

**U.S. Army Defense  
Appellate Division**

---

---

**Vol. 12, No. 5**

**September — October 1980**

**Contents**

256

**ADMISSIBILITY OF POLYGRAPH RESULTS UNDER  
MILITARY AND FEDERAL RULES OF EVIDENCE**

Edward L. Van Oeveren

299

**THE ACCUSED'S CONSTITUTIONAL RIGHT  
TO DEFEND**

Terrence Lewis

307

**SIDE BAR**

PROPERTY OF U. S. ARMY  
THE JUDGE ADVOCATE GENERAL'S SCHOOL  
LIBRARY

310

**USCMA WATCH**

318

**CASE NOTES**

332

**ON THE RECORD**

# THE ADVOCATE

Volume 12, Number 5

September-October 1980

Chief, Defense Appellate Division

COL Edward S. Adamkewicz, Jr.

## EDITORIAL BOARD

Editor-in-Chief:	CPT Edwin S. Castle
Managing Editor:	CPT Alan W. Schon
Articles Editor:	CPT Edward J. Walinsky
Case Notes Editor:	MAJ Robert D. Ganstine
Trial Tactics Editor:	CPT Courtney B. Wheeler
USATDS Representative:	MAJ John R. Howell

## STAFF AND CONTRIBUTORS

### Associate Editors

MAJ Grifton E. Carden  
CPT Robert L. Gallaway  
CPT Charles E. Trant  
CPT Joseph A. Russelburg

### Contributors

Mr. Edward L. Van Oