactively and not to apply the doctrine of waiver, as did the Army Court of Military Review in this case. If the Court applies Payton prospectively, the appellant will argue alternatively that the bill was discovered pursuant to an invalid apprehension unsupported by probable cause. The Phinizy case and others involving the application of constitutional safeguards to the military illustrate the need for trial defense counsel to remain aware of how these protections apply and assert them vigorously. Such alertness may avoid possible waiver problems, and stimulate a broader extension of constitutional protections within the military community.

SEARCH AND SEIZURE: Automobile Exception

In United States v. Snoke, SPCM 14378 (ACMR 18 June 1980), pet. granted, 10 M.J. 13 (CMA 1980), the Court will examine the scope of the "automobile exception" to the Fourth Amendment's warrant requirement. The appellant challenges the warrantless search of an opaque plastic bag which contained hashish. The bag, which was located between the front seats of the appellant's automobile, was seized incident to his apprehension. He contends that the automobile exception applies only to a search of the automobile itself and not to luggage or packages contained within the vehicle. See United States v. Chadwick, 433 U.S. 1 (1977) (locked footlocker); Arkansas v. Sanders, 99 S.Ct. 2586 (1979) (unlocked luggage). In rejecting the appellant's argument, the Army Court of Military Review compared the plastic bag to the brown paper bag seized from the trunk of an automobile and searched in United States v. Ross, 27 Crim. L. Rep. (BNA) 2169 (D.C. Cir. 1980). The lower court held that the "general vulnerability to public display of [the bag's] contents" belied any reasonable expectation of privacy the appellant may otherwise have harbored.

SEARCH AND SEIZURE: Probable Cause

United States v. Ochoa, SPCM 14333 (ACMR 16 June 1980), pet. granted, 10 M.J. ____ (CMA 1980), presents the question of whether the commander who authorized appellant's apprehension knew sufficient underlying facts about the alleged offense to satisfy the "basis of knowledge" aspect of the probable cause test. A CID agent advised the unit first sergeant that Specialist Parks had been apprehended and found in possession of LSD; that he had received the LSD from a soldier named Newman; and that Newman told Specialist Parks that he also intended to deliver LSD to the appellant. When he relayed this information to the unit commander, the first sergeant stated only that Parks had been apprehended in possession of LSD and that, according to Parks, the appellant also possessed LSD. No mention was made of the fact that Parks received his information from Newman, and apparently no other underlying facts were disclosed to the commander. The commander knew Parks and considered him "fairly reliable." Based on the first sergeant's report, the commander searched the appellant and discovered the LSD. The appellant contends that the apprehension and subsequent search were illegal because the commander did not have personal knowledge of the factual basis for the informant Parks' allegation. Appellate defense counsel maintain that the basis of the commander's knowledge was insufficient to constitute a reasonable belief that the appellant had committed an offense. In discussing the quantum of proof required to establish probable cause to apprehend, the Army Court of Military Review stated that the authorizing official need only be satisfied of the probability that the apprehended person has committed an offense; he does not have to have enough information to raise a prima facie showing of criminal activity before he can act.

WITNESSES: Denial of Defense Request for Production

The Court will review the denial of a defense request for production of a material witness in United States v. Jefferson, CM 438956 (ACMR 10 July 1980), pet. granted, 10 M.J. ____ (CMA 1980). At trial, the military judge denied the civilian defense counsel's request for a witness who was located in a room near the scene of the alleged rape at the time of the offense, and who would allegedly testify that he was awake during the incident and heard nothing, despite the victim's testimony that she screamed repeatedly. The request was tendered on a Friday afternoon, two days prior to the trial, which was scheduled for the following Monday morning. The defense counsel had not interviewed the witness at the time of the request, and the latter departed Fort Gordon, the situs of the trial, before the request was submitted. The Army Court of Military Review noted that the trial defense counsel's showing of materiality

was deficient; that the request was not made in a timely manner; and that the witness' purported testimony was cumulative with that of two other available witnesses. Appellate defense counsel will argue that the witness request, which was based on a CID synopsis, contained a proper averment of materiality and that even if the requested witness' testimony was cumulative, the military judge abused his discretion, and thereby violated the appellant's rights under Article 46, UCMJ, and the Sixth Amendment. He will also argue that the witness' testimony was more credible than the testimony of other defense witnesses, and that the defense counsel should therefore have been allowed to choose which witness to present. Finally, he will contend that if the denied witness' testimony is both material and noncumulative, the error is of constitutional dimension, and was not harmless beyond a reasonable doubt.

EFFECTIVE ASSISTANCE OF COUNSEL: Ethical Constraints

One of the Court's most interesting grants of review is United States v. Radford, 9 M.J. 769 (AFCMR 1980), pet. granted, 10 M.J. 29 (CMA 1980). In Radford, the appellant was convicted, contrary to his plea, of selling hashish. He took the stand in his own defense on the merits, denied that he had ever sold hashish, and referred to witnesses who would prove his innocence. The testimony consisted only of his own narration and cross-examination; the defense counsel asked no questions. After the appellant's testimony, the military judge conducted an out-of-court session in order to determine whether the appellant had belatedly raised an alibi defense. The defense counsel suggested that the alibi defense was not raised. He told the military judge that if he made an offer of alibi witnesses, he would be remiss in his duties, and asked to be excused from the case. Apparently realizing that the defense counsel believed the appellant's testimony was false and had advised the appellant not to testify, the military judge told him he was not expected to produce the alibi witnesses to whom the appellant referred in his testimony. The defense counsel did not renew his withdrawal request, and continued to represent the appellant throughout the trial.

Appellate defense counsel now contends that the military judge violated the appellant's constitutional and statutory right to effective assistance of counsel by not excusing the defense counsel. The Air Force Court of Military Review disagreed with this position, stating that the accused received a fair trial and was ably defended by a competent, diligent, and ethical counsel. The lower court noted the absence of a request from the accused that his counsel be replaced and the record's failure to indicate any antagonism between the accused and counsel sufficient to require substitution of the latter. The Court must decide whether a

trial defense counsel who is precluded by ethical constraints from aiding testimony he believes to be false, can nevertheless effectively represent his client. This issue is a matter of continuing controversy among legal organizations. The American Bar Association and the American Trial Lawyers Association are preparing new codes of professional responsibility and have endorsed contrary positions on the issue.

* * * * *

Summary of Post-Trial Issues Before the Court

United States v. Titsworth, pet. granted, 9 M.J. 425 (CMA 1980), presents the issue of whether an accused was prejudiced by his defense counsel's failure to comply with the military judge's suggestion that he submit a petition for clemency on the accused's behalf. In United States v. Narine, pet. granted, 10 M.J. ___ (CMA 1980), the Court must determine whether the staff judge advocate violated the provisions of United States v. Goode, 1 M.J. 3 (CMA 1975), when he attached an addendum to the post-trial review addressing new matter and failed to allow the defense counsel an opportunity to review and respond to those additions. Finally, in several recent decisions, the Court delineated the safeguards which are triggered by vacation proceedings conducted pursuant to Article 72(a), UCMJ. See United States v. Bingham, 3 M.J. 119 (CMA 1977); United States v. Rozycki, 3 M.J. 127 (CMA 1977); United States v. Hurd, 7 M.J. 18 (CMA 1979). The Court will reexamine those requirements in United States v. Hawkins, pet. granted, 9 M.J. 401 (CMA 1980), a case it first considered last year. At that time, the Court directed a new Article 72 vacation proceeding because the convening authority failed to comply fully with Bingham and Rozycki. See United States v. Hawkins, 7 M.J. 326 (CMA 1979). The Court must now determine whether its earlier order mandating a new Article 72 vacation proceeding was satisfied by a hearing which was conducted without presence of, or notice to, the appellant or his counsel, and consisted only of ex parte review of exhibits and written summaries of testimony.

* * * * *

REPORTED ARGUMENTS

PRETRIAL AGREEMENTS: "Subsequent Misconduct" Provision

In United States v. Dawson, pet. granted, 9 M.J. 28 (CMA 1980), argued 8 October 1980, the Court considered the legality of the "subsequent misconduct" provision included in many pretrial agreements, and the due process to which an accused is entitled if an act of misconduct

triggers that provision. Private Dawson pleaded guilty pursuant to a pretrial agreement containing a 2-year limitation on confinement. His adjudged sentence included five years of confinement. Because the appellant allegedly committed a drug offense subsequent to the trial, however, the convening authority departed from the terms of the agreement and approved the adjudged sentence. In his rebuttal to the staff judge advocate's post-trial review, the appellant denied that he committed the alleged offense.

