

OCT 16 1984

# THE ADVOCATE



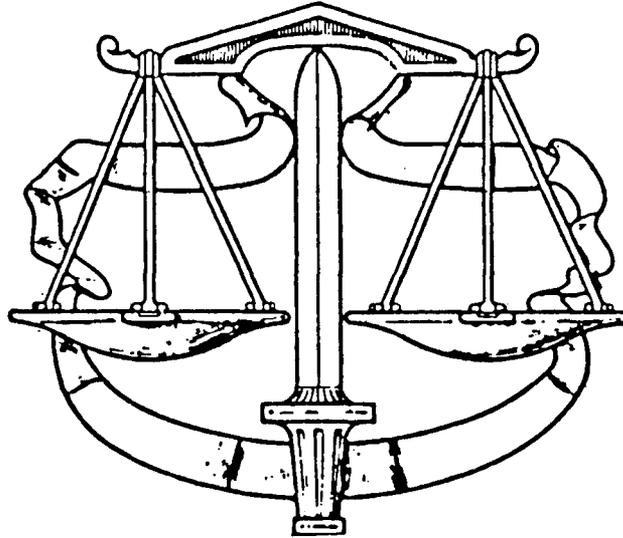
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A Journal For Military Defense Counsel

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VOLUME 15, NUMBER 6

NOV - DEC 1983



## DEFENSE TACTICS UNDER THE NEW DEATH PENALTY SENTENCING PROCEDURE

CAPTAIN WILLIAM T. WILSON

## CORROBORATION OF CONFESSIONS

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THE ADVOCATE (USPS 435370) is published by-monthly by the Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, Virginia 22041. Second class postage paid at Falls Church, Virginia 22041 and at additional mailing offices. SUBSCRIPTIONS are available from the Superintendent of Documents, U.S. Government Printing Office, ATTN: Order Editing Section/SSCM, Washington, D.C. 20402. POSTMASTER/PRIVATE SUBSCRIBERS: Send address corrections to Superintendent of Documents, U.S. Government Printing Office, ATTN: Change of Address Unit/SSCM, Washington, D.C. 20402. The yearly subscriptions prices are \$15.00 (domestic) and \$18.75 (foreign). The single issue prices are \$5.00 (domestic) and \$6.25 (foreign).

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The Advocate is published under the provisions of AR 310-1 as an informational media for the defense members of the U.S. Army JAGC and the military legal community. Use of funds for printing this publication has been approved by the Secretary of the Army on 1 December 1983 in accordance with the provisions of AR 310-1, paragraph 5-11a. Articles represent the opinions of the authors or the Editorial Board and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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## OPENING STATEMENTS

This issue of The Advocate opens with an extensive review of the new Manual for Courts-Martial provisions relating to the imposition of the death penalty. The guidance issued by the Court of Military Appeals in United States v. Matthews and the promulgation of regulations relevant to sentencing procedures in a capital case may increase the frequency of capital referrals, and as the author notes, the possibility that an adjudged death sentence may eventually be carried out. Captain Wilson's comprehensive article explores possible constitutional defects in the new procedure and suggests a trial strategy designed to lessen the likelihood that a death sentence will be adjudged.

Our second article by CPT Robert Johnson examines the corroboration rule for admissions and confessions. It explores the historical development of the requirement that an out of court confession or admission of an accused be corroborated by independent evidence. The present version of corroboration rule as embodied in Rule 304(g), Military Rules of Evidence is analyzed and the author suggests a helpful test which defense counsel can employ prior to trial to determine if a confession lacks independent corroboration.

Sidebar this month covers three areas of interest: subject matter jurisdiction, expert testimony, and the litigation of multiplicity issues after United States v. Holt. Finally, this issue contains the index of Volume 15 of The Advocate.

# DEFENSE TACTICS UNDER THE NEW DEATH PENALTY SENTENCING PROCEDURE

By Captain William T. Wilson\*

## I. Introduction

In United States v. Matthews,<sup>1</sup> the Court of Military Appeals held that the military system of imposing the death penalty for murder and rape failed to satisfy the requirements of the eighth amendment.<sup>2</sup> The majority also held that systemic defects could be corrected by either Congress or the President.<sup>3</sup> Under recent changes to the Manual<sup>4</sup>, which required proof of at least one "aggravating" circumstance in addition to proof of all elements of an underlying capital offense, a service-member sentenced to death faces a realistic possibility of having that sentence imposed. It is therefore imperative that the defense make an effective presentation at the sentencing phase in a capital case.

This article assumes a conviction of a capital offense and deals only with the sentencing issue.<sup>5</sup> It suggests several tactics which may

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1. 16 M.J. 354 (CMA 1983).
2. U.S. Const. amend. VIII.
3. 16 M.J. at 381.
4. RCM 1004, Manual for Courts-Martial, United States, 1984; formerly Para. 75g, MCM.
5. Counsel must consider the impact of evidence presented on the merits on the sentencing issue in planning an overall trial strategy. It will probably not be beneficial to your client to express remorse after conviction if his defense on the merits was alibi. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 328-334 (1982) [hereinafter Goodpaster].

(Continued)

be useful in capital cases, including attacks on the Manual system's competence to impose the death sentence. It also discusses categories of evidence which may be presented to the court. The treatment of these areas should not be considered exhaustive. These proposals will hopefully provoke still more imaginative and effective tactics by counsel in the cases which are certain to be tried soon.

The position taken by the Court of Military Appeals as to who may undertake systemic remedial measures of capital sentencing procedure is a defensible one and will be binding on the lower courts until the law is further clarified by the Supreme Court. The President has promulgated RCM 1004 in an effort to cure these defects. These changes completely fail to address one of the fatal defects in the old military system, the lack of a requirement for unanimous findings of either premeditated murder or felony murder prior to consideration of the death penalty.<sup>6</sup> This defect is still present and should be the first line of attack in any capital sentence proceeding. Other, less obvious,

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5. (Continued)

Another issue which is treated differently in capital cases is jury selection and voir dire. A juror may not be excused for cause solely because he has general objections to the death penalty; he must be unable to vote to impose it under any circumstances. Witherspoon v. Illinois, 391 U.S. 510 (1968). If fortunate enough to have one or more court-members who express reservations about capital punishment, defense counsel must attempt to rehabilitate them, i.e., establish some willingness to at least consider the death sentence, however reluctantly. See also Jurek v. Estelle, 593 F.2d 672, 683 (5th Cir. 1979) vacated on other grounds, 623 F.2d 929 (5th Cir. 1980) cert. denied, 450 U.S. 1001 (1981) (ineffective assistance of counsel found in failure to object to challenge for cause of juror with reservations about capital punishment). If a court member expresses an inflexible opposition to capital punishment, counsel may consider a request for separate panels for findings and sentence to avoid exclusion of a court member who is qualified to decide your client's guilt because of an attitude which relates only to sentencing. At least one court has been persuaded by such an argument. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); contra People v. Fields, \_\_\_ Cal. 3d \_\_\_, 197 Cal Rptr. 803 (1983); State v. Bondurant, \_\_\_ N.C. \_\_\_, 309 S.E.2d 170 (1983); State v. Battle, 661 S.W.2d 487 (Mo. 1983); Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983).

6. 16 M.J. at 379-380.

issues are explored in the remainder of this article. The provisions are readily susceptible to challenge, both collectively and individually. The government has finally begun to respond to the requirements of Furman v. Georgia<sup>7</sup> and its progeny, but it has by no means eliminated all the legal issues which stand between its desire to execute and the execution.

## II. Challenging the Presidential Power

Legislatures, as the elected representatives of the people, fix the limits of punishment for criminal offenses. They also select the criteria which place one offense in a category subject to a greater or lesser punishment than another. This principle has been acknowledged by the governing plurality of the Supreme Court as applicable to capital sentencing proceedings:

It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.<sup>8</sup>

The military, however, is a special jurisdiction to which the constitution makes some concessions.<sup>9</sup> Servicemembers are tried without juries before judges who lack life tenure, but article III<sup>10</sup> and the sixth amendment<sup>11</sup> are not violated.<sup>12</sup> Grand juries are not required.<sup>13</sup>

7. 408 U.S. 238 (1972).

8. Gregg v. Georgia, 428 U.S. 153, 192 (1976); see also Zant & Stephens, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2743, n.15, (1983); United States v. Harper, \_\_\_ F.2d \_\_\_, \_\_\_, No. 84-1010 (9th Cir. decided April 3, 1984)

9. E.g. Chappell v. Wallace, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2362 (1983); Parker v. Levy, 417 U.S. 740 (1974).

10. U.S. Const. art. III.

11. U.S. Const. amend. VI.

12. United States v. Rojas, 15 M.J. 902, 919 (NMCMR 1983) vacated and remanded 17 M.J. 154 (CMA 1984); United States v. Guilford, 8 M.J. 598 (ACMR 1979) pet. denied 8 M.J. 242 (CMA 1980);

13. U.S. Const. amend. V.

There is no legislature which is required to proportionately represent the members of the military jurisdiction as a separate population. The President, as the commander-in-chief and benevolent leader of this community, may share some of the powers which otherwise would be reserved to the legislative branch.<sup>14</sup> If the President's action is taken in reliance on authority delegated from Congress, as it purports to be,<sup>15</sup> he is nevertheless limited by the legislative intent.<sup>16</sup>

In creating the Uniform Code of Military Justice,<sup>17</sup> Congress delegated the power to fix maximum punishments to the President.<sup>18</sup> Reading the entire statutory scheme in pari materia, however, establishes that this delegation did not extend to the death penalty. Where capital punishment was contemplated, Congress spoke to that subject more specifically.<sup>19</sup> No serious argument extends the legislative intent to allow presidential expansion of death eligible crimes. The prosecution has no need to invoke presidential authority to justify the maximum punishment, however, for Congress has ordained it. It is not the penalty itself, but the system under which it is imposed, that the defense must attack. The President's power to decide maximum punishments is not really pertinent to that issue.

Congress has also delegated the power to promulgate rules of procedure to the President in Article 36.<sup>20</sup> This authority will uphold

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14. See *Swain v. United States*, 165 U.S. 553 (1897).

15. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984).

16. *United States v. Smith*, 12 USCMA 105, 32 CMR 105 (1962); *United States v. McCormick*, 12 USCMA 26, 30 CMR 26 (1960).

17. 10 U.S.C. §§ 801 et seq., hereinafter UCMJ.

18. Article 56, UCMJ.

19. Articles 85(c), 90, 94, 99, 100, 101, 102, 104, 106, 110(a), 113, 118, and 120(a), UCMJ.

20. Article 36(a), UCMJ.

the overall system adopted by the new Rules for Courts-Martial if that system is considered procedural in nature.<sup>21</sup> In Dobbert v. Florida,<sup>22</sup> a case interpreting the ex post facto clause<sup>23</sup>, the Supreme Court held that the Florida system for imposing the death penalty is procedural rather than substantive and susceptible to retroactive application.<sup>24</sup> If the Manual provisions are merely procedural, the President's power is not exceeded by their promulgation.

Fortunately, it can be persuasively argued that the Manual system is more than merely procedural. The new military system requires the court members to find the accused guilty not only of the Congressionally specified capital offense, but also of the aggravating factor or factors which limit the category of death eligible offenses.<sup>25</sup> The latter finding must be unanimous<sup>26</sup> and by proof beyond a reasonable doubt.<sup>27</sup>

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21. Article 18, UCMJ, which provides that general courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter," could also be construed as a grant of authority to the President. United States v. Morlan, 24 CMR 390, 393 (ABR 1957). The "including the penalty of death when specifically authorized by this chapter" language was a late amendment proposed by assistant general counsel Felix Larkin during hearings before the House Committee on Armed Services. Uniform Code of Military Justice, 1949: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 959 (1949). It was adopted with the clear understanding that it "neither adds to nor takes anything from existing provisions of law." Id. at 961 (statement of Robert W. Smart, staff member, House Comm. on Armed Services). This provision does no more than clarify the statutory jurisdiction of general courts-martial and does not expand the President's rule-making power beyond that prescribed in Articles 36 and 56, UCMJ.