During argument, the Court focused on the legality of the subsequent misconduct provision. Appellate defense counsel did not consider the legality issue to be a strong one in view of past decisions, see United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973); United States v. French, 5 M.J. 655 (NCOMR 1978); United States v. Alvarez, 5 M.J. 762 (ACMR 1978). Instead, he emphasized the inadequacy of the due process accorded to the appellant in the post-trial review procedure and in the convening authority's consideration of the post-trial misconduct; he maintained that the subsequent misconduct provision poses a danger of eclipsing the criminal process and should therefore be nullified on policy grounds. Counsel also contended that the convening authority's action was a nullity because he had no statutory authority to disregard the sentence limitation and could not legally create a probationary period between the date of the adjudged sentence and the date of his action.

Several of the Court's questions dealt with the relevance of United States v. Goode, 1 M.J. 3 (CMA 1975). In that case, the Court apparently sanctioned the application of the subsequent misconduct provision without a hearing in the event of a breach by the accused. Appellate defense counsel sought to distinguish Goode by pointing out that that decision addressed the legality question only tangentially and did not contemplate an accused's denial of the misconduct. Counsel noted that the Goode decision provides no mechanism to resolve a factual controversy such as the one in this case. He contended that even if the Court finds the provision enforceable, Private Dawson was not accorded minimum due process safeguards in view of his denial of any wrongdoing. He stood in a position analogous to that of a probationer or a parolee, and he was therefore entitled to protections similar to those mandated in Morrissey v. Brewer, 408 U.S. 539 (1974).

The gravamen of government counsel's argument was that an accused is entitled to bargain away any right he can lawfully waive. He cited numerous instances where the Court recognized ancillary conditions as valid portions of pretrial agreements. He pointed out that the subsequent misconduct provision did not attempt to interfere with or "orchestrate" trial proceedings. With regard to the due process question, he

contended that the actions of the staff judge advocate and the convening authority did not amount to a "hearing" at which constitutional due process standards apply. He analogized the situation in this case to a parole determination proceeding where no due process standards apply, rather than to a parole violation proceeding, where certain safeguards are required. He added, however, that the government's position is that no formalized process is necessary--a conclusion the Court apparently adopted in United States v. Goode, *supra*. He contended that the informal requirements set forth in that decision adequately protect the accused. With respect to this last point, Chief Judge Everett questioned whether the procedures required for an Article 72 vacation proceeding should serve as a model if the Court concludes that the Goode procedures are inadequate. Judge Fletcher was concerned as to what evidentiary standards the convening authority was applying in determining whether the accused was guilty of a subsequent crime and had thereby violated the terms of his agreement. The staff judge advocate had not advised the convening authority whether a reasonable doubt or any other standard was to be used in determining this controverted question of fact.

FOURTH AMENDMENT: Warrantless Apprehension in Private Dwelling

In United States v. Mitchell, 7 M.J. 676 (ACMR 1979), *pet. granted*, 7 M.J. 380 (CMA 1979), argued 15 October 1980, the Court must determine whether a CID agent's warrantless apprehension of a servicemember in a German apartment house violated the Fourth Amendment. After receiving information from an informant, a CID agent arranged a controlled purchase of heroin from the appellant. He completed the transaction at the appellant's apartment, contacted German police, and requested their assistance in effecting the apprehension. Fearing that the appellant would depart before the German police arrived, and that the marked funds might then be lost as evidence, the American agent apprehended the appellant at his apartment. The military judge admitted certain evidence discovered following the apprehension, ruling that exigent circumstances justified the warrantless apprehension.

Appellate defense counsel urged the Court to apply Payton v. New York, 100 S.Ct. 1371 (1980), and find that the warrantless entry into a private dwelling was illegal. The Court asked probing questions concerning the applicability of the NATO Status of Forces Agreement (SOFA) and the attendant supplementary agreements, specifically as to the CID agent's authority to act without German assistance. The Court also manifested concern about whether Payton fully applied in a military setting, especially in an overseas area. Government counsel argued that the apprehension occurred in a public area and that Payton is therefore inapplicable; it is unclear whether the appellant was inside or outside his apartment

when the agent apprehended him. Government counsel also argued that even if Payton did apply, exigent circumstances existed, and that, at any rate, the agent acted in good faith and the exclusionary rule should therefore not apply. The Court expressed skepticism at the viability of this "good faith" exception. Other questions focused on the scope of the arrest power under military law and the privacy interests of service-members in overseas areas vis-a-vis their counterparts in the continental United States.

REFERRAL OF CHARGES: Equal Protection for Officers

In United States v. Means, pet. granted, 8 M.J. 219 (CMA 1980), argued 9 October 1980, the Court reviewed the conviction of an Air Force lieutenant who contends that his case was referred to a general court-martial solely because of his officer status, in violation of his constitutional right to equal protection of the law. After a general court-martial convicted Lieutenant Means of wrongfully possessing small amounts of amphetamines and marijuana, it sentenced him to dismissal and partial forfeitures. The record showed that the Article 32 investigating officer recommended a special court-martial, although all commanders recommended a general court-martial. In his pretrial advice, the staff judge advocate specifically mentioned Lieutenant Means' officer status as one reason for his recommendation that the charges be referred to a general court-martial. The appellant had served in the Air Force for ten years and had no prior convictions or records of nonjudicial punishment in his record. Finally, the defense counsel presented statistical summaries to support his argument that enlisted persons in the same command would have received nonjudicial punishment or trial by special court-martial for offenses analogous to those committed by the appellant. Citing United States v. Batchelder, 99 S.Ct. 2198 (1979), and Olyer v. Boles, 368 U.S. 448 (1962), the defense contended that referral of Lieutenant Means' case to a GCM amounted to selective enforcement based on an arbitrary classification, in violation of his constitutional right to equal protection of the law. Appellant argued further that Congress never intended officers and enlistees to be treated differentially under the UCMJ.

SEARCH AND SEIZURE: Standing

United States v. Cordero, CM 437407 (ACMR 13 Mar 79), pet. granted, 7 M.J. 249 (CMA 1979), first argued on 17 January 1980, was reargued on 15 October 1980. The Court apparently withheld its decision in this case until the United States Supreme Court clarified the status of the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960). The Cordero decision involves the admissibility of a plastic bag of

marijuana seized from beneath the front passenger seat of an automobile in which the appellant was a passenger. At trial, the military judge denied a defense motion to suppress because the accused lacked standing to contest the search and seizure. The appellate defense counsel contended that the appellant possessed standing. Most of the Court's questions on this point concerned the effect of United States v. Salvucci, 100 S.Ct. 2547 (1980), and whether the appellant had an expectation of privacy in the seized evidence. The defense counsel further contended that the appellant's commander could not authorize a search of the vehicle because he was not "neutral and detached." The record shows that he contacted the CID about information an informant had conveyed to him, and he escorted the informant to the CID office for an interview. The Court was concerned about the impact of United States v. Ezell, 6 M.J. 307 (CMA 1979), which was published after the authorities' actions in this case. The Court's latest guidance on the "neutral and detached" requirement imposed upon commanders who authorize searches is set forth in United States v. Rivera, 10 M.J. 55 (CMA 1980), which was published after oral argument in this case.

JURISDICTION: National Guardsmen

The issues involved in United States v. Self, 8 M.J. 519 (ACMR 1979), pet. granted, 8 M.J. 136 (CMA 1979), argued 13 November 1980, were described in a previous USCMA Watch feature, see 12 The Advocate 31 (1980). Basically, the case presents the question of whether the government possessed authority to retain Private Self, a North Carolina National Guardsman, beyond the expiration date of his obligated period of active duty for purposes of criminal investigation and prosecution. Private Self was on active duty pursuant to self-executing orders issued by the North Carolina National Guard. The alleged offenses of wrongfully burning an automobile and false swearing occurred on 1 and 3 November 1977. On 11 November 1977, the Army CID identified the appellant as a potential suspect. He was interrogated on 16 November and was "flagged" on 18 November, the day his term of active duty was to terminate. Court-martial charges were not preferred until 16 February 1978. Acting on the basis of United States v. Peel, 4 M.J. 28 (CMA 1977), and at the request of Army authorities, the North Carolina National Guard subsequently issued amending orders authorizing Private Self's retention on active duty for court-martial purposes.

Relying on 10 U.S.C. §672(d), as well as United States v. Peel, supra, and United States v. Hudson, 5 M.J. 413 (CMA 1978), appellate defense counsel contended that the government failed to establish in personam jurisdiction over Private Self. He argued that the proper sovereign, the State of North Carolina, did not exercise jurisdiction

in a timely manner, since the State did not affirmatively authorize the appellant's retention prior to the termination date set by the self-executing orders. He also contended that the Army's attempt to "flag" Private Self could not override the orders. The Court asked defense counsel what official action would have authorized the retention of the appellant. He responded that neither preferral of charges nor pretrial confinement are sufficient, although he conceded that telephonic authorization from the State prior to the termination date probably would have been enough. He argued further that even if the State gave its express consent, para. 11d, MCM, 1969, did not authorize retention solely for purposes of a CID investigation. Chief Judge Everett questioned whether the State contemplated that the appellant could be retained beyond his expiration date if he was the subject of ongoing criminal investigation and impliedly consented to retention for that purpose when it issued the self-executing orders. The government counsel focused on his contention that the flagging action amounted to "commencement of action with a view toward trial" under the provisions of paragraph 11d, MCM, 1969. He maintained that the investigation had focused on Private Self by 16 November, the date of his visit to the CID office, and that the appellant knew he was a suspect. The defense counsel rebutted that even if this was true, the State did not expressly consent to the appellant's retention prior to his expiration date.

RIGHT TO COUNSEL: Interrogation

The case of United States v. Fox, 8 M.J. 526 (ACMR 1979), pet. granted, 8 M.J. 220 (CMA 1980), presents the question of whether admissions uttered during a casual conversation between the appellant and a CID agent could be suppressed on the basis of the Fifth and Sixth Amendments and Articles 27 and 31, UCMJ. The granted issue concerns the appellant's alleged theft of a pistol in November 1978. When he was first questioned by the CID about the theft, the appellant had been assigned a defense counsel as a result of other charges pending against him. He told the agent that he did not want to talk about the pistol until he had consulted with his lawyer. The agent subsequently learned of these pending charges and sought out the appellant in his unit's recreation room. The appellant reasserted his desire to see a lawyer. Thereafter the agent engaged him in casual conversation and eventually obtained admissions concerning the theft. Citing United States v. Dowell, 10 M.J. 36 (CMA 1980), the defense counsel focused on the right to counsel argument, pointing out that the appellant repeatedly asserted his desire to consult with a lawyer. The government counsel distinguished Dowell on the basis that it involved a custodial interrogation. He argued that the agent never conducted an interrogation or the functional equivalent thereof, and that the admissions were voluntarily and spontaneously made. He maintained that although an accused has asserted his right to

counsel, a CID agent can ask him later if he has seen a lawyer or if he still desires to assert the right. One fact that undermined appellant's right to counsel argument in this case was the absence of an affirmative showing at trial that the appellant had established an attorney-client relationship concerning the theft offense. The record suggests that the appellant never talked to an attorney before he made his admissions. In future cases, trial defense counsel should insure that the record clearly shows the existence of any attorney-client relationship.

CHAIN OF CUSTODY: Sufficiency

Soon after its decision in United States v. Courts, 9 M.J. 285 (CMA 1980), the Court of Military Appeals heard argument on 18 November 1980 in the case of United States v. Parker, CM 437794 (ACMR 12 December 1979) (unpub.), pet. granted, 9 M.J. 18 (CMA 1980). As in Courts, the Court confronts an issue involving sufficiency of proof of a chain of custody over marijuana seized from the appellant. The Court must also consider whether to apply retroactively the decisions in United States v. Neutze, 7 M.J. 30 (CMA 1979), and United States v. Porter, 7 M.J. 32 (CMA 1979), which held that the Army chain of custody form (Department of the Army Form 4137) is prepared for the purposes of prosecution and is inadmissible hearsay. The conflict in Parker centered around the handling of a backpack and its contents, which were seized from an automobile in which the appellant was a passenger during a gate search at an American military installation in Germany. Authorities found four chunks of suspected hashish inside the backpack. At trial, the government presented testimony from all links in the chain except one. The military judge admitted the DA Form 4137, without defense objection, and the laboratory report concerning the hashish. Although witnesses identified the backpack and the hashish, they did not refer to any identifiable features on the backpack or the contraband itself; the seized items were not placed in sealed evidence bags until after the gap in the chain of custody.

The defense counsel distinguished Courts on the basis that the hashish in Parker was "fungible" evidence. It was not specially packaged or marked, and the witnesses only testified that it "looked similar" to the contraband initially seized. He argued that the Court should therefore apply the rule of United States v. Nault, 4 M.J. 318 (CMA 1978), which imposed strict tracing requirements on the prosecution in drug cases. The defense counsel also cited the possibility of tampering, and noted that field tests were not conducted before and after the gap in the chain of custody. Government counsel argued that Courts is controlling. He asserted that the evidence was not fungible because it was in a readily identifiable container. Furthermore, since there was no substantive change in the condition of the evidence between seizure and testing,

the Court should presume regularity in the official handling of the items. Judge Fletcher showed interest in how the Court should determine whether evidence is fungible. His questions highlight the comparatively strict foundational requirements applied to fungible, as opposed to nonfungible evidence. Trial defense counsel must be continuously alert to this development and urge the military judge to apply the stricter standard of admissibility. Evidence of tampering will strengthen the defense case, as will proof that the evidence was not specially marked or packaged. Moreover, counsel should emphasize the importance of safeguarding the integrity of fungible evidence prior to testing.

ARTICLE 31 RIGHTS: Applicability

In United States v. Lloyd, SPCM 14287 (ACMR 17 April 1980) (unpub.), pet. granted, 9 M.J. 251 (CMA 1980), argued 10 November 1980, the Court must determine whether the appellant's relinquishment of his military ID card, without a prior Article 31, UCMJ, rights advisement, violated that article and thereby tainted his subsequent confession to ration control violations. After reporting the loss of his ID card and ration control plate to authorities in Korea, the appellant was issued replacements. Records of purchases made with the old plate and apparently signed by the appellant later began to appear, and the unit commander investigated the ration control violations. He called in the appellant, asked to see his ID card, and compared the signature thereon with the signatures on the purchase slips. After concluding that someone forged the appellant's signature on the purchase slips, he escorted the appellant to the local CID office. An agent conducted another signature comparison, and noted that the appellant had tendered the card he had previously reported as lost. The appellant later confessed that he filed a false report.

The principal arguments centered around the questions of whether the appellant was a suspect when he went to the CID office with his commander and whether Article 31 applies to the physical act of turning over the ID card. The defense counsel contended that under the circumstances, the appellant was a suspect, and his act of relinquishing the card was a verbal act within Article 31's ambit. The government counsel maintained that the appellant was merely a custodian of his ID card and had a duty to surrender it on demand by proper authority. He also emphasized that the appellant's confession was introduced by trial counsel not during his case-in-chief, but in rebuttal, to counter defense evidence that the appellant had lost his ID card. He argued further that any causal connection between failure to advise the appellant of his rights before he surrendered his ID card and his subsequent confession was attenuated because he was warned of his rights before he confessed.

REVIEW OF COURTS-MARTIAL: Certified Questions

The Court of Military Appeals in United States v. Leslie, 9 M.J. 646, cert. filed, 9 M.J. 67, motion to dismiss cert. filed 11 June 1980, argued 9 December 1980, will consider a preliminary motion to dismiss a question certified by the Navy Judge Advocate General. One judge on the Navy Court of Military Review opined that the case must be set aside because of a fatal variance between the charge and the proof. A second judge, while concurring in that result, found insufficient evidence to support the conviction, but identified no variance. The third judge found neither variance nor insufficiency of proof. The appellate defense counsel argued that since the holding did not rest upon an error of law, there was no justiciable issue within the court's mandate. Argument was largely based on Article 67(d), UCMJ, which states in part, "the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review." Since there was no majority holding setting the case aside as incorrect in law, the certified question should be dismissed.