22. 432 U.S. 282 (1977).

23. U.S. Const. art. I, § 9, cl. 3.

24. 432 U.S. at 292.

25. RCM 1004(c).

26. RCM 1004(b)(7).

27. RCM 1004(b)(4).

The Florida system under review in Dobbert included none of these requirements.<sup>28</sup> When the Supreme Court was called upon to review a state system which did have these provisions in Bullington v. Missouri,<sup>29</sup> it concluded:

The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.<sup>30</sup>

The Missouri system, and therefore the very similar military system, appears to be something more than mere procedure. The procedural powers of the President do not extend to the creation of distinctions between different kinds of crime and his power to fix maximum punishments is ineffective where Congress has already fixed the punishment without delegating this power to the President. He has undertaken to make substantive law, which he may not do.<sup>31</sup>

The conclusion that the presidential power has been exceeded is bolstered by the expressed preference for legislative selection of the limiting factors,<sup>32</sup> which was observed even in Florida's "procedural" system.<sup>33</sup>

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28. 432 U.S. at 290-292.

29. 451 U.S. 430 (1981).

30. 451 U.S. at 438.

31. *United States v. Wimberly*, 16 USCMA 3, 36 CMR 159 (1966).

32. Note 10, supra.

33. *Proffit v. Florida*, 428 U.S. 242, 248 n.6 (1976).

The difference between substantive and procedural matters has been the subject of some comment.<sup>34</sup> Decisions interpreting Article 36 have not extended the President's power beyond promulgation of rules of procedure and rules of evidence, since "modes of proof" has been equated to rules of evidence.<sup>35</sup>

The President's power as commander-in-chief does not embody legislative authority to provide crimes and offenses. And in this area under the Code, the Executive's authority has expressly been limited to the authority to prescribe rules of evidence and procedure and maximum limits upon the punishments which a court-martial may direct.<sup>36</sup>

While the President may promulgate rules as to the competence of witnesses<sup>37</sup> or as to how certain elements can be proved,<sup>38</sup> he may not alter those things which must be proved, whether they be elements of the offense<sup>39</sup> or the definitions of defenses.<sup>40</sup> The actual distinction is between what must be proved or disproved and how the proof is to be accomplished or, as the Supreme Court wrote, in interpreting its own rules enabling act:

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34. E.g. Fidell, Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs, 4 Mil.L.Rev. 6049, 6051-52 (1976).

35. United States v. Jenkins, 7 USCMA 261, 22 CMR 51 (1956).

36. United States v. McCormick, 12 USCMA n. 18 at 28, 30 CMR at 28 (citations omitted).

37. United States v. Wimberly, 16 USCMA at. 36 CMR at 167.

38. United States v. Smith, 12 USCMA 105, 32 CMR 105 (whether corpus delicti, if proved by accused's own statement, must be corroborated, is a rule of evidence. Whether the corpus delicti must be proved at all, however, is a rule of substance).

39. United States v. Jenkins, 7 USCMA 261, 22 CMR 51 (1956) (fraudulent enlistment).

40. United States v. Frederick, 3 M.J. 230, 236 (CMA 1977) (insanity); United States v. Smith, 13 USCMA 471, 33 CMR 3 (1963) (self defense).

[The Act] authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.<sup>41</sup>

Another court put it thus:

When a rule of law is one which would affect a person's conduct prior to the onset of litigation and has no design to manage ongoing litigation, it is a rule of substance rather than procedure.<sup>42</sup>

Whether RCM 1004 is viewed as limiting the scope of preexisting capital offenses or as reenacting a death penalty which had been eliminated by Matthews, it modifies, abridges and enlarges the substantive rights of parties. It changes the actions of the accused which must be proved to allow the imposition of the death penalty. Finally, because deterrence is one of the justifications for capital punishment, the Manual rule is one "which would affect a person's conduct prior to the onset of litigation."<sup>43</sup> A viable attack upon the entire new capital sentencing system can and should be made by counsel in every capital case.

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41. United States v. Sherwood, 312 U.S. 584, 590 (1941); see also Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945); Sibbach v. Wilson and Co., Inc., 312 U.S. 1 (1941).

42. McCollum Aviation, Inc. v. CIM Associates, Inc., 438 F. Supp. 245, 248 (S.D. Fla. 1977).

43. Id. One state may have rejected this analysis of Bullington. See Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982). This decision is subject to criticism because it perceives Bullington as depending more on the life sentence adjudged at the first trial, rather than on the nature of the Missouri capital sentencing system. The Bullington Court, however, approved of longstanding law that a more severe sentence, even extending to death, may be imposed at a second trial if no new substantive matters must be proved. 451 U.S. at 438 citing Stroud v. United States, 251 U.S. 15 (1919). Some clarification may be forthcoming from the Supreme Court on further consideration of the system previously reviewed in Dobbert. See Spaziano v. Florida, 433 So. 2d 508 (Fla 1983) cert. granted — U.S. —, 34 Crim.L.Rptr 4159 (1984) (No. 83-5596).

### III. Litigating the Aggravating Circumstances

RCM 1004(c) and 1004(d) set out those circumstances which will allow the imposition of the death penalty. Once a capital conviction is obtained, the government must prove one or more of these matters or death may not be adjudged by the court. Counsel should endeavor to eliminate as many of these circumstances as possible. They can be eliminated by failure of proof, by a ruling of factual invalidity, by a narrowing interpretation which excludes the provable facts or by a ruling that they duplicate each other. The fewer of these circumstances which the court members consider in their deliberations, and especially the fewer the court finds, the better the defendant's chances are.

Understanding the law with regard to "aggravating" circumstances which justify the imposition of the death sentence must begin with the Supreme Court's decision in Godfrey v. Georgia.<sup>44</sup> In that case the limiting factor reviewed was one which allowed imposition of the death penalty for a murder which was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."<sup>45</sup> The Court remembered that it had reviewed the same statutory circumstance four years earlier and had held it was not unconstitutional on its face.<sup>46</sup> The change was a result of the Georgia Supreme Court's failure to read the aggravating circumstance in a narrow manner to avoid an "open ended construction."<sup>47</sup> The facts of Godfrey are somewhat important. The crime scene was indeed nauseating,<sup>48</sup> but the governing plurality of the Court still held that Georgia's construction of the words "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," could not be applied to the facts in such a way as to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."<sup>49</sup> As interpreted by the Georgia courts the language was too

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44. 446 U.S. 420 (1980).

45. Id.

46. 446 U.S. at 422.

47. 446 U.S. at 423; see Gregg v. Georgia, 428 U.S. 153, 201 (1976).

48. 446 U.S. at 449 (White, J., dissenting).

49. 446 U.S. at 433.

vague to provide a constitutional limiting factor for imposition of capital punishment.<sup>50</sup>

The minimal requirement is that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."<sup>51</sup> Some aggravating circumstances are so inherently vague that they cannot support the death penalty under any circumstances.<sup>52</sup> Others which may be susceptible to overbroad interpretations must be narrowed by judicial construction.<sup>53</sup> Each of the specific aggravating circumstances must be read with these principles in mind. In addition, a number of them are self-limiting due to their own terms.

Aggravating circumstance (1),<sup>54</sup> that the offense was committed in the presence of the enemy, will hopefully not apply in many capital cases because it expressly does not apply to murder or rape offenses. Since Furman v. Georgia,<sup>55</sup> only murder has been sustained by the Supreme

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50. The Georgia Supreme Court has since revived the aggravating factor by further restricting its scope. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980); see also Gray v. State, 375 So. 2d 994, 1003-1004 (Miss. 1979).

51. Zant v. Stephens, 103 S.Ct. at 2742-2743.

52. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976). Cited with approval in Zant v. Stephens, 103 S.Ct. at 2743 n. 16) ("substantial history of serious assaultive criminal convictions" held too vague; accused had convictions for two assaults with intent to murder in 1968 and one armed robbery in 1970); contra State v. Rust, 197 Neb. 528, 250 N.W.2d 867, 1977); see also Whalen v. State, 434 A.2d 1346, 1360 (Del. 1980) (victim's status as "elderly" or "defenseless" is too vague).

53. Ex parte Kyzer, 399 So.2d 330 (Ala. 1981); State v. LaFleur, 398 So.2d 1074, 1078 (La. 1981); State v. Stewart, 197 Neb. 497 250 N.W.2d 849, 1977) (that murder was especially "heinous, atrocious or cruel" must be construed strictly so that it does not become a catch-all); State v. Creech, 105 Idaho 362, 670 P.2d 463, 471 (1983) ("utter disregard" for human life is limited to the utmost, callous disregard).

54. RCM 1004(c)(1)

55. 408 U.S. 238 (1972).

Court as a capital offense. The death penalty has been held to be disproportionate to the offense of rape, at least in most circumstances.<sup>56</sup> Even felony murder is insufficient to support the death penalty, regardless of the existence of statutory aggravating circumstances, if the accused did not personally kill, attempt to kill or have the intent to kill.<sup>57</sup> These principles are arguably pertinent to any of the UCMJ offense, for which Congress authorized capital punishment.<sup>58</sup> To establish aggravating circumstance (1), the government will have to prove that the accused was posted at a place where he was supposed to be ready to participate in offensive or defensive battle and that his or his unit's weapons were then capable of delivering or susceptible to receiving fire.<sup>59</sup> "The enemy" may extend to insurgents and guerillas in undeclared police actions.<sup>60</sup> Inasmuch as this entire aggravating circumstance is subsumed in Article 99, UCMJ, as an element of the offense, defense counsel should argue that it does not adequately limit the court's discretion if applied to the offense of misbehavior before the enemy.<sup>61</sup>

Section (2)(A), that the offense was done with the intent to cause substantial damage to national security, may be overbroad on its face.<sup>62</sup> The word "substantial" is impossible to apply in a principled, limiting manner. The vagaries inherent in this word were primarily responsible for the failure of one of the aggravating circumstances in Georgia's statute.<sup>63</sup> It differs from many other words which are superficially

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56. *Coker v. Georgia*, 433 U.S. 584 (1977).

57. *Enmund v. Florida*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 3368 (1982).

58. See note 19, *supra*.

59. *United States v. Carey*, 4 USCMA 112, 15 CMR 112 (1954); *United States v. Sperland*, 5 CMR 89 (CMA 1952).

60. *United States v. Monday*, 36 CMR 711 (ABR 1966) (Dominican rebels); *United States v. Terry*, 36 CMR 756 (NBR 1965) (Viet Cong).

61. See *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979) (a felony may not be both element of offense of first degree felony murder and aggravating circumstance authorizing the death penalty).

62. RCM 1004(c)(2)(A).

63. *Arnold v. State*, 224 S.E.2d at 386.

broad but can be construed in a manner which provides some practical guidance.<sup>64</sup> The phrase "national security of the United States," could apply to everything the military does. It therefore fails to limit sentencing discretion in even an unprincipled way. Some effect has been made to define the words "national security" after RCM 1004(c)(10), but these definitions and the accompanying examples remain extraordinarily vague. The Supreme Court has defined national security as comprehending:

[O]nly those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.<sup>65</sup>

This description also applies to everything a soldier does while on duty and a good deal of what he does in his spare time. If read expansively, (2)(A) is nothing more than an effort to revive the argument that the uniqueness of the military community justifies the application of different eighth amendment standards. This argument has been rejected by the Court of Military Appeals.<sup>66</sup> That the circumvention of that decision is nevertheless the intent of this aggravating circumstance remains a possibility inasmuch as the drafters have experienced no difficulty in identifying some rather specific circumstances which more directly effect "national security."<sup>67</sup> If these more specific circumstances are not subsumed within (2)(A) and (3), and thereby rendered superfluous, then it is difficult to give any content to the latter circumstance at all.