The defense further argued that in the absence of an appealable majority opinion, any decision by the Court would be advisory, and no statutory provision authorizes an Article I court to render advisory opinions. The government appellate counsel countered that under Article 67(b), the Court is required to review the record in all cases which The Judge Advocate General certifies, since he is exercising a statutory prerogative when he certifies a question to the Court; pursuant to statutory directive, the Court must review all such cases, and has no authority to dismiss a certified question. The government was unwilling to assert that The Judge Advocate General's power in this regard amounted to a "carte blanche," but argued that since the statutory language was mandatory, the Court could not dismiss. Both Chief Judge Everett and Judge Fletcher queried counsel as to the Court's obligations with regard to a certified question containing no issue of law. Since the language directing review was mandatory and the language authorizing the Court to act was precatory, is the Court under any obligation to answer a certified question which contained no justiciable issues? Defense counsel opined that the Court was under no such obligation.

INSTRUCTIONS: Lesser Included Offenses

In United States v. Waldron, 9 M.J. 811, cert. filed, 9 M.J. 211, motion to dismiss cert. denied, 9 M.J. 423, argued 9 December 1980, the Court will decide a question certified to the Court by The Judge Advocate General of the Navy. The appellant was charged with murder; the sole

issue was whether he acted in self-defense. Over defense objection, the judge instructed the jury on lesser-included offenses, including aggravated assault. The appellant was convicted of voluntary manslaughter. During the panel's deliberation on sentence, they returned to open court and requested instructions on reconsideration and lesser-included offenses. Over defense objection, the judge reinstructed the panel on the assault offenses. The members returned with a finding of guilty of assault by intentionally inflicting grievous bodily harm. The Navy Court of Military Review set aside the findings and sentence and dismissed the charge based on the improper instruction on lesser-included offenses not reasonably raised by the evidence. In their final briefs, government appellate counsel virtually conceded the certified question and in oral argument addressed the issue of the instructions on reconsideration. Appellate defense counsel argued that the policy of discouraging compromise verdicts compelled the result reached by the lower court. The appellant was entitled to an "all or nothing" verdict on the issue of self-defense. By instructing the members on lesser-included offenses, the judge encouraged a compromise verdict. On questioning by the Court, the government appellate counsel was unable to cite a single federal or state case ruling that such instructions were proper.

SEARCH AND SEIZURE: Probable Cause

In United States v. Sanchez, pet. granted, 8 M.J. 100 (CMA 1979), argued 10 December 1980, the Court will decide whether a platoon sergeant had probable cause to seize a small pipe which the accused was attempting to light. The pipe had a metallic bowl and a wooden stem, and a laboratory report indicated that it contained marijuana residue. The appellant reasserted his argument at trial, contending that the sergeant only "figured" that the pipe was being used for marijuana and that it was not contraband subject to seizure. After counsel for the government stated that the seizure could be upheld as either incident to an apprehension or based on probable cause, both Chief Judge Everett and Judge Fletcher questioned whether the government was assuming a heavier burden by arguing that a lawful apprehension had occurred. Counsel for both sides cited cases where courts had ruled on seizures of unique pipes, hand-rolled cigarettes, tin-foil packets, and other drug paraphernalia. Because the record did not establish whether the possession or use of the pipe would be proscribed as drug paraphernalia under command regulations, the Court requested the parties to submit supplemental pleadings.

WITNESSES: Request for Production

Does a court-martial have the power to subpoena a civilian residing in the United States and compel her attendance at a trial in a foreign country? That was the claim of the defense in United States v. Roberts, pet. granted, 9 M.J. 122 (CMA 1980), argued on 10 December 1980. The accused was convicted of cutting his wife during a marital squabble. She left Germany for the United States and refused to return for the trial or submit to a deposition. The trial judge denied the defense request to produce the victim, change the venue to the United States, or abate the proceedings. Counsel for the accused distinguished United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974), where the requested material witness-victim was in a foreign country; he also argued that the plain meaning of Article 46, UCMJ, is that a court-martial subpoena "shall run to any part of the United States"; that the failure to produce the witness denied the accused his Sixth Amendment rights to compel the attendance of witnesses; and that the government failed to carry its heavy burden on this issue as enunciated most recently by the Supreme Court in Ohio v. Roberts, 100 S.Ct. 2531 (1980) and applied in United States v. Vietor, 10 M.J. 69 (CMA 1980), decided only two days before oral argument. Counsel for the government contended that the witness was not material because the defense never made an offer of proof and the only indication at trial was that her testimony would be unfavorable, and that the good faith efforts made to obtain her appearance satisfied the requirements of Roberts and Vietor. Both sides acknowledged that the Court could rule in their favor without reaching the extraterritorial effect of a military subpoena.

CLOSING ARGUMENT: Comments on Post-Arrest Silence

In United States v. Philpot, SPCM 13925, pet. granted, 9 M.J. 138 (CMA 1980), argued 10 December 1980, the granted issue was whether the appellant was prejudiced by the government counsel's repeated questions and comments concerning his post-apprehension silence. During oral argument, Chief Judge Everett was apparently concerned about whether the record demonstrated that the appellant, after he had been properly advised of his rights and had answered some initial questions, thereafter invoked his right to remain silent. The government appellate counsel argued that the appellant gave two different versions of the facts, never invoked his right to refuse to answer further questions, and could therefore properly be impeached. The defense's position was that the appellant's pretrial statements were contradictory to his testimony at trial; however, the record demonstrates that the appellant properly invoked his right to refuse to answer further questions. The Army Court of Military Review did not make a finding of fact as to whether the appellant had invoked his rights. The government conceded that if the Court found that the appellant had invoked his rights, the trial counsel's comment thereon was

improper. The appellant maintained that the record of trial clearly demonstrated that after initially waiving his right to remain silent, he asserted that right by refusing to answer further questions. The appellant's revocation of waiver therefore could not be commented upon or used to impeach him. See Doyle v. Ohio, 426 U.S. 610 (1976). Further, the defense contended that whether the waiver was revoked or not, para. 140a(4), MCM, 1969, governs comments on post-arrest silence or refusal to answer questions, and Anderson v. Charles, 100 S.Ct. 2180 (1980) is therefore inapplicable.

RIGHT TO COUNSEL: Multiple Representation

SENTENCING ARGUMENT: Comment on Accused's Unsworn Statements

Two issues of interest for trial defense counsel were presented to the court in United States v. Breese, AFCMR 22524, pet. granted, 9 M.J. 18 (CMA 1980), argued 10 December 1980. The first involves representation of multiple accused by the same defense counsel. The second pertains to the presentation of an unsworn statement by the accused during sentencing. The appellant and co-accused were arraigned together and both plead guilty. Each was then sentenced in separate hearings. The appellant received three years and six months at hard labor. The co-accused received, inter alia, two years of confinement at hard labor. On appeal, the appellant contended that the military judge erred by failing to advise the appellant of his right to conflict-free counsel. See United States v. Davis, 3 M.J. 430 (CMA 1977). An accused cannot waive this right unless he is properly informed as to the risk of divided loyalty inherent in a single attorney's representation of several accused. The government countered that Davis required a showing of actual conflict of interest. Since nothing in the record indicated a conflict, there was no requirement for the military judge to engage in a colloquy with the accused. Both Judges Everett and Fletcher were particularly interested in the variances between the adjudged sentences. The second issue confronting the court stems from the fact that, during the sentencing portion of the trial the appellant made an unsworn statement as authorized by para. 75c(2), MCM, 1969. Over defense objection, the trial counsel stated in his sentencing argument that in assessing the accused's credibility, the jury should remember that everyone other than the accused had taken an oath to tell the truth. Appellate counsel argued that the fact that the accused exercised a statutory right by making an unsworn statement should not of itself be the basis of an inference to the court members that he was lying. The government counsel contended that the prosecutor's comment went to the weight that should be accorded the accused's unsworn statement and did not raise any inference based on his failure to submit to cross-examination, or to present additional evidence.

SPEEDY TRIAL: Violation of Administratively Imposed Deadlines

In United States v. McGraner, AFCMR 24687, pet. granted, 8 M.J. 126 (CMA 1979), argued 10 December 1980, the court will address the issue of whether administrative regulations mandating time standards to dispose of cases accord a benefit to an accused. In this case, the accused moved to dismiss all charges and specifications since the government failed to prosecute in a timely manner. See United States v. Dunks, 1 M.J. 254 (CMA 1976). The appellant contended that the government violated time schedules set forth in Air Force Manual 111-1. The military judge denied the defense motion on the ground that "the regulation confers no benefit upon the accused and he has no standing to raise that regulation." Appellate defense counsel argued that Dettinger v. United States, 7 M.J. 216 (CMA 1979), and Dunks, supra, resolved this question in favor of the appellant. Counsel relied on Dettinger, which stated in part that "an accused, whose case is handled by the Government in a way contrary to the prescribed provision on disposition, can raise the matter at trial; and, the judge can grant such relief as is appropriate," Dettinger, supra at 224. The government argued that Judge Cook's comments in Dettinger were dicta, and that only those regulations which protect an accused's rights give him standing. Government counsel distinguished Dunks from this case on the grounds that the USAREUER supplement to AR 27-10 (45 day rule) considered in Dunks did confer to an accused the benefit of an administrative speedy trial right. Since the time standards in Air Force Manual 111-1 were no more than internal management guidelines, the Manual in question did not have as its underlying purpose the protection of the accused's rights. The accused therefore lacked standing to complain about the government's failure to comply with its regulations. In oral argument before the Court, the government relied heavily on United States v. Caceres, 440 U.S. 741 (1979), a case involving a defendant convicted of bribing an IRS agent. In Caceres, the Supreme Court refused to exclude evidence obtained by electronic surveillance in violation of an IRS regulation that required prior IRS authorization of electronic surveillance.

* * * * *

The United States Court of Military Appeals has indicated that it will not rotely apply precedent in order to reach results which do not reflect the individual philosophies of the judges who currently compose that tribunal. Two recent examples of this apparent willingness to re-examine particular issues are United States v. Armstrong, 9 M.J. 374 (CMA 1980) (involuntary blood tests may be beyond the ambit of Article 31, UCMJ) and United States v. Trottier, 9 M.J. 337 (CMA 1980) (expansion of court-martial jurisdiction over off-post drug offenses). Chief Judge Everett implicitly invited review of similar issues when he stated in

Trottier that it "is not unreasonable for an appellate court to be asked from time to time to reexamine an important decision widely affecting the court system which it supervises." The Government is responding to the Court's amenability to reexamine far-reaching legal questions by filing certificates for review on several issues, including the burden of proof on exceptions to regulations, see United States v. Cuffee, Certificate for Review filed, 8 M.J. 227 (CMA 1980); providency inquiries, see United States v. Steck, Certificate for Review filed, 8 M.J. 269 (CMA 1980); and court-martial jurisdiction to try a soldier for an offense occurring during his prior enlistment when he was discharged solely for the purpose of reenlistment, see United States v. Clardy, Certificate for Review filed, 10 M.J. ___ (CMA 20 Nov. 1980). Trial defense counsel should be aware of this apparent willingness to modify -- or in some cases overrule -- long-standing precedent, and should not hesitate to litigate meritorious issues which do not enjoy the unqualified support of the current Court, receive different treatment in civilian courts, or require a "change" under current constitutional standards.

CASE NOTES

Synopsis of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

PUNISHABLE OFFENSES: Communication of a Threat

United States v. Macias, NCM 79-1378 (NCMR 29 Sep. 1980) (unpub.).
(ADC: LCDR Haskel, USN)

The appellant was convicted, *inter alia*, of communicating a threat. The evidence adduced at trial established that he approached an individual who had earlier observed him assault a female with a knife, and told him, "you better not say I assaulted the girl." This alleged threat occurred in the hallway of the battalion headquarters, where the marine was waiting to be interviewed as a witness to the assault. The Navy Court of Military Review held that the statement was, at most, a conditional warning of unspecified consequences, not necessarily including any injury to the person, property, or reputation of the alleged victim, as required under Article 134, Uniform Code of Military Justice [hereinafter UCMJ]. See paragraph 213f(10), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969]. The court likewise found that the statement failed to sustain a conviction for the lesser included offense of using provoking words, punishable under Article 117, UCMJ.

EXTRAORDINARY RELIEF: Review of Sentence SENTENCE: Powers of Military Judge

Gragg v. United States, 10 M.J. ____ (NCMR 4 Nov. 1980).
(ADC: LT Fayle, USN)

Although the appellant had not been illegally confined, the military judge directed the convening authority to grant credit for the period of pretrial confinement served. In his post-trial review, the staff judge advocate opined that this order was without precedent and that no credit need be extended. The convening authority approved the adjudged sentence. The petitioner sought enforcement of the trial judge's order and release from confinement in a petition for extraordinary relief. The Navy Court of Military Review acknowledged its authority to entertain the petition, see Dettinger v. United States, 7 M.J. 216 (CMA 1979), but declined to issue a writ of habeas corpus. Recognizing that a military judge may make sentence recommendations, see paragraph 77a,

MCM, 1969, and order day-for-day credit for illegal pretrial confinement, see United States v. Larner, 1 M.J. 371 (CMA 1976), the court nevertheless determined that because a military judge possesses no authority to "execute" a sentence or enter a "judgment of conviction,"* see United States v. Occhi, 2 M.J. 60 (CMA 1976), and United States v. Marshall, 2 USCMA 342, 8 CMR 142 (1953), his order to apply confinement credit was a nullity. The court denied the requested relief, observing that any issue pertaining to the military judge's possible impeachment of his sentence could be resolved through normal appellate procedures and was not so extraordinary as to require a writ of habeas corpus. On 25 November 1980, the United States Court of Military Appeals, in a summary disposition, granted Gragg's appeal from the lower court's decision and ordered that Gragg be released from confinement. Gragg v. United States, 10 M.J. ____ (CMA 1980). An opinion of the Court is to be issued and Judge Cook will file a dissent. Accordingly, trial defense counsel should request the military judge to order sentence credit for "legal" pretrial confinement in appropriate cases, e.g., after challenge, the trial judge rules the confinement was lawful, but questionable governmental practices were present.

EVIDENCE: Nonjudicial Punishment

United States v. Thomas, NCM 79-0006 (NCMR 16 Oct. 1980) (unpub.).
(ADC: LT Durbin, USNR)

At trial, two records of nonjudicial punishment were admitted into evidence against the appellant. The appellant argued that he had been improperly denied his right to demand trial by court-martial, although an accused offered nonjudicial punishment while attached or embarked on a vessel cannot demand trial by court-martial in lieu of such punishment. See Article 15(a), UCMJ. In this case, the "vessel" in question, a commissioned Navy ship, was a floating dry dock with no means of propulsion. Appellate counsel argued that such a "ship" does not fall within the meaning of the term "vessel" as defined by 1 U.S.C. §93 (1976). Relying upon its previous decision in United States v. Forester, 8 M.J. 560 (NCMR 1979), the Navy Court of Military Review held that all commissioned Navy ships are "vessels" within the meaning of Article 15, UCMJ.

*That authority is reposed only in a convening authority and the Courts of Military Review. See United States v. Stene, 7 USCMA 277, 22 CMR 67 (1956); Articles 64, 65, and 66, UCMJ.

PUNISHABLE OFFENSES: Resisting Apprehension

United States v. Rodriguez, CM 439213 (ACMR 9 Oct. 1980) (unpub.).
(ADC: MAJ Carden)

At trial, the appellant was convicted, inter alia, of resisting apprehension by a German civilian policeman, in violation of Article 95, UCMJ. The Army Court of Military Review agreed with the appellant's contention that resisting a civilian policeman's attempt to apprehend is not cognizable under Article 95, UCMJ, although it may be an offense under Article 134, UCMJ. See United States v. Hunt, 18 CMR 498 (AFBR 1954). Because the questions of prejudice to discipline or the service-discrediting nature of the resistance were not addressed at trial, the appellant's conviction could not be sustained under Article 134, UCMJ. See United States v. Bralaski, 50 CMR 310 (ACMR 1975).