Aggravating circumstance (2)(B),<sup>68</sup> authorizing death where the offense was done with the intent to substantially damage a mission, system or function of the United States, is subject to attack in the same manner as its companion, (2)(A). In addition, the phrase "mission, system, or

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64. See cases cited at note 53, supra.

65. *Cole v. Young*, 351 U.S. 536, 544 (1956).

66. 16 M.J. at 368-369.

67. See RCM 1004(c)(5), (6), (7)(f), (7)(g).

68. RCM 1004(c)(2)(B).

function of the United States" is fertile with ambiguities. State courts have apparently upheld aggravating circumstances pertaining to "governmental functions or the enforcement of the laws,"<sup>69</sup> but no precise definition of a governmental "function" has been found necessary in those cases. "Mission" and "system" are even more obscure, although it is hoped they are limited to something less than the overall "mission" of the Air Force or the Army's M-16A1 weapons "system". This aggravating circumstance should not be allowed to duplicate other, more specific, circumstances found in the same case.<sup>70</sup>

Circumstance (3),<sup>71</sup> that the offense caused substantial damage to the security of the United States, is similar to (2)(B), supra in the issues it raises. It does not apply to murder or rape.

Aggravating circumstance (4),<sup>72</sup> that the offense endangered individual's lives other than the intended victim, resembles some found in other jurisdictions which apply when the accused "knowingly created a great risk of death to many persons,"<sup>73</sup> or "knowingly created a great risk of death to at least several persons,"<sup>74</sup> but is far more ambiguous. Other systems require a "knowing" creation of "great" risk, which is defined as "not a mere possibility but a likelihood or high probability,"<sup>75</sup> while the Rules for Courts-Martial will require no scienter and persist in the drafters' fixation with the word "substantial." While

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69. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569, (1979); State v. Rust, 250 N.W.2d at 875.

70. State v. Goodman, 257 S.E.2d at 587.

71. RCM 1004(c)(3).

72. RCM 1004(c)(4).

73. Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979); see also State v. Clark, 126 Ariz. 428, 616 P.2d 888, 895-896 (Ariz. 1980).

74. State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977).

75. Kampff v. State, 371 So. 2d at 1009.

"great risk" is construed as limited to "the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations,"<sup>76</sup> "substantially endangered" may not be so easily limited.<sup>77</sup> In addition, "persons other than the victim, if any" may not require that even as many as two persons have been endangered. This aggravating circumstance does not apply to rape, but is applicable to all other capital offenses.

Section (5)<sup>78</sup>, that the offense was committed with the intent to avoid hazardous duty, incorporates terms of art from Article 85(a)(2), UCMJ. "Hazardous duty" is not the same thing as "important duty"<sup>79</sup> and cases interpreting the latter phrase<sup>80</sup> are not controlling. All service in Vietnam was not, as a matter of law, hazardous duty.<sup>81</sup> Under some circumstances, even service in a combat zone may not be "hazardous duty."<sup>82</sup> The intent requirement may not be provable, even if the duty concerned is proved to be hazardous.<sup>83</sup>

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76. State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977).

77. See Arnold v. State, 224 S.E.2d at 386.

78. RCM 1004(c)(5).

79. United States v. Smith, 18 USCMA 46, 49, 39 CMR 46, 49 (1968).

80. United States v. McKenzie, 14 USCMA 361, 34 CMR 141 (1964); United States v. Moss, 44 CMR 298 (ACMR 1971).

81. United States v. Smith, 39 CMR at 50. Whether a particular service is hazardous duty is a question of fact for the court members to decide.

82. United States v. Shepard, 4 CMR 79 (CMA 1952) (a unit not in contact with the enemy, whose duty was to protect rear supply lines from a location 200 to 300 miles behind the front lines, was not a hazardous duty assignment).

83. E.g. United States v. Apple, 2 USCMA 592, 10 CMR 90 (1953); United States v. Knapp, 13 CMR 744 (AFBR 1953); but see United States v. Mellow, 14 USCMA 265, 34 CMR 45 (1963).

Aggravating circumstance (6),<sup>84</sup> applicable only to murder and rape, requires proof of two facially distinct facts, the first of which is that the offense occur in "time of war." This phrase presents a thorny issue, for it has been construed quite differently with regard to different statutes. In construing Article 2(10), UCMJ, the military courts have limited it to times of "war formally declared by Congress,"<sup>85</sup> but undeclared, de facto wars have been sufficient under articles defining substantive offenses.<sup>86</sup> In either case, the United States must be one of the nations at war, since all the cases discuss the involvement of the United States, even though two other countries were clearly at war with each other.<sup>87</sup> The second requirement of section (6) is satisfied if the offense actually occurs in territory where United States forces are engaged in "active hostilities" or in territory where the United States or a United States ally is an "occupying power." A hypothetical war in the Caribbean ought not to authorize application of this circumstance to a crime committed in southern Lebanon, where a United States ally<sup>88</sup> currently may be an "occupying power," or central Lebanon, where United States forces intermittently shelled hostile militias, unless the two regional conflicts can be concluded to be part of the same war.

Aggravating circumstance (7) and its ten subsections apply only to premeditated murder. Subsection (A)<sup>89</sup> seems rather clear on its face, for it should be easy to determine if an accused was "serving a sentence of confinement for 30 years or more." But what if the accused is on parole or has had his confinement deferred or suspended? The exact nature of

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84. RCM 1004(c)(6).

85. *Zamora v. Woodson*, 19 USCMA 403, 42 CMR 5 (1970); *United States v. Averette*, 19 USCMA 363, 41 CMR 363 (1970).

86. *United States v. Bancroft*, 3 USCMA 3, 11 CMR 3 (1953) (Article 113, UCMJ); *United States v. Franks*, 10 CMR 634 (AFBR 1953) (Article 90, UCMJ); see also *United States v. Anderson*, 17 USCMA 588, 38 CMR 386 (1968); *United States v. Robertson*, 1 M.J. 934 (NCFR 1976) (Article 43(a), UCMJ).

87. See cases cited note 86, supra.

88. Query also as to what is required to constitute another country as an "ally." It may not require active assistance in ongoing hostilities. Cf. *Sundell v. Lotmar Corp.*, 44 F. Supp. 816 (S.D.N.Y. 1942) (Soviet Union and U.S. were allies, in 1942, within meaning of 50 U.S.C., Appendix § 7(b)).

89. RCM 1004(c)(7)(A).

the program under which he is outside the walls of the prison may be determinative.<sup>90</sup>

Subsection (7)(B)<sup>91</sup> requires proof of the commission or attempted commission of certain enumerated crimes. Robbery, rape, aggravated arson, sodomy, burglary, mutiny and sedition should require proof of the substantive elements for those offenses as prescribed by the code.<sup>92</sup> Counsel should beware of the alternate theories available to the government to establish a kidnapping.<sup>93</sup> Attempted kidnapping may not be viable as an aggravating circumstance.<sup>94</sup> The piracy circumstances will be defined by the federal statutes which apply to those offenses.<sup>95</sup>

Subsection (7)(C),<sup>96</sup> covering murders committed for money or a thing of value, may cover a variety of circumstances, from murder for hire to murder for insurance fraud.<sup>97</sup> It should not be construed to allow an automatic doubling of aggravating circumstances where the robbery

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90. Delap v. State, 440 So.2d 1242, 1256 (Fla. 1983) (parole status satisfies a circumstance requiring that the accused be "under sentence of imprisonment," as opposed to "serving" such a sentence); Bufford v. State, 382 So.2d 1162, 1174 (Ala. Cr. App. 1980) ("work release" status satisfied similar criteria); but see Peek v. State, 395 So.2d 492, 499 (Fla. 1980), cert. denied 451 U.S. 964 (1981) (probation is not a sentence of imprisonment).

91. RCM 1004(c)(7)(B).

92. Articles 122, 120, 126(a), 125, 129, 94(a)(1) and 94(a)(2), UCMJ, respectively.

93. United States v. Scholton, 17 M.J. 171 (CMA 1984).

94. See United States v. Craig, 15 M.J. 513 (ACMR 1982) pet. granted 16 M.J. 189 (CMA 1983).

95. 18 U.S.C. §§ 1652, 1653 and 1655 (1948); 49 U.S.C. § 1472(i)(2) (1980); United States v. Dixon, 592 F.2d 329 (7th Cir. 1979) cert. denied 441 U.S. 951 (1981).

96. RCM 1004(c)(7)(C).

97. See Cook v. State, 369 So.2d 1251, 1256 (Ala. 1979).

or burglary provisions of (7)(B) are also applicable.<sup>98</sup> Subsection (7)(D)<sup>99</sup> is directed at the person who employs another to commit his murder. It is fairly narrow, but could be abused by coupling it with (7)(E).<sup>100</sup>

Subsection (7)(E),<sup>101</sup> murder to avoid apprehension or to escape from custody, should be limited to situations where the accused is in custody or confinement or apprehension is imminent, and not applied to any murder committed where it is arguable that death is inflicted "to prevent identification by the victim" of another crime.<sup>102</sup> Efforts to limit similar aggravating circumstances to the murder of law enforcement personnel have been unsuccessful,<sup>103</sup> but it takes more than "the mere fact of death"<sup>104</sup> to prove this one.

Most of the specific individuals identified in subsection (7)(F)<sup>105</sup> are unambiguous and if a client has killed one of them he will be in real danger. A "judge of the United States" may not include a military judge.<sup>106</sup> The accused must have actual knowledge of the status of the persons singled out in (7)(G) and they must be people who are actually

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98. *Maggard v. State*, 399 So.2d 973, 977 (Fla. 1981); *Gafford v. State*, 387 So.2d 333, 337 (Fla. 1979); *State v. Stewart*, 250 N.W.2d at 867; *Bolender v. State*, 422 So.2d 833 (Fla. 1982).

99. RCM 1004(c)(7)(D).

100. See note 98, supra.

101. RCM 1004(c)(7)(E).

102. *Ex parte Johnson*, 399 So.2d 873, 874 (Ala. 1979).

103. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569, 586 (N.C. 1979); *Riley v. State*, 366 So.2d 19, 22 (Fla. 1979).

104. See note 103, supra.

105. RCM 1004(c)(7)(F).

106. See 28 U.S.C. § 451 (1982). This definition is expressly limited to Title 28 U.S.C., but the phrase still connotes a judge with general personal jurisdiction.

employed in those capacities in some way. Since this circumstance is clearly directed at those who murder authorities, it should be inapplicable to one who kills a subordinate, unless the lower ranking servicemember's official status was of a different nature than that of the killer. For instance, a staff sergeant who kills a sergeant in the execution of the office of leading his fire team should not fit within this aggravating circumstance. But a staff sergeant who kills a sergeant in the execution of military police duties could fall within this subsection. The difference is that in the former case, the special status sought to be emphasized by the aggravating circumstance is not invoked. In short, the literal wording of this circumstances ought not to be interpreted to make it applicable where the victim has no position of authority over the accused.

Counsel should attempt to limit subsection (7)(M)107 to the intent to obstruct justice as that substantive offense is defined in 18 U.S.C. § 1503 (1948).<sup>108</sup> The elements of that offense are (1) endeavoring to (2) corruptly (3) influence any witness in any court of the United States or influence the due administration of justice.<sup>109</sup> One is not a witness unless he is expected to be called to testify; the mere fact that a person has material knowledge does not make him a witness within the meaning of this offense.<sup>110</sup> This subsection should not be allowed to duplicate others such as (7)(E) or (2)(B).<sup>111</sup> It is to be distinguished from those which apply to efforts "to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime."<sup>112</sup>

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107. RCM 1004(c)(7)(M).

108. The military offense (Article 134, UCMJ) derives its elements from this statute. *United States v. Wysong*, 9 USCMA 249, 26 CMR 29 (1958); *United States v. Daminger*, 30 CMR 521, 523 (AFBR 1961) citing *Kloss v. United States*, 77 F.2d 462, 464 (8th Cir. 1935); But see *United States v. Caudill*, 10 M.J. 787 (AFCMR 1981); *United States v. Favors*, 48 CMR 873 (ACMR 1974).

109. *United States v. Tedesco*, 635 F.2d 902, 907 (1st Cir. 1980) cert. denied 452 U.S. 962 (1981).

110. *United States v. Chandler*, 604 F.2d 972, 974 (5th Cir. 1979) cert. dismissed 444 U.S. 1104 (1980); *United States v. Jackson*, 513 F.2d 456, 459 (D.C. Cir. 1975).

111. See note 98, supra.

112. See *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849, 863 (1977).

Subsection (7)(I)113 punishes murder preceded by the infliction of prolonged mental or physical pain. This subsection's double reliance on the word "substantial" should be fatal. The word is, as previously explained, undefinable and without it the subsection has no content at all.114 In the event this circumstance survives an attack for facial validity, it must be read at least as narrowly as more precise aggravating circumstances have been in other jurisdictions.115 The government's understandable effort to insure that the most atrocious and gruesome murders do not slip through a crack must not be converted into a "catch all."116

The final subsection of aggravating circumstance (7), that the appellant has been found guilty of another Article 118, UCMJ, offense in the same case, is narrowly drafted and probably sufficient.117 It applies only to those who commit two or more murders, and not to one who commits a murder and merely attempts to commit another one.118 Should the military judge insist on allowing separate specifications alleging murder of the same victim to go to the members, the separate allegations do not invoke this circumstance.119 It will be observed that no aggravating circumstance applies to an accused who is convicted of different murders at separate trials. A motion for severance, if successful, could never benefit defense counsel's client more than when the government seeks the death penalty under subsection (7)(J).120

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113. RCM 1004(c)(7)(I).

114. See note 52, supra.

115. See e.g. State v. Clark, 616 P.2d at 896. State v. Ceja, 612 P.2d 491 (1980); State v. McKenzie, 608 P.2d 428, 445 (Mont. 1980); State v. Simants, 250 N.W.2d at 891.

116. See note 53, supra.

117. RCM 1004(c)(7)(J).

118. See e.g. State v. Stewart, 250 N.W.2d at 849.

119. See e.g. United States v. Teeter, 16 M.J. 68, 72 (CMA 1983); United States v. Severs, 49 CMR 429 (ACMR 1974).

120. See Ferrante, Joinder and Severance of Offenses: Fair Trial Considerations, 15 The Advocate 253 (1983).

Aggravating circumstance (8),<sup>121</sup> applicable only to felony murder, will bring a sentence into compliance with Emmund v. Florida.<sup>122</sup> Requiring the accused to actually be the "triggerman" adds very little to the offense of felony murder, so it can be argued that this circumstance still does not narrow the category of death eligible murders in a "principled" way.<sup>123</sup>

Aggravating circumstance (9)(A)<sup>124</sup>, authorizing the death penalty for the rape of a female under the age of twelve, speculates on the meaning of Coker v. Georgia's<sup>125</sup> holding that "death is indeed a disproportionate penalty for the crime of raping an adult woman."<sup>126</sup> This statement arguably reserves decision over the offense of rape of a minor. After Emmund v. Florida held that robbery may not support the death penalty, even where it causes a death, unless the accused kills or intends to kill, it is significantly less likely that rape can invoke capital punishment where no death occurs. Circumstance (9)(B),<sup>127</sup> rape in conjunction with a maiming or an attempt to kill the victim, similarly speculates on the meaning of the second paragraph of footnote 16<sup>128</sup> of Coker. This subsection is also rendered even more tenuous by Emmund.<sup>129</sup>

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121. RCM 1004(c)(8).

122. Note that some of the previously discussed aggravating circumstances may not do this. E.g., RCM 1004(c)(2), (4), (5), and (6).

123. See Godfrey v. Georgia, supra; United States v. Matthews, supra at 379.

124. RCM 1004(c)(9)(A).

125. 433 U.S. 584 (1977).

126. 433 U.S. at 597.

127. RCM 1004(c)(9)(B).

128. 433 U.S. at 599, n. 16.

129. \_\_\_ U.S. \_\_\_, 102 S.Ct. 3368 (1982).

The Rules for Courts-Martial retains a mandatory death penalty for spying in time of war.<sup>130</sup> Mandatory death penalties have been declared unconstitutional for murder, regardless of how limited the categories of murder are.<sup>131</sup> The reasoning of these decisions should be applicable, even in time of war, to any mandatory death penalty.

Defense counsel must minimize the number of separate circumstances that are before the members when they deliberate, even if it is inevitable that defense counsel's client will be found to fit within one or more of the enumerated aggravating circumstances. The subtle influence of multiple aggravating factors is well recognized.<sup>132</sup> The military judge's instructions will heighten that tendency by advising the members that the aggravating circumstances are to be "weighed" against extenuating and mitigating circumstances.<sup>133</sup> Aggravating circumstances which were not found at trial may not support a death sentence, even if closely related to circumstances which were found.<sup>134</sup> Assuming defense counsel's attempts to delete an aggravating circumstance are unsuccessful at trial, but successful on appeal, the client's life may thus be saved by successful litigation that eliminated other circumstances at trial. The notice requirement of RCM 1004(b)(1) may assist in limiting the government to

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130. RCM 1004(d); Article 106, UCMJ.

131. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

132. See *United States v. Sturdivant*, 13 M.J. 323, 330 (CMA 1982); see also *United States v. Doss*, 15 M.J. 409, 412 (CMA 1983).

133. RCM 1004(b)(4)(B) and (b)(6).

134. *Presnell v. Georgia*, 439 U.S. 14 (1978).

fewer aggravating circumstances,<sup>135</sup> especially if some specific strategy was relied upon by the defense which would have been altered if notice had been given.

#### IV. Presenting the Defense's Sentencing Case

Even though the government has presented evidence which tends to further aggravate the offense and has established at least one of the enumerated "aggravating capital circumstances" to obtain the death penalty, it must still show that any extenuating and mitigating circumstances are outweighed by factors in aggravation.<sup>136</sup> Effective representation in the defense's presentation of extenuation and mitigation evidence requires a genuinely meaningful attorney-client relationship with a very difficult personality.<sup>137</sup> Any tendency by your client to present himself in an unnecessarily offensive manner should be suppressed;<sup>138</sup> even if your client is a remorseless sadist, he doesn't have to look like one to the members. More than just improving the accused's personal demeanor and appearance, the defense must present as much information concerning the accused's background, experience and

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135. Cases requiring notice in advance of trial under other systems are *State v. Timmons*, 192 N.J. super. 141, 468 A.2d 46 (1983), *Keenan v. Superior Court of California, City and County of San Francisco*, 126 Cal. App.3d 576, 177 Cal. Rptr. 841 (Cal. App., 1st Dist. 1981) and *State v. Sonnier*, 379 So.2d 1336 (La. 1980) (not a statutory requirement, but a constitutional one); contra *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982); see also *Green v. State*, 246 Ga. 598, 272 S.E.2d 475, (1980) (Hill, J., dissenting in part) (this opinion would restrict evidence in aggravation to that which is relevant to establish an aggravating factor, thus excluding inflammatory evidence which may have been admissible at an earlier stage in the trial).

136. RCM 1004(b)(4)(B). This subsection does not prescribe the percentage of votes or burden of proof on this issue. Counsel should argue for unanimous findings, see Article 52(b)(1), UCMJ; RCM 1004(b)(7); and for proof beyond a reasonable doubt, see RCM 1004(b)(4)(A) and RCM 1004(c).

137. Goodpaster, supra note 4 at 322-323.

138. Goodpaster, supra note 4 at 323.

positive qualities as good tactics will allow. Almost any criminal will still have redeeming qualities which may be demonstrated to the court,<sup>139</sup> although it may take extensive investigation and effort to identify them. Even if your client cannot be depicted as an overall positive member of society, the presentation of whatever favorable evidence there is may avoid the death penalty by focusing the court's attention on something - anything - other than the gruesome details of the crime.

RCM 1004(b)(3), gives the accused "broad latitude to present evidence in extenuation and mitigation." This provision contemplates a greater latitude than that created by a mere "relaxation" of the rules of evidence,<sup>140</sup> or it is superfluous. Such an interpretation is supported by the Supreme Court's decisions that no relevant mitigating evidence or circumstance of the accused's background may be excluded from sentencing consideration.<sup>141</sup> These decisions probably place additional constitutional constraints on refusal to provide available witnesses under RCM 1001(e) (formerly Para. 75e MCM) Expense to the government is hardly a legitimate excuse for denying live testimony when the government puts life itself in jeopardy. In many ways the presentation of the defense sentencing case will resemble that at any other military sentencing procedure. However, there may be some categories of evidence which a capital case will treat differently.

Some consideration should be given to presenting evidence about the death penalty itself. A member who would impose the death penalty as a deterrent to others might be influenced by expert testimony that its deterrent value is questionable at best.<sup>142</sup> One who fears recidivism by

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139. *People v. Jackson*, 28 Cal.3d 264, 329, 618 P.2d 149, 201, 168 Cal.Rptr. 603, 655 (Mosk J., dissenting).

140. RCM 1001(c)(3), formerly Para. 75c(3), MCM; Military Rules of Evidence, Rule 1101(c).

141. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see also *Lockett v. Ohio*, 438 U.S. 586 (1978). The prosecution is limited to relevant matters in aggravation and may not use evidence or make argument which improperly appeal to passions or to irrelevant considerations such as financial expense to the government, race, religion, or the possibility of parole. See *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984); *Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1984); *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983).

142. See *Furman v. Georgia*, 408 U.S. at 348-352 (Marshall, J., concurring); *Gall v. Commonwealth*, 607 S.W.2d 97, 112 (Ky. 1980) (affidavit that death penalty is not deterrent admitted).

the particular accused on trial might be influenced by favorable evidence of the rehabilitative successes of the military correctional system.<sup>143</sup> Anyone might be influenced by evidence that the method of execution is far from humane<sup>144</sup> or that it is imposed in a discriminatory manner.<sup>145</sup> While the trial judge may not be required to admit evidence of these types, even under the broad standards required by the Constitution,<sup>146</sup> he may exercise his discretion and permit it in a particular case. If the military judge balks at admitting such evidence through witnesses, the defense should try to present it through documents.<sup>147</sup>

Evidence of a co-accused's sentence is relevant to the issue of a proper sentence.<sup>148</sup> Non-capital military decisions have intimated that

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143. Cf. Davis v. State, 241 Ga. 376, 387, 247 S.E.2d 45, 52, cert. denied 439 U.S. 947 (1978) (former death row inmate testified to his rehabilitation).

144. See Furman v. Georgia, 408 U.S. at 287-288 (Brennan, J., concurring); Gall v. Commonwealth, 607 S.W.2d 97, 112 (Ky. 1980) (witness to electrocutions described them).

145. See Harris v. Pulley, \_\_\_ U.S. \_\_\_, 52 U.S.L.W. 4141, 4149 (1984) (Brennan, J., concurring); Davis v. State, 241 Ga. 376, 247 S.E.2d 45 cert. denied 439 U.S. 974 (1978) (evidence of wealth discrimination).

146. Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981) (opinion evidence as to death penalty's appropriateness); Shriner v. State, 386 So.2d 525 (Fla. 1980) cert. denied 449 U.S. 1103 (1981) (witness to an execution); Irving v. State, 361 So.2d 1360 (Miss. 1978) cert. denied 441 U.S. 913 (1979) (evidence of discriminatory application of death sentence).