DEFENSES: Divestiture of Office

United States v. Allen, 10 M.J. ____ (ACMR 20 Oct. 1980).
(ADC: CPT Wheeler)

The appellant was tried and convicted of assaulting a noncommissioned officer, disobeying a noncommissioned officer, and being disorderly in camp. At trial, the defense requested the military judge to instruct the court members that the noncommissioned officer's use of the word "boy" when speaking to the appellant just prior to the assault constitutes a defense to assaulting a noncommissioned officer in the performance of his duties. Both the appellant and the noncommissioned officer were black. The military judge found that the evidence at trial did not warrant the requested instruction. The Army Court of Military Review determined that a reviewing tribunal must address two questions when resolving issues involving possible divestiture of one's status as a commissioned or noncommissioned officer: (1) whether the superior by his words or actions stepped outside his position; and (2) whether his conduct initiated or provoked the offense. In this case, the court found that although the use of the word "boy", when intended as a racial slur, can divest a superior of his protected status, see, e.g., United States v. Richardson, 7 M.J. 320 (CMA 1979), and United States v. Johnson, 43 CMR 604 (ACMR 1969), pet. denied, 20 USCA 667, 43 CMR 413 (1970), the appellant regarded the use of the term as at most a slur against his manhood; thus, he could not claim that it unduly angered or provoked him. The "Side Bar" section of this issue discusses problems associated with raising the abandonment of office defense.

EVIDENCE: Disclosure to Accused

United States v. Kilmer, 10 M.J. ____ (NCFM 31 Oct. 1979).
(ADC: LCDR Haskel, USN)

An informant testified against the appellant in a trial for wrongfully possessing, transferring, and selling marijuana. After each drug transaction between the informant and the appellant, the informant returned to the Office of the Naval Investigation Service (NIS), where an NIS agent interviewed him after preparing written outlines of pertinent facts including names, time sequences, and building numbers. The NIS agent verified the accuracy of these outlines, and prepared narrative statements from them, which the informant would sign under oath. The defense counsel unsuccessfully moved for the production of the outlines under the Jencks Act, 18 U.S.C. §3500 (1976), as applied to the military in United States v. Albo, 22 USCMA 30, 46 CMR 30 (1972). The Navy Court of Military Review held that any written recorded observation transferred to a government agent for the purpose of interpreting information, and simultaneously verified by its author, is a "statement" within the meaning of the Jencks Act. Although the "good faith" destruction of such statements is sometimes excusable, see Killion v. United States, 368 U.S. 231 (1961), in this case the government did not show that the outlines were destroyed prior to the decision to prosecute the appellant, or pursuant to a routine administrative practice. See United States v. Jarrie, 5 M.J. 193 (CMA 1978). The court therefore held that the destruction was improper. Because only the appellant and his counsel may decide whether such statements are useful for impeachment purposes, see United States v. Dixon, 8 M.J. 149 (CMA 1979), and because the absence of the statements precluded the appellate court from assessing possible prejudice, the informant's testimony could not be considered in weighing the factual sufficiency of the evidence.

COURTS-MARTIAL: Composition

United States v. Burke, CM 439497 (ACMR 4 Dec. 1980) (unpub.).
(ADC: MAJ Johnson)

Two of the members detailed to serve on the appellant's court-martial were specialists four, a rank junior to the accused, who was a corporal. The defense counsel challenged the failure to comply with the provisions of Article 25(d), UCMJ, when he responded to the post-trial review in accordance with United States v. Goode, 1 M.J. 3 (CMA 1975). Although the appellate defense counsel alleged that the error was jurisdictional, the Army Court of Military Review opined that the alleged defect simply constituted a basis for trial challenge of the court members. See

paragraph 62f(13), MCM, 1969. Because counsel did not do so, it was not error for the two members to participate in the proceedings. See United States v. Branford, 2 CMR 489 (ABR 1951), and United States v. Aho, 8 M.J. 236 (CMA 1980) (defect in composition of court must be raised at trial).

SEARCH AND SEIZURE: Scope

United States v. Miller, NCM 80-0024 (NCMR 31 Oct. 1980).
(ADC: LCDR Haskell, USN)

A reliable informant notified the first sergeant of a Marine unit that the appellant, a staff sergeant, and two other soldiers, both lance corporals, were involved in the possession, transfer, and sale of marijuana in a specific barracks room. The first sergeant reported these facts to the unit commander, who in turn relayed them to the battalion commander. The battalion commander authorized a search of the barracks room. One of the lance corporals was advised of his rights and consented to a search of his wall locker and other areas within the room. This search uncovered a quantity of marijuana and hashish. Soon thereafter, the first sergeant administered proper rights warnings to the other lance corporal and received permission to search his portion of the room and his automobile. During their search of the car, the apprehending officers found a field jacket bearing a staff sergeant's rank chevrons; the jacket contained approximately 20 grams of marijuana. The Navy Court of Military Review found that, under these facts, the first sergeant had no authority to search the jacket, which obviously did not belong to the owner of the searched car. This search exceeded the granted authority, and the fruits of the search were therefore inadmissible.

SEARCH AND SEIZURE: Gate Searches

United States v. Zachary, 10 M.J. ____ (ACMR 24 Nov. 1980)
(ADC: CPT Wheeler)

Over his objection, the appellant was searched as he exited his unit compound in Korea. An inspection of the bag he was carrying uncovered several envelopes containing 493 grams of marijuana. The appellant was subsequently convicted, inter alia, of possessing this contraband. The search was conducted pursuant to a standardized procedure whereby the possessions of all personnel except those in the grade of E-9 or O-4 and above were searched upon entry to and exit from the compound. In resolving the legality of the search, the Army Court of Military Review held that the "border search" exception to the Fourth Amendment warrant requirement as set forth in Boyd v. United States, 116 U.S. 616 (1886),

*This case is currently pending before the Court of Military Appeals, see United States v. Miller, Certificate for Review filed, 10 M.J. 119 (CMA 18 Nov. 1980).

and adopted in United States v. Rivera, 4 M.J. 215 (CMA 1978), applies to searches of persons exiting, as well as entering, overseas military installations. Cf. United States v. Swarorski, 592 F.2d 131 (2d Cir. 1979); United States v. Stanley, 545 F.2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978) (both applying border search exception to incoming and outgoing border crossings).

SEARCHES AND SEIZURES: Inspections

United States v. Mitchell, SPCM 15060 (ACMR 25 Nov. 1980) (unpub.). (ADC: MAJ Clark)

The appellant's commander conducted an unannounced "health and welfare" inspection of the unit barracks at 0330 hours. The purpose of the inspection was to assess the accountability and serviceability of clothing, to search for prohibited items, to inspect the condition of the barracks and furniture, and to identify spoiled food, roaches, and mildewed uniforms. A narcotics detection dog was used. During the inspection of the appellant's room, the dog's handler discovered several partially burned marijuana cigarettes. On appeal, the government conceded that no probable cause existed for any search, but maintained that the commander executed a legitimate inspection. The Army Court of Military Review, however, determined that the early hour of the inspection and the use of the dog clearly showed that the inspection was a subterfuge for a general and unreasonable search for narcotics. Relying upon United States v. Roberts, 2 M.J. 31 (CMA 1976), the Court found this artifice to be impermissible under the Fourth Amendment. See also United States v. Thomas, 1 M.J. 397 (CMA 1976); Mil. R. Evid. 313(b).

PRESENTENCING EVIDENCE: Civilian Conviction

United States v. Ring, CM 439800 (ACMR 25 Nov. 1980) (unpub.). (ADC: CPT Moriarty)

During sentencing proceedings, the military judge admitted, without defense objection, a prosecution exhibit reflecting the appellant's preservice conviction by an Illinois court for larceny of an amount less than \$150.00. The Army Court of Military Review agreed with the appellant's assertion that the introduction of the document was improper, but found that its admission was harmless, and affirmed the sentence. The Court held that a record of civilian conviction is admissible (1) when the record is properly included in the accused's personnel records, see United States v. Krewson, 8 M.J. 663 (ACMR 1979), and paragraph 75d, MCM, 1969; and (2) when the documented conviction involves moral turpitude or otherwise affects the accused's credibility, and is admitted

solely for impeachment purposes, see United States v. Cobb, 9 M.J. 786 (ACMR 1980) and paragraph 138g, MCM, 1969. The court determined that neither requirement was met in this case, and that because the record was inadmissible as evidence, it should have been excluded even in the absence of a defense objection. See United States v. Negrone, 9 M.J. 171 (CMA 1980). But see Mil. R. Evid. 103 (error waived unless defense counsel lodges timely objection).