147. See e.g., Military Rules of Evidence, Rule 803(8).

148. Gafford v. State, 387 So.2d 333, 337 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); cf. Blankenship v. State, \_\_\_ Ga. \_\_\_, 308 S.E.2d 369 (1983) (error to exclude evidence of third party's involvement in rape and murder).

co-actors' sentences were not admissible,<sup>149</sup> but these decisions have not been based on a lack of relevance and are therefore suspect in a capital case.<sup>150</sup>

The defense's case can involve the testimony of relatives, friends, acquaintances and strangers as to the circumstances of the offense, the accused's past, his mental and physical condition and his potential for rehabilitation. The evidence presented will depend on the judgment of counsel as to the persuasive impact of the defense evidence and on what the government may present in rebuttal.<sup>151</sup> You are pursuing only one vote out of the whole court membership.<sup>152</sup> What may not be persuasive to most court members may win that one vote. Unless certain evidence is actually damaging to your client's cause, doubt should be resolved in favor of introduction.

#### V. Conclusion

After being on notice for twelve years, the military has taken the first step to bring its capital sentencing procedures in compliance with the Constitution. The new system may still be inadequate to withstand appellate review, but your client will be best served if his is not the case to test that speculation. A trial strategy which attacks the constitutionality of the sentencing procedure authorized by the new Manual provisions and aggressively and creatively presents evidence in extenuation and mitigation offers the best chance for avoiding the death penalty at trial while laying the groundwork for further litigation on appeal.

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149. United States v. McNeece, 30 CMR 453 (ABR), pet. denied, 30 CMR 417 (CMA 1960); Cf. United States v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959).

150. Eddings v. Oklahoma, 455 U.S. 104 (1982).

151. See Tucker v. Francis, supra n. 128 (defendant's exculpatory testimony on sentencing opened door to cross-examination concerning his failure to testify on the merits).

152. Article 52(b)(1), UCMJ.

# CORROBORATION OF CONFESSIONS

By Captain Robert S. Johnson, Jr.\*

## I. Introduction

Military Rule of Evidence 304(g) requires that before an admission or a confession can be considered against a defendant on the question of guilt, the admission or the confession must be corroborated. The rule requires the prosecution to corroborate the essential facts with independent evidence, either direct or circumstantial, sufficient to justify an inference of truth. This article reviews the history of the corroboration rule and discusses its application in the military and federal judicial systems.

## II. History of Corroboration

In the United States one cannot be convicted based upon his extrajudicial confession alone. This rule was established because:

In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession.<sup>1</sup>

Thus, even if a statement is voluntarily made to police officials and is not subject to the exclusionary rule, the statement may still be unreliable because it was made by a suspect under the pressure of a police investigation.<sup>2</sup> Two classic cases exemplify the need for the requirement that confessions and admissions be corroborated.

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1. *Opper v. United States*, 348 U.S. 84, 89-90 (1954).
2. *Smith v. United States*, 348 U.S. 147 (1954).

The first case was tried in 1660.<sup>3</sup> William Harrison left home one night to visit a nearby town. When he did not return, a servant named John Perry was sent to look for him. Perry also did not return. The next morning Edward Harrison, William's son, searched for both men. He found Perry, but not William, although, they did find his hat and a comb. Suspicions of murder arose, with Perry being the prime suspect. After a week in jail, Perry confessed, implicating not only himself but also his brother, Richard, and their mother. Those two, however, denied any knowledge of or involvement in the disappearance of William Harrison. At trial John Perry stated that he was insane and hadn't known what he said when he confessed. Notwithstanding this recantation, all three were convicted solely on the basis of Perry's confession and were hanged. Two years later William Harrison returned and told how he had been robbed, kidnapped and sold into slavery. He escaped and returned to England after his master died.

One hundred and fifty years later, in Boorn's Trial,<sup>4</sup> two brothers were charged with the murder of Russel Colvin, a man of weak intellect, who was sometimes insane and who would leave home for long periods of time. One time Colvin disappeared and stayed away for what turned into years. Rumors spread and the people of his town began to expect foul play. When one of the Boorn brothers stated he knew Colvin was dead, many people began to believe the Boorn brothers, Jessie and Stephen, had murdered Colvin. After his arrest Jessie stated that his brother Stephen had murdered Colvin. Stephen was arrested but denied the accusation. While the two awaited trial, public feeling became intense against the brothers. Many townspeople, including persons of character and influence and officers of the law, visited them in jail and told them the evidence was clearly against them and to confess. If they did confess efforts would be made to have their sentences commuted to life in prison. Finally, convinced this was their only hope, Stephen signed a confession. Based almost entirely on this confession both were convicted and sentenced to be hanged. Stephen asked one of his lawyers to advertise for Colvin. This was done in a local paper and was copied in a New York paper. One person recognized the description given as similar to that of a man who worked for him. The employee was located and identified as Russel Colvin. Only then were the two brothers released.

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3. Perry's Case, 14 How. St. Tr. 1312 (1660).

4. 6 Am. St. Tr. 73 (VT 1819).

In order to prevent such injustices the rule requiring corroboration of confessions evolved. Initially this rule was that a confession must be corroborated by independent proof of the corpus delecti.<sup>5</sup> Corpus delecti ("the body of the crime") is evidence that a crime has been committed by someone. Although the prosecution also must prove that the defendant committed the criminal act, the confession could be used for this purpose provided the corpus delecti was adequately corroborated.<sup>6</sup> Some jurisdictions held that the corpus delecti rule applied only to felonies and that one could be convicted for a misdemeanor on his confession alone.<sup>7</sup>

The rule requiring independent proof of the corpus delecti led to the following provision in the 1951 Manual for Courts-Martial:

An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offenses charged had probably been committed by someone. The corroborating evidence need not . . . tend to connect the accused with the offense.<sup>8</sup>

Thus, the early military rule did not require the connection of the accused with the offense and it did not require any details of the confession itself to be corroborated. It simply required that there be evidence that the crime charged had probably been committed by someone.<sup>9</sup> As stated

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5. Wharton's Criminal Evidence, § 691 (21st ed. 1973).

6. Id.

7. See Annotation, 127 A.L.R. 1130, 1132.

8. Para. 140a, Manual for Courts-Martial, United States, 1951.

9. United States v. Dolliole, 3 USMA 101, 11 CMR 101 (1953).

by one military board of review<sup>10</sup> there must be "substantial independent evidence tending to establish the existence of each element of the offense charged." However, this evidence need only establish the probability, rather than prove beyond a reasonable doubt, that the criminal act had occurred. In establishing this probability consideration was given both to the facts and to "any reasonable inferences" that could be drawn therefrom.<sup>11</sup> The Court of Military Appeals stated the rule was satisfied if there was "substantial evidence which makes it probable that the accused did not confess to an offense which never occurred."<sup>12</sup> Thus, in applying the corpus delicti rule, one would first determine the elements of the charged offense and determine whether evidence or reasonable inferences derived therefrom existed aside from the confession to prove a crime had been committed. It was not necessary to corroborate the connection of the accused with the crime. For example, if the accused was charged with murder and there was evidence of a death and circumstances indicating that the death was unlawful, i.e., bullet holes, stab wounds, etc, the rule was satisfied and a confession would be admissible.<sup>13</sup>

### III. The Present Rule

Although the military rule paralleled the rule in many federal courts, other federal courts had adopted a different corroboration rule. This latter rule required only that the corroborating evidence fortify the truth of the confession or tend to prove the facts outlined in the confession.<sup>14</sup> Because two different rules were being applied in the

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10. United States v. Fairless, 18 CMR 904, 906 (AFBR 1955) (citations omitted; emphasis in original).

11. Id.

12. United States v. Evans, 1 USCMA 207, 209, 2 CMR 113, 115 (1952).

13. Para. 140a, MCM, 1951, supra.

14. See Opper v. United States, 348 U.S. at 92, and cases cited therein.

federal courts, the United States Supreme Court addressed the issue in Opper v. United States and Smith v. United States. The Supreme Court held that for the government to corroborate a confession it must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement."<sup>15</sup> Evidence of corroboration was sufficient if it supported the essential facts sufficiently to justify an inference of truth.<sup>16</sup> Corroboration could thus be accomplished by the introduction of independent evidence which bolstered the confession.<sup>17</sup>

This holding by the Supreme Court eventually led to a change in the corroboration rule as applied in the military. The Military Rules of Evidence now state the following:

An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.<sup>18</sup>

Thus, the rule is no longer concerned with the elements of the offense when corroborating a confession but focuses on the statement itself. The government must corroborate the essential facts admitted by the accused by independent evidence to indicate the truthworthiness of the confession or admission. These essential facts may or may not be elements of the offense. However, all the elements of the offense must still be established either by independent evidence or by corroborated admissions or confessions.<sup>19</sup> If the government can only corroborate

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15. Opper v. United States, 348 U.S. at 93.

16. Id.

17. Smith v. United States, 348 U.S. 147 (1954).

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

19. United States v. Dake, 12 M.J. 666 (ACMR 1981).

certain parts of an admission or confession only the part corroborated may be used to prove the accused's guilt.<sup>20</sup>

The facts in United States v. Dake<sup>21</sup> illustrate how the present corroboration rule operates. The issue before the Army Court of Military Review was whether the accused's confession to conspiracy should have been excluded from evidence because it had not been properly corroborated. The Government's case as to the conspiracy charge rested entirely upon the following statement given by the accused (errors in original):

During the first week in Oct 79, HICKEL came to me and said that he had heard that I was going to take in country leave and wanted me to take leave to Japan and make some purchases for him. I at first did not agree but after he asked several times we made a deal. I signed out on leave on 22 Oct 79 and met HICKEL that day. HICKEL gave me a phony set of leave papers from Ft. ORD, CA, and \$15000.00 plus another ninety dollars for misc. expenses. He also gave me a paper listing the people that I was to send the items I purchased in Japan for him. All the people I was to send the stuff to were members of the unit. I understood that he had made arrangements with to receive the boxes. When he handed me the list of names he stated "Here is the list of people I asked to receive the boxes. He also provided the name of a Japanese who worked in the Pony Store in Japan who I was to ask for. When I got to JAPAN and the store I asked for this fellow, I Can't recall him name, and when he came up to me I got the impression that I was expected. This fellow took me downstairs and we had coffee. I gave him the list and he took it to get the items together. I purchased eight VTR, eight color TV, and four each amplifiers

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

21. 12 M.J. 666 (ACMR 1981).

and tuners. This came back a while later and I paid him for the merchandise. We then went up stairs and they were already wrapping the stuff. I left and returne the next day and began making trips to the APO to mail the stuff back to the guys in my unit. It took a total of five trips. When I came back to Korea I still had about \$700.00 left and that was mine to keep plus I was supposed to get another \$30.00 per boxx when they came in. I met with HICKEL on the 25th the day after I got back. I gave him all the receipts for the stuff and the mail receipts and asked about the money. He said that when the boxes came in he would pay me. Some time later HICKEL told me that the boxes had been held at KIMPO and that I should just be kool.<sup>22</sup>

To corroborate this confession the government produced evidence that: (1) custom officials had impounded twenty packages bearing the return address of the appellant; (2) the packages were addressed to eight members of the 595th Maintenance Company; (3) eight of these packages contained Sony model 8600 videotape records, eight contained Sony color television sets, and four contained both a Marantz amplifier and a Marantz tuner; (3) photographs of the items indicated that the merchandise was new; (4) photographs of the wrapping indicated that the packages were mailed on 23 October 1979 through the Air Force postal system; and (5) independent evidence revealed the prices of these items. The court agreed that the independent evidence was sufficient to corroborate the appellant's confession that he used the postal system for personal profit and that he committed the overt act alleged. However, the crucial question on appeal was whether the accused's confession as it related to the conspiracy charge had been corroborated.