TRIAL: Continuance

United States v. Garcia, 10 M.J. ___ (ACMR 8 Dec. 1980).
(ADC: CPT Moriarty)

The Army Court of Military Review held that the military judge did not err by failing to determine whether the accused intended to assert his right to be tried no sooner than five days following service of charges. See para. 44h, MCM, 1969; Article 35, UCMJ. After reviewing and discussing the legislative history of Article 35, UCMJ, the court concluded that the provision was not a per se bar to trial, but served instead to protect an accused from being tried without adequate preparation. The court also concluded that the right to a continuance on this basis is waived absent a specific defense motion or objection. See United States v. Lumbus, 48 CMR 613 (ACMR 1974). The court also departed from its prior conclusion that "unless waived by [a] knowing refusal to object, the provisions of [Article 35] are both mandatory and absolute," see United States v. Pergande, 49 CMR 28, 32 (ACMR 1974), citing, United States v. Simpson, 16 USCMA 137, 36 CMR 293 (1966), United States v. Tibbs, 15 USCMA 350, 35 CMR 322 (1965). See also United States v. Oliphant, 50 CMR 29, 30 (NCOMR 1974). The court regarded this prior language as dicta and did not impose upon the military judge the duty to establish a "knowing refusal to object" on the record.

WITNESS: Testimonial Immunity

United States v. Gonzalez, CM 439294 (ACMR 28 Nov. 1980) (unpub.).
(ADC: MAJ Johnson)

The appellant was convicted of stealing an automobile. He testified that the owner delivered it to him in furtherance of a scheme to submit a fraudulent insurance claim. Prior to trial, the appellant unsuccessfully requested that the convening authority "immunize" the testimony of two soldiers who helped the appellant strip the "stolen" automobile and would purportedly corroborate his defense. On appeal, the Army Court of Military Review denied the appellant's claim that the convening authority abused his discretion by denying immunity. Relying upon two recent

decisions by the Navy Court of Military Review, see United States v. Villines, 9 M.J. 807 (NCOMR 1980), cert. for rev. filed, 9 M.J. 210 (CMA 1980); United States v. Martin, 9 M.J. 731 (NCOMR 1979), reconsidered, 9 M.J. 746 (NCOMR 1980), cert. for rev. filed, 9 M.J. 194 (CMA 1980), the court held that the convening authority has no duty to immunize to defense witnesses absent "prosecutorial distortion of the fact-finding process." See, e.g., United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967), United States v. DePalma, 476 F.Supp. 775 (D.C.N.Y. 1979). But see Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980) (defense immunity required, even in absense of prosecutorial misconduct, if government has no strong interest in withholding immunity from potential witness whose testimony is clearly exculpatory and essential). In this case, the court found no prosecutorial misconduct; in addition, it regarded the two witness' expected testimony as merely cumulative and not clearly exculpatory. Finally, the court found that the government had an overriding interest in preserving the opportunity to prosecute the two soldiers allegedly involved in the theft.

FEDERAL COURT DECISIONS

PUNISHABLE OFFENSES: Carnal Knowledge

Navedo v. Preisser, 28 Crim. L. Rptr. (BNA) 2114 (8th Cir. 22 Sep. 1980).

An Iowa trial court convicted the appellant of carnal knowledge. State statutes bar a male over the age of 25 years from having carnal knowledge of a female under the age of 16 years. Because the statute defines "carnal knowledge" as the penetration of a female sex organ by a male sex organ, the statute necessarily applies only to males. The appellant filed a federal writ of habeas corpus, claiming that the statute violates due process and denies equal protection under the law. The Eighth Circuit agreed with the appellant and directed the district court to issue a writ of habeas corpus. Relying upon Craig v. Boren, 429 U.S. 190 (1976), the court held that unless the State demonstrates that the gender-based classification serves important governmental objectives and substantially relates to the achievement of these objectives, the statute cannot be upheld as constitutional. The State argued that the statute attempted to prevent pregnancy, physical injury, and emotional trauma caused by sexual intercourse with an older man, especially if he uses undue influence or if pregnancy occurs. The State, however, failed to meet its affirmative burden of showing, through statistical data or medical evidence that the statute substantially furthers these objectives. Similar statutes have been invalidated on these grounds. See United States v. Hicks, 625 F.2d 216 (9th Cir. 1980) (federal law); Meloon v.

Helgemoe, 564 F.2d 602 (1st Cir. 1977) (New Hampshire statute). But see Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979) (Maine statute upheld after government presented statistical and medical evidence to support its contentions). This issue is currently pending at the U.S. Supreme Court in Michael M. v. Sonoma County Superior Court, cert. granted, 48 U.S.L.W. 3802 (U.S. Sup. Ct. 10 Jun. 1980) [see discussion at 28 Crim. L. Rptr. (BNA) 4002, 4056 (1980)].

SEARCH AND SEIZURE: Warrant Requirement

United States v. Benson, 28 Crim. L. Rptr. (BNA) 2062 (8th Cir. 18 Sep. 1980).

An informant notified state narcotic agents that the appellant, who was scheduled to arrive at a Little Rock, Arkansas, airport, would probably be carrying cocaine in a vinyl tote bag. The informant told the agents that when he met the appellant at the airport, he would ascertain whether the appellant was possessing cocaine and signal them accordingly. The informant later relayed a signal to the agents, who then seized the appellant's tote bag. A warrantless search of the bag revealed cocaine. The United States Court of Appeals for the Eighth Circuit suppressed the contraband, finding that the warrantless search violated the Fourth Amendment because the bag was in police custody and under their control. Any claims of exigent circumstances or a search incident to an arrest were thereby negated. See United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979). Relying upon Arkansas v. Sanders, 442 U.S. 753 (1979), the court also refused to apply the "automobile" exception to the Fourth Amendment warrant requirement, and stated that once a police officer has exclusive control of luggage, the warrant requirement is triggered. See United States v. Chadwick, 433 U.S. 1 (1977); United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978); United States v. Schleiss, 582 F.2d 1166 (8th Cir. 1978).

SEARCH AND SEIZURE: Legality of Detention Following Investigatory Stop

United States v. Chamberlain, 28 Crim. L. Rptr. (BNA) 2159 (9th Cir. 7 Oct. 1980).

The appellant was observed by a policeman who knew he had an extensive criminal record. As the policeman approached him, he attempted to flee. The officer stopped him, and detained him in a squad car. The apprehending officer found a U.S. Treasury check on the scene, and later determined that the appellant had attempted to cash the check. He was subsequently tried and convicted of possession of a check stolen from the mails, in violation of 18 U.S.C. §1708 (1976). In United

States v. Chamberlain, 609 F.2d 1318 (9th Cir. 1979), the court found the investigative stop to be permissible under Terry v. Ohio, 392 U.S. 11 (1968), but held that the continued detention of the appellant violated his Fourth Amendment rights. See Dunaway v. New York, 442 U.S. 200 (1979). The court concluded that the appellant's statements, and the observation of his demeanor after being placed in the squad car, were inadmissible and that the identification evidence obtained at the store where the appellant presented the stolen check constituted "fruits" of this unlawful activity. See also United States v. Ocheltree, 622 F.2d 992, 993 (9th Cir. 1980). The court later withdrew its opinion and ruled that Dunaway v. New York, *supra*, was controlling. The court again determined that although the initial stop was lawful, the continued detention was unlawful and the questioning of the appellant while he was in the squad car constituted "custodial interrogation." Because the appellant had not been advised of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966), the statements he made while in the squad car were inadmissible. The court suppressed the demeanor observations and identification evidence as inadmissible "fruits" of the unlawful detention.

SELF-INCRIMINATION: Witness' Assertion of Right at Trial

Klein v. Harris, 28 Crim. L. Rptr. (BNA) 2156 (D.C.N.Y. 25 Sep. 1980).