The analysis utilized by the Army Court of Military Review in answering the questions was first to determine the elements of the offense of conspiracy. This required the government to prove the existence of an agreement between the accused and some other individual. The court then used the Opper/Smith rule, as incorporated in the Military Rules of Evidence, to determine if there was independent evidence corroborating the accused's admission regarding an agreement. Since there was none, the charge alleging conspiracy was dismissed.<sup>23</sup>

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22. United States v. Dake, 12 M.J. at 667-68 (ACMR 1981).

23. Id. at 670.

The recent case of United States v. Loewen<sup>24</sup> is another example of how military courts apply the corroboration rule. The accused was convicted of twenty-six specifications of larceny of drugs and twenty-six specifications of forgery. The court in deciding whether his confession was sufficiently corroborated first listed the essential facts admitted in his statement. It next looked for independent corroboration of these facts by the government's evidence. The only fact corroborated was that the accused was addicted to tylenol. Since the government's evidence failed as to the remaining facts the statements by the appellant were held inadmissible. Without his statements, the evidence was insufficient to prove the accused guilty and the charges were dismissed. The court noted the underlying danger in relying upon uncorroborated confessions when it suggested that not only did the independent evidence fail to support an inference that the confession was reliable, it strongly indicated that it was false.

In analyzing a corroboration problem the first step for a defense counsel is to review the statement and locate the essential facts admitted. The second step is to review the other evidence available to the government. It then must be determined which of the facts admitted are corroborated by this independent evidence. It should be pointed out that this independent evidence only has to raise an inference of the truth of the admission. For instance, possession of bags of marijuana packaged for sale is sufficient to raise an inference of truth of an admission of introduction for the purpose of sale.<sup>25</sup> Possession of drugs on an installation is sufficient to corroborate an admission of wrongful introduction.<sup>26</sup> However, mere possession is insufficient to corroborate an admission of transfer or sale.<sup>27</sup> Once a determination has been made as to what essential facts have been corroborated and what independent evidence is available, the last step is to compare this admissible evidence to the elements of the offense charged. This analysis will reveal the strength of the government's case and thus guide counsel in preparing the defense.

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24. 14 M.J. 784, 788 (ACMR 1982).

25. United States v. Henken, 13 M.J. 898 (NMCMR 1982).

26. United States v. Hollen, 43 CMR 461, 467-468 (ACMR 1970).

27. United States v. Bailey, 3 M.J. 799 (ACMR 1977).

#### IV. Type of Evidence That May Be Used

Once the essential facts and the other evidence available to the government have been determined, the question remains as to what type of evidence is admissible to corroborate those essential facts. Military Rule of Evidence 304(g) limits what can be used to direct or circumstantial evidence. The standards of admissibility are not relaxed in order to corroborate the essential facts of a statement. The basic reason for barring certain types of inadmissible evidence is because it is untrustworthy. To allow untrustworthy evidence to corroborate a confession would defeat the entire purpose of the rule, i.e., to ensure an inference of truth.<sup>28</sup> Thus, this part of the article will give some examples of how confessions have been corroborated. However, it is important to remember that the quality and type of independent evidence necessary to corroborate a confession depends upon the facts of each case.

Other post-offense statements of an accused may not be used to provide the necessary corroboration.<sup>29</sup> However, statements made prior to or contemporaneous with the misconduct may provide the necessary corroboration.<sup>30</sup> Furthermore, statements admissible under other rules of evidence not pertaining to confessions and admissions may be utilized. For instance, a properly qualified business entry could be used to corroborate a confession.<sup>31</sup> However, inadmissible hearsay cannot be used to satisfy this rule.

In United States v. Springer, the Air Force Court of Military Review held that in special cases evidence of other larcenies could provide the necessary corroboration for an admission or confession to that offense.<sup>32</sup> This rule was qualified by the requirement that the items taken in another offense should be similar and taken over a short

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28. Developments - Confession, 79 Harvard Law Review 935, 1075 (1966).

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

30. United States v. Cortes, 20 USCMA 132, 42 CMR 324 (1970).

31. United States v. Villasenor, 6 USCMA 3, 19 CMR 129 (1955).

32. 5 M.J. 590 (AFCMR 1976).

period of time. In United States v. Seigle,<sup>33</sup> the accused confessed to taking 74 albums and a phonograph from the base exchange. Independent testimony from several witnesses revealed that they had observed the accused take between 2 and 15 albums from the exchange without paying for them. Six of the 74 albums turned over to police officials by the accused were identified by stock numbers as coming from the exchange. Based upon this evidence the Court of Military Appeals believed there was ample evidence to corroborate the essential facts as to stealing 74 albums. No one saw the accused take the phonograph. However, there was independent evidence that the phonograph was similar to the ones stocked by the exchange and the box in which it was packaged bore an exchange stock number. The court stated that these facts "alongside the appellant's observed theft of record albums permit our finding that there was sufficient evidence that the confession was not made up by him with the intent to deceive."<sup>34</sup> Thus, Siegle's conviction of larceny of 74 albums and the phonograph was upheld. However, the use or possession of drugs on one occasion has been insufficient to be used to corroborate an admission of use or possession on another.<sup>35</sup>

In some federal cases corroboration has been found in the detailed nature of a confession, i.e., knowledge of the time, place or method of an offense, or by knowledge of facts that a suspect would be unlikely to know unless he were the perpetrator.<sup>36</sup> In United States v. Waller,<sup>37</sup> the accused made a statement admitting that he and another individual had robbed a taxicab. The court examined the facts as outlined in the statement and stated that these facts not only coincided with the other facts known, but also could not have been known by the accused unless he had committed the crime. Mapys v. United States<sup>38</sup> dealt with an accused

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33. 22 USCMA 403, 47 CMR 343 (1973).

34. Id. at 406, 47 CMR at 343.

35. United States v. Kaetzel, 48 CMR 58 (AFCMR 1973).

36. See, e.g., United States v. Gresham, 585 F.2d 103 (5th Cir. 1978); United States v. Abigando, 439 F.2d 827 (5th Cir 1971).

37. 326 F.2d 314 (4th Cir. 1963).

38. 409 F.2d 964 (10th Cir. 1969).

charged with transporting a stolen car through interstate commerce. To determine that his admission concerning this offense was adequately corroborated, the court considered the fact that the accused, who desired to obtain some personal belongings from the car, was able to locate the stolen car without assistance in a parking lot containing a large number of automobiles.

In United States v. Speakes,<sup>39</sup> the defendant was charged with passing a counterfeit \$20.00 bill. The accused argued that his admission that he knew the bill was counterfeit was not corroborated. The court found corroboration because (1) the counterfeiting job was very poor and the bill was recognized immediately as bogus; (2) the defendant's story that he found the bills in a parking lot and wanted to spend them to see if they were genuine was bizarre and incredible; (3) the defendant was in the company of a man who tried to hide the bills after their apprehension; and (4) the defendant and his co-accused immediately tried to leave town when one store would not accept one of the bills. The Speakes case is an example as to how circumstantial evidence may be used to justify an inference of truth.

In other cases, a letter from a drug dealer to an accused charged with manufacturing, importing and distributing heroin, without any reference as to the contents, was held to support an inference of a relationship between the two and it, along with other facts, provided the necessary corroboration.<sup>40</sup> The mental or physical injury of a victim resulting from an offense has been used to corroborate a confession to offenses such as assault or rape.<sup>41</sup>

## V. Objection

The above cases demonstrate how a confession can be corroborated. In the majority of cases the government will have substantial independent evidence such as witnesses, physical injuries of a victim, fruits of the crime, or incriminating evidence seized from a defendant which will adequately corroborate an accused's admission or confession. However,

39. 453 F.2d. 966 (1st Cir. 1972).

40. United States v. Abigando, supra.

41. United States v. Shreck, 10 M.J. 563 (AFCMR 1980).

in every case where a client has confessed the attorney should analyze the independent evidence to determine if corroboration might pose a problem for the prosecution. Simply because an accused has confessed does not guarantee a conviction. However, failure to object to the introduction of a confession because of lack of corroboration may waive the error on appeal.<sup>42</sup>

The Military Rules of Evidence state that the military judge will determine when there has been adequate corroboration.<sup>43</sup> In a trial before members, there would appear to be two acceptable ways to object to the admissibility of a confession because of a lack of corroboration. The first would be by way of a motion for appropriate relief prior to entering pleas. The government would then present to the military judge its available independent evidence. The military judge would thereupon make a ruling on admissibility. A second procedure would be to inform the military judge prior to pleas that the defense is going to object to the admissibility of the defendant's confession because of lack of corroboration. If the military judge refuses to decide the issue prior to entry of pleas, then the defense should request that the government be required to present its independent corroborating evidence prior to introducing the accused's statement into evidence. At that point in the trial, an Article 39a, UCMJ, session could be conducted to allow argument on the issue and to allow the judge to make a decision and enter findings. Although the Military Rules of Evidence allow the military judge to admit the admission or confession subject to later corroboration, the defense attorney should object strongly to this procedure being utilized in a court-martial with members. Once the court members are allowed to hear evidence concerning an admission or confession it will become virtually impossible for them to divorce this from their deliberation regardless of any cautionary instructions. If the judge does allow the government to introduce the statement subject to later corroboration, and he then determines that corroboration is lacking, defense counsel should move for a mistrial. Should the military judge deny this motion, then the defense should make a motion for a finding of not guilty at the end of the government's case.

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42. United States v. Lockhart, 11 M.J. 603 (AFCMR 1981).

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

## VI. Conclusion

The rule requiring that a confession or an admission be corroborated before it is admissible is a seldom-used basis for excluding evidence which is usually devastating to the defense's case. In the majority of cases, of course, there is sufficient independent evidence to adequately corroborate a confession or an admission. However, an alert defense counsel will always ensure that such is the case during his pretrial preparation. One should never let police officials or trial counsel believe that they have a conviction simply because they have a confession.

## SIDE BAR

This edition of Sidebar discusses the importance of litigating three issues at trial. The first segment concerns the litigation of subject-matter jurisdiction. Although it may appear that jurisdiction is not a "winning" issue in many cases, it can be meritorious if properly presented by the defense. Moreover, as was discussed at length in the September/October issue of The Advocate, The Military Justice Act of 1983 provides for Supreme Court review of Court of Military Appeals decisions. Jurisdiction is an issue likely to result in a grant of certiorari. However, the issue must be fully litigated at trial if there is to be any hope of success on appeal.

Experts can be found on almost any subject espousing a plethora of novel theories. In the criminal context the "theories" on which an expert bases his testimony are closely examined to ensure the scientific validity of the underlying principles. In the next segment of Sidebar a recent decision of the Army Court Military Review dealing with novel scientific testimony is examined.

Finally, Sidebar examines the impact of the Court of Military Appeals' opinion in United States v. Holt, 16 M.J. 393 (CMA 1983), on the litigation at trial of multiplicity of charges for findings. Although the failure to object to multiplicitious specifications at trial currently no longer waives the issue, the failure to ensure that the multiplicitiousness of the offenses appears on the face of the specification will result in a denial of relief.

## SUBJECT-MATTER JURISDICTION

### A. Introduction

During the past year, the defense bar suffered three more defeats at the Court of Military Appeals on the issue of subject-matter jurisdiction.<sup>1</sup> Since its landmark decision in United States v. Trotter,<sup>2</sup> the Court and the Courts of Military Review<sup>3</sup> have espoused a more flexible and less restrictive view of the meaning of "service connection,"<sup>4</sup> as clarified by the twelve criteria set forth in Relford v. United States Disciplinary Commandant.<sup>5</sup> Nonetheless, as military defendants attain the right to appeal directly to the Supreme Court,<sup>6</sup> military defense counsel should understand that these setbacks do not sound the "death knell" for the jurisdiction issue. Rather, these three decisions only underscore that jurisdiction must be litigated, with imagination and forethought, on the record. Consequently, this Sidebar note is designed to suggest trial strategy which either will win at trial or will preserve the issue for appeal.

1. United States v. Johnson, 17 M.J. 73 (CMA 1983); Murray v. Haldeman, 16 M.J. 74 (CMA 1983); United States v. Lockwood, 15 M.J. 1 (CMA 1983).

2. 9 M.J. 377 (CMA 1980).

3. See, e.g., United States v. Masuck, 14 M.J. 1017 (ACMR 1982) (forgery of check); United States v. Petitti, 14 M.J. 754 (AMCR 1982), pet. denied, 15 M.J. 317 (CMA 1983) (communication of threat); United States v. Lange, 11 M.J. 884 (AFCMR 1981), pet. denied, 12 M.J. 318 (CMA 1981) (marijuana possession and use); United States v. Brace, 11 M.J. 794 (AFCMR 1981), pet. denied, 12 M.J. 109 (CMA 1981) (companion case to Lange); United States v. Coronado, 11 M.J. 522 (AFCMR 1981), pet. denied, 11 M.J. 365 (CMA 1981) (sodomy).

4. O'Callahan v. Parker, 395 U.S. 258 (1969).

5. 401 U.S. 355 (1971).

6. Military Justice Act of 1983, 97 Stat. 1393 (codified at 28 U.S.C. § 1259 (as amended)).

B. "I Have Some Good News and Some Bad News."

Initially, two observations should be made regarding the good news and bad news heralded by last year's decisions. First, the bad news--the defense must contest service connection on the record at trial. Unfortunately, the defense can no longer remain confident that jurisdiction "cannot be waived and may be asserted at any time."<sup>7</sup> In United States v. Lockwood, Chief Judge Everett stressed that "appellant's express refusal to contest service connection justifies drawing any reasonable inferences against him with respect to factual matters not fully developed in the record of trial."<sup>8</sup> Similarly, in United States v. Johnson, Chief Judge Everett again noted the failure to litigate the issue at the trial level.<sup>9</sup> Nevertheless, the Court appears to be on solid ground. In Schlesinger v. Councilman,<sup>10</sup> the Supreme Court observed:

[The issue of service connection] turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. See Relford v. United States Disciplinary Commandant, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971). More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts.<sup>11</sup>

7. Paragraph 68b, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

8. 15 M.J. at 7.

9. 17 M.J. at 75.

10. 420 U.S. 738 (1975).

11. Id. at 760 (emphasis in original).

Absent a fully developed record, however, "any eventual review in Art.III courts" will be improbable and, perhaps, impossible. Thus, the clear message of Lockwood is that jurisdiction must be litigated on the record at the accused's court-martial.

Second and most importantly, the good news -- the Court of Military Appeals has struck a crippling blow to the government's messianic crusade since Trottier to circumvent the Relford factors by erecting a per se rule of jurisdiction. In Murray v. Haldeman, Chief Judge Everett recalled that, in United States v. Beeker,<sup>12</sup> the Court had initially applied the precepts of O'Callahan in an expansive approach to military jurisdiction.<sup>13</sup> Furthermore, the Murray opinion remembered the broad rule of Trottier that "almost every involvement of service personnel with the

12. 18 USCMA 563, 40 CMR 275 (1969)

13. In Beeker, the Court held:

Apart from the specifics of Federal and State law, use of marihuana and narcotics by military persons on or off a military base has special military significance..... As a result, the circumstance of "no military significance," described in O'Callahan as an essential condition for the limitation on court-martial jurisdiction, is not present as to the offenses alleged.

2. As with the case of use of marihuana, possession of marihuana by military persons is a matter of immediate and direct concern to the military as an act intimately concerned with prejudice to good order and discipline or to the discredit of the armed forces. [Citations omitted] Like wrongful use, wrongful possession of marihuana and narcotics on or off base has singular military significance which carries the act outside the limitation on military jurisdiction set out in the O'Callahan case.

18 USCMA at 565, 40 CMR at 277.

commerce of drugs is 'service connected.'"<sup>14</sup> Notwithstanding these wide precedents, the Murray decision emphasized "that Beeker had not been reincarnated"<sup>15</sup> by reaffirming the exception enunciated in footnote 28 of Trottier<sup>16</sup> and clearly stating:

Nonetheless, in light of O'Callahan v. Parker, supra, and Relford v. Commandant, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971), we did not in Trottier return fully to the holding of United States v. Beeker, supra, that, by reason of a servicemember's status, every drug offense he commits ipso facto is service-connected.<sup>17</sup>

Thus, the Court of Military Appeals has signalled a return to the "ad hoc approach" of analyzing the Relford criteria to determine jurisdiction controversies.

14. 9 M.J. at 350.

15. 16 M.J. at 79.

16. 9 M.J. at 350 n.28:

For instance, it would not appear that use of marihuana by a serviceperson on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under O'Callahan. Similarly, the interest of the military in the sale of a small amount of a contraband substance by a military person to a civilian for the latter's personal use seems attenuated. See United States v. Morley, 20 U.S.C.M.A. 179, 43 CMR 19 (1970).

17. 16 M.J. at 79.

### C. Litigating Jurisdiction

In light of these decisions, the defense bar has two basic strategies for jurisdiction litigation. First, the defense must force the government to plead jurisdiction in the charges and specifications against the accused. Second, the defense must insist that the government assume its evidentiary burden and affirmatively prove service connection that is sufficient to demonstrate military jurisdiction.

#### 1. The pleading strategy.

Anglo-American criminal law and military law clearly hold that the government has an affirmative obligation to establish jurisdiction in its pleadings. In Runkle v. United States,<sup>18</sup> the Supreme Court announced the basic rule of jurisdictional averments in courts-martial:

To give effect to [a court-martial's] sentences it must appear affirmatively and unequivocally that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. Dynes v. Hoover, 20 How. 65, 80; Mills v. Martin, 19 Johns. 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in Brown v. Keene, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: "The decisions of this court require, that averments of jurisdiction shall be positive - that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.<sup>19</sup>

18. 122 U.S. 543 (1886).

19. Id. at 556 (emphasis added).

Likewise, the military courts have required that sufficient facts be pleaded to establish jurisdiction. In United States v. Alef,<sup>20</sup> the Court of Military Appeals criticized "the unfortunate motion practice which has developed in military courts on questions of jurisdiction."<sup>21</sup> Alef considered the problem of an inadequate specification format<sup>22</sup> which did not present sufficient information to demonstrate the service connection criteria set forth in Relford and, hence, the basis for military jurisdiction. In Alef, Chief Judge Fletcher wrote:

The crux of the problem is that the prosecution does not present to the trial court sworn charges/indictments which, on their face, set forth sufficient facts to demonstrate . . . jurisdiction over the given defendant and his acts in a military tribunal. The specification format [citation omitted] currently utilized does not present sufficient information to demonstrate military jurisdiction . . . . In the absence of such indictment, the defense is not truly on notice of what jurisdictional basis, if any, the government is urging . . . . The better practice [citation omitted], and the one we now make mandatory, is for the government affirmatively to demonstrate through sworn charges/indictment, the jurisdictional basis for trial of the accused and his offenses.<sup>23</sup>

20. 3 M.J. 414 (CMA 1977).

21. Id. at 418.

22. Appendix 6, MCM, 1969.

23. 3 M.J. at 418-19 (emphasis in original).

Chief Judge Fletcher noted that drug cases presented "difficult factual patterns for analysis" yet commanded that the mandatory practice would apply in "all cases regardless of the nature of the offense."<sup>24</sup> In short, the Court adopted this mandatory procedural rule for all courts-martial because it was "reflective of procedural dictates and practices in every Anglo-American criminal jurisdiction."<sup>25</sup> Thus, the prosecution must plead sufficient facts of jurisdiction in its charges and specifications.<sup>26</sup>

Relying upon this background, defense counsel should carefully scrutinize the charges and specifications levied against the accused. Do the charges and specifications present sufficient facts to place the defense on notice of what jurisdictional basis, if any, the government is urging? If not, the defense should, at the outset, make appropriate motions to quash the indictment or, alternatively, to obtain a "bill of particulars" relative to the prosecution's theory of jurisdiction.<sup>27</sup>

The importance of this strategy cannot be overstated. First, by litigating the sufficiency of the charges, the defense can force the government to commit itself to clearly defined theories of jurisdiction. This strategy will limit the contest to a discussion of particular Relford criteria. Second, aggressive litigation on this issue will absolutely avoid the sanctions of the waiver doctrine. Unlike the substantive issue of jurisdiction which is never waived,<sup>28</sup> failure to challenge pleading deficiencies, though they relate to alleging jurisdiction, will result

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24. Id. at 419 n.17.

25. Id. at 421 (Perry, J., concurring).

26. It should be noted that Trottier did not eliminate this pleading requirement but may have limited those factors which the government must aver in drug cases. See United States v. Trottier, 9 M.J. at 351 n.30.

27. See generally United States v. Means, 12 USCMA 290, 30 CMR 290, 292 n.1 (1961).

28. See note 7, supra.

in waiver.<sup>29</sup> Thus, the defense must litigate the sufficiency of the jurisdictional averments at trial.

## 2. The proof of jurisdiction strategy.

Matters of jurisdiction must be established by the government on the record and not by resort to allied papers or generalization.<sup>30</sup> The Courts of Military Review have generally recognized that the issue of subject-matter jurisdiction is an interlocutory question to be decided by the trial judge utilizing a preponderance of the evidence standard.<sup>31</sup> At least one case suggests that, where there is a dispute regarding the date and place of an offense,<sup>32</sup> the factual issue should be submitted to the fact-finder, not as a question of jurisdiction, but as an element of the offense. As such, the standard of proof is proof beyond a reasonable doubt.<sup>33</sup> Regardless of the evidentiary standard, however, military law envisions the prosecution affirmatively presenting evidence on the issue of jurisdiction.

In preparation for litigation of the Relford factors, the defense should conduct extensive and aggressive pretrial discovery.<sup>34</sup> To avoid the pitfall of generalizations and assumptions (i.e., "Of course this crime had an adverse impact on morale and discipline in my unit"), the defense should seek the production of documentary and other evidence

29. United States v. Adams, 13 M.J. 728 (ACMR 1982); United States v. King, 6 M.J. 553 (ACMR 1978), pet. denied, 6 M.J. 290 (CMA 1979), pet. for reconsideration denied, 7 M.J. 61 (CMA 1979).

30. See United States v. Alef, supra. See also Runkle v. United States, supra.

31. See United States v. Bivens, 7 M.J. 531 (ACMR 1979); United States v. Harrison, 3 M.J. 1020 n.3 (NCOMR 1977); United States v. Bobkoskie, 1 M.J. 962 (NCOMR 1976). See also paragraph 57b, MCM 1969.

32. This is, for all practical purposes, at issue in drug cases in which urinalysis results are the only prosecution evidence.

33. United States v. Jessie, 5 M.J. 573 (ACMR 1978), pet. denied, 5 M.J. 300 (CMA 1978).

34. Paragraph 115, MCM, 1969.

relevant to the offense at issue. Depending upon the offense, and the accused's unit of assignment, these facts can be derived from:

- \*JAG-2 Reports<sup>35</sup> statistics
- \*Article 15 statistics
- \*Administrative board statistics
- \*Number of soldiers enrolled in drug and alcohol programs
- \*Military police blotter entries
- \*Skill Qualification Test (SQT) results
- \*IG results

Obviously, if these facts and statistics do not show a measurable variance in the unit's discipline, training, operations, etc., profile, then the prosecution is less apt to carry their evidentiary burden of proving a demonstrable impact on the unit.