At the appellant's trial for murder, the defense called as a witness a co-actor who had plead guilty to manslaughter at another trial. The co-actor testified that the appellant killed the victim. Moments after his testimony, the co-actor approached the defense counsel and stated that he had lied, because of pressure from the prosecutor, and that he had actually killed the victim. The co-actor invoked his Fifth Amendment rights when asked to repeat the disclosure in court. The appellant was convicted of felony murder and murder in the second degree. Noting that under New York law the co-actor could not have been prosecuted for perjury because he would have recanted his untruthful statements in the same trial, the court held that because the co-actor had earlier given testimony concerning the incident in question, he could not assert his rights upon further questioning as to that incident. The court found that the trial judge committed "plain error" by not directing the witness to answer the question or striking his testimony from the record. In view of the trial judge's actions, any request or objection by defense counsel would have been futile; no waiver would therefore be applied. Compare United States v. Rivas, 3 M.J. 282 (CMA 1978), wherein the United States Court of Military Appeals found inadequacy of counsel when no motion to strike was submitted in a similar situation.

EVIDENCE: Disclosure Under Jencks Act

United States v. Algie, 49 U.S.L.W. 2323 (D.C. KY. 1 Oct. 1980).

Prior to trial, the court ordered the prosecutor to release statements to which the defense was entitled under the Jencks Act, 18 U.S.C. §3500 (1976). The prosecution refused to comply, relying on provisions in the Act which require disclosure only after a witness testifies at trial. The court held that under Rules 102 and 403 of the Federal Rules of Evidence (FRE), it could direct pretrial release of evidence susceptible to discovery under the Jencks Act, and that a contrary result would deprive an accused of effective assistance of counsel, due process of law, a speedy trial, and equal protection. The court determined that by enacting Rules 102 and 403, FRE, Congress "amended" the Act's disclosure requirements and vested trial judges with a wide discretion to structure judicial proceedings so as to reach a just result without unduly expending the time of the court, jurors, witnesses, and litigants.

SEARCH AND SEIZURE: Expectation of Privacy

United States v. Ramapuram, 28 Crim. L. Rptr. (BNA) 2180 (4th Cir. 9 Oct. 1980).

An agent of the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) received information that the appellant was concealing 100 sticks of dynamite in the trunk of an automobile parked in a field owned by the his father. Two ATF agents drove to the farm where the automobile was located. The vehicle appeared to be abandoned. The agents discovered 88 sticks of dynamite in the unlocked trunk, and the appellant was arrested and convicted of violating 18 U.S.C. §842(h) (1976). Relying upon the "privacy" analysis in Katz v. United States, 389 U.S. 347 (1967), the court held that the appellant lacked a "legitimate expectation of privacy" in the trunk of the automobile sufficient to vest him with standing to contest the "reasonableness" of the seizure under the Fourth Amendment. See Rawlings v. Kentucky, 48 U.S.L.W. 4885 (U.S. Sup. Ct. 1980), and Rakas v. Illinois, 439 U.S. 128 (1978). The court found that in order for an accused to challenge the reasonableness of a search or seizure, he must show that governmental action has infringed upon a "justifiable," "reasonable," or "legitimate" expectation of privacy. In determining whether such an expectation exists, two questions must be addressed. First, has the accused by his conduct and actions exhibited a subjective intent to preserve something as private? Second, is the accused's subjective expectation of privacy one that the court

is prepared to recognize as reasonable and objectively justifiable? In this case, the appellant took no action to exclude others from the property, and the court accordingly held that the search and seizure did not invade any constitutionally cognizable privacy interest.

STATE COURT DECISION

PLEA NEGOTIATIONS: Admissibility

People v. Friedman, 403 N.E.2d 229 (Ill. 1980).

Prior to his trial for deception and mail fraud, the appellant contacted the attorney general's office and spoke to the investigator assigned to his case. The appellant inquired about "making a deal" and stated that, if convicted, he "would rather go to a Federal prison as opposed to a State prison." On appeal, the appellant alleged that he was prejudiced by the jury's consideration of these admissions, which should have been excluded as comments made during a plea-related discussion. The Illinois Supreme Court rejected the State's argument that Rule 402(f) of the Illinois Rules of Evidence, which makes admissions during plea discussions inadmissible, only applies when the admissions are an integral part of a bona fide negotiation with a person having the authority to negotiate. The court applied the two-step approach developed under Fed. R. Evid. 410 in resolving the admissibility issue, and addressed the questions of (1) whether the accused had a subjective expectation to negotiate a plea agreement; and (2) whether the expectation was reasonable under the circumstances. The court found that an offer to plead guilty may be as devastating at trial as statements made in an attempt to secure an agreement, and that neither are admissible against the accused. See also People v. Bennifield, 28 Crim. L. Rptr. (BNA) 2142 (Ill. 8 Sep. 1980). A similar result should follow in the military, because Mil. R. Evid. 410 is broader in scope than its federal and state counterparts.

FIELD FORUM

Defense Appellate Division Responses to Readers' Inquiries

A reader recently asked why appellate attorneys are appointed to represent servicemembers who have knowingly and voluntarily waived that right after consulting with their trial defense counsel.

The Defense Appellate Division is not involved with the decision to appoint counsel for servicemembers who indicate that they do not desire legal representation before the military appellate tribunals. When the form advising the accused of his appellate rights indicates that the accused waives his right to be represented by appellate defense counsel, the Army Court of Military Review issues a "Precipe for Designation of Counsel," requesting The Judge Advocate General to appoint counsel for the accused. See United States v. Palenius, 2 M.J. 86, 91 n.7, 92 (CMA 1977). The appointed counsel must confirm the accused's intention to voluntarily and intelligently waive his right to appellate representation. If the accused persists in his waiver, the appointed counsel submits a motion to withdraw from the case. The Army Court of Military Review believes that the precipe serves two functions: first, it gives the accused an opportunity to reconsider his decision to waive representation; in addition, it eliminates any possibility that the accused was erroneously advised of his rights at the trial level. See United States v. Arvie, 7 M.J. 768 (ACMR 1979). Where an accused has been granted excess leave pending completion of appellate review under paragraph 5-2d(4), AR 630-5, appellate defense counsel may spend an inordinate amount of time attempting to locate the accused to determine if he persists in his waiver. In such cases, an accused's intent to expedite his appellate review may be frustrated. In those cases in which there is no issue, an initial decision at the trial level to request appointed counsel may expedite the appellate process. The Air Force and Navy Courts of Review do not issue similar precipes, and instead act upon the appellant's original waiver of appellate representation.

* * * * *

The staff of The Advocate welcomes inquiries pertaining to the legal aspects of the appellate process, and will publish responses to questions of general interest to our readers. Direct any questions to Managing Editor, The Advocate, Nassif Building, 5611 Columbia Pike, Falls Church, VA . 22041

ON THE RECORD

or

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

MJ: You have no evidence of any convictions, trial counsel?

TC: Your Honor, I don't know what the defense counsel is referring to, but from what I've been able to gather, the defense counsel has an almost obnoxiously clear record. I have nothing to bring out.

DC: Well, I know I have

* * * * *

WIT: But, it was just something on the side we were talking about, he told me it was a hobby that he likes to do and I just -- it's just regular running talk, when you talk to anybody they will always tell you they run fifteen miles when they are only running ten miles, it's just a -- running is easy to exaggerate.

* * * * *

MJ: Now, is there any objection to the documents marked as Prosecution Exhibits 1, 2, 3, 4, and 5?

DC: I understood it was 1 through 5.

* * * * *

DC: The defense would argue to the contrary, not having case law as its support

* * * * *

MJ: Is that what you thought your deal was all along, Specialist?

ACC: Under the table, sir?

* * * * *

MJ: Okay. Now, the original, which he signed, of course, it would be -- shall we say: the original-original. Now, this particular document is not an original; but it's not meant to be a copy of the original-original; it's meant to be a copy of his copy. But even his copy, the original of his copy, is not signed. That's what I'm getting at.

* * * * *

TC: When you were talking to [the accused] in the room where you took his fingerprints, what was your intent? Were you trying to question him?

CID Agent: No sir. My intent was that he was to get a lawyer and things so that we could find out the facts of the investigation.

* * * * *

(During voir dire)

DC: Does any member feel in a general sense that too many criminals are being released by the courts because of technicalities in the law?

(Affirmative response by all members.)

* * * * *

ACC: There's one date in particular that is very vivid on my mind, and that is the date in which I parked my car diagonal from the library, which was a bright, sunny day.

TC: And that is vivid in your mind?

ACC: That date is very vivid.

TC: What day was that?

ACC: Sir, I do not recall the date.

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