During the litigation of the jurisdiction issue itself, the defense should guard against certain pitfalls. First, the defense should be mindful that during an Article 39(a), UCMJ, session, the rules of evidence are not relaxed<sup>36</sup> and all appropriate objections must be made on the record to preserve the issue for appeal.<sup>37</sup> Second, beware of prosecution efforts to short-circuit the litigation of the issue. The typical short-cuts, which the trial counsel may employ, include:

1. Once the defense motion is made, some trial counsel may only respond with oral argument instead of witnesses, documents, or other evidence.<sup>38</sup> Remember: Rhetoric and oral argument are not evidence.

2. The trial counsel may offer to stipulate to certain facts. In fact, he may attempt to offer an oral stipulation instead of a written stipulation. While this is a tactical decision for the defense, watch out for overbroad language and other assumptions which might otherwise be difficult to prove with real or other evidence. Ultimately, the defense counsel may decide to refrain from stipulating by relying on this standard: Would the accused stipulate to an element of the offense?

35. See Chapter 15, Army Reg. 27-10, Military Justice (1 Sep. 1982).

36. See Mil. R. Evid. 1101(a).

37. See Mil. R. Evid. 103.

38. United States v. Persley, SPCM 18469 (ACMR 9 Aug. 1983) (unpub.), pet. denied, 17 M.J. 316 (CMA 1984).

3. The trial counsel may urge the military judge to take judicial notice of certain facts. If such an attempt is made, defense counsel should ensure that the facts to be judicially noticed actually are "adjudicative facts" that are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." <sup>39</sup> Broad generalizations about the impact on the unit or the surrounding community are not proper subjects of judicial notice.

4. Watch out for the overbroad opinions of the accused's chain of command. Military trials frequently contain unchallenged maxims: "of course, this drug possession affected my unit" or "a soldier should be a soldier, twenty-four hours a day," etc. Armed with pretrial preparation, the defense counsel should test, during cross-examination, the factual bases for these and other conclusory opinions.

In this manner, the defense counsel will ensure that the jurisdiction issue is fully explored on the record and preserve the controversy for appeal to the military courts and, perhaps, to the Supreme Court.

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39. See Mil. R. Evid. 201; Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 38 (1981).

## ATTACKING NOVEL SCIENTIFIC EVIDENCE

Since the promulgation of the Military Rules of Evidence, the continued viability of the standard for the admissibility of novel scientific evidence articulated in United States v. Frye, 293 F. 1013 (D.C. Cir. 1923), has been called into question. In United States v. Bothwell, 17 M.J. 684 (ACMR 1983), the Army Court of Military Review reaffirmed the Frye standard, and in a thoughtful analysis of Frye and its interrelation with the Military Rules of Evidence, stated that expert testimony based on novel scientific evidence is admissible if it would assist the trier of fact, see Mil. R. Evid. 702, and if it is relevant, see Mil. R. Evid. 401. The Court noted, however, that the relevance of expert testimony is, at least in part, a function of the reliability of the scientific principles underlying the testimony.

The Court articulated a three-part test to determine whether novel scientific evidence is sufficiently reliable to be admitted. First, there must be sufficient evidence from which the military judge can determine that the underlying scientific principle is valid. Second, the technique which applies that principle must be valid. Finally, the technique must have been employed in a proper fashion in the particular case. Using this analysis, novel scientific evidence, such as mandatory urinalysis results, may be attacked by undermining any of these three prerequisites to admissibility.

In its analysis, the Court in Bothwell noted that the Court of Military Appeals has not yet decided how Frye is to be applied under the Military Rules of Evidence. Id. at 687. Recently, however, the Court of Military Appeals recognized the possible conflict between Frye and the Military Rules of Evidence. United States v. Hammond, 17 M.J. 219 (CMA 1984). In Hammond, the Court affirmed the use of expert testimony relating to the "Rape Trauma Syndrome" and its probable effect on a rape victim. The court, per Judge Cook, held that even though the expert witness had not personally examined the rape victim, the expert's testimony was sufficiently related to the rape victim so as to be of assistance to the triers of fact. In a footnote, Judge Cook noted that Mil. R. Evid. 702 "may be broader" than the test for scientific evidence set out in Frye. Id. at 220 n.4.

Recognizing that there may be different ways of approaching the admissibility of scientific evidence, it is suggested that counsel seek to apply the test for admissibility announced by the Army Court of Military Review in Bothwell. Whether or not Mil. R. Evid. 702 is broader than Frye is a less important consideration in the analysis than determining whether the evidence is legally relevant and sufficiently reliable so as not to be unfairly prejudicial in a Mil. R. Evid. 403 sense.

In preparing for an attack on the scientific basis of novel scientific evidence, counsel should seek the advice of experts in the relevant field. A chemist may not be sufficiently familiar with the various principles to be applied in a urinalysis case, for example, whereas a toxicologist may have a greater understanding of the validity of the principles involved. Counsel should remember that the Manual for Courts-Martial provides a means by which the defense can obtain funding to obtain expert witnesses. See paragraph 116, MCM, 1969; United States v. Johnson, 22 USCMA 424, 47 CMR 402 (1973); Urinalysis: Defense Approches, 15 The Advocate 114, 129 nn. 75 and 76 (1983).

MULTIPLICITY FOR FINDINGS: "THE BALL IS BACK IN THE TRIAL COURT"

In United States v. Baker, 14 M.J. 361, 368 (CMA 1983), the Court of Military Appeals ruled that charges were multiplicitous for purposes of findings if either: (1) one of the charges necessarily included all of the elements of another, or (2) the allegations under one of the charges, as drafted, "fairly embraced" all of the elements of another. More significantly, however, the Court in Baker, and in the cases applying Baker, viewed the failure of the trial or intermediate appellate courts to dismiss the included offense as "plain error" not waived by the lack of objection. See, e.g., United States v. Hendrickson, 16 M.J. 62 (CMA 1983); United States v. Jean, 15 M.J. 433 (CMA 1983). Thus, the failure to litigate the issue at trial or before the Courts of Review no longer bars relief by the Court of Military Appeals. The decision in Baker relieved trial defense counsel, for the time being, of the burden of preserving the issue of multiplicity for findings during a hectic trial.

In United States v. Holt, 16 M.J. 393 (CMA 1983), however, the Court returned to trial defense counsel the onus of taking affirmative action at trial, in certain cases, to obtain dismissal of multiplicitous charges. After Holt, dismissal of multiplicitous charges would only be granted if the multiplicitousness appeared "on the face of" the specifications. The Court refused to go beyond the language of the specifications to determine if the "Baker criteria" for dismissal were present. See also United States v. Fair, 17 M.J. 1036 (ACMR 1984). (Describing a two-part test under which dismissal will not be granted, even if the specifications are multiplicitous on their face, unless the facts produced at trial also support a claim of multiplicity).

The Court of Military Appeals and the Courts of Military Review have applied Holt literally and have repeatedly refused to dismiss offenses, which were in fact multiplicitous, because the language used in the specifications did not reflect that multiplicity. An example of the anomalous results produced by Holt is found in a recent decision of the Army Court of Military Review, United States v. Malone, SPCM 19711 (ACMR 10 Feb. 1984) (unpub). In Malone, the appellant rented a television set from AAFES and was in legitimate possession of it. Eleven months later, Malone sold the set to a fellow service member without having authority to do so. Appellant was charged with the larceny of the television set from AAFES and with the larceny of the money paid to him by the service member who purchased the television.

The Court concluded that, based on the providence inquiry, it was apparent that the appellant should have been charged with only a single larceny. However, because the two larceny specifications were cleverly drafted and each avoided reference to the facts of the other, their multipliciousness did not appear on their face. Thus, the Court felt compelled by Holt to allow the convictions for both specifications to stand.

The unfairness and potential for further prejudice to the accused inherent in such a result is obvious. Dismissal of multiplicious offenses is more than an effort to engage in "administrative house cleaning". Appellate courts have long recognized that an unreasonable multiplication of charges against an accused can be prejudicial to him both in the court's determination of findings and an appropriate sentence. See United States v. Sturdivant, 13 M.J. 323 (CMA 1982); United States v. Gibson, 11 M.J. 435 (CMA 1981); United States v. Middleton, 12 USCMA 54, 30 CMR 54 (1960).

Under the rule of Holt, the multiplicious charges which are most likely to remain on appellant's record are those which do not reflect that they in fact describe a single offense. Thus, those individuals that will view appellant's record in the future will believe that the appellant in fact committed more than one offense.

The answer to the dilemma lies in the Holt decision itself. In Holt the Court specified the issue of whether offenses alleged in specifications which were not multiplicious for findings as drafted under Baker, should be dismissed nonetheless if a defense motion to make more definite and certain would have resulted in the specifications being held multiplicious. The Court ultimately answered the question in the negative; choosing not to go beyond the language of the specifications because it would be too speculative to determine how a trial judge would have ruled on a motion to make more definite. Implicit in the opinion is the suggestion that a motion to make more definite and certain may be the means to obtain the dismissal of an offense which is in fact included within another charged offense but which is alleged in such a way as to make it appear to be a separate offense.

The difficulty that exists in this approach lies in the fact that motions to make more definite are generally based on defense claims that the specification, while sufficient to state a offense, does not allege facts sufficient to enable the accused to defend himself. See United States v. Westergren, 14 CMR 560, 586 (ABR 1953); Paragraph 69b, MCM, 1969. Motions to force the government to plead additional facts so that the defense can move to dismiss the lesser offense are not likely to be viewed with favor by trial judges. An argument could be made, however,

that the means by which an offense, for example a larceny, is committed is a necessary part of the larceny charge and is required to fairly apprise the appellant of the charge against which he must defend. Defense counsel could also argue that the Court of Military Appeals has implicitly provided for the use of a motion to make more definite in these circumstances by its decision in United States v. Holt.

As a closing note, counsel must bear in mind that they may avoid the entire "fairly embraced" dilemma by remembering that a lesser/greater relationship is only one basis for dismissing multiplicitous charges. In Baker, the Court stated that relief would also be available where "the charges alleged as a matter of fact are parts of an indivisible crime as a matter of civilian or military law" or "where both charged offenses are different aspects of a continuous course of conduct prohibited by one statutory provision." United States v. Baker, 14 M.J. at 366. In a case where the government has merely fragmented the same offense into two or more charges it is irrelevant whether one "fragment" is fairly embraced by another. See United States v. Harclerode, 17 M.J. 981, (ACMR 1984). Rather than dismissing the multiplicitous specification in such a case, the remedy is to consolidate the offenses. Id.

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*Required by 39 U.S.C. 3685*

<b>1A. TITLE OF PUBLICATION</b> THE ADVOCATE		<b>1B. PUBLICATION NO.</b> 4 3 5 3 7 0			<b>2. DATE OF FILING</b> 2 Nov. 1983	
<b>3. FREQUENCY OF ISSUE</b> Bimonthly		<b>3A. NO. OF ISSUES PUBLISHED ANNUALLY</b> 06			<b>3B. ANNUAL SUBSCRIPTION PRICE</b> \$15.00 (domestic) \$18.75 (foreign)	
<b>4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION (Street, City, County, State and ZIP Code) (Not printers)</b> Defense Appellate Division, 5611 Columbia Pike, Falls Church, VA 22041						
<b>5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OF GENERAL BUSINESS OFFICES OF THE PUBLISHER (Not printer)</b> Same as item 4.						
<b>6. FULL NAMES AND COMPLETE MAILING ADDRESS OF PUBLISHER, EDITOR, AND MANAGING EDITOR (This item MUST NOT be blank)</b>						
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EDITOR (Name and Complete Mailing Address) CPT Marcus C. McCarty, 5611 Columbia Pike, Falls Church, VA 22041						
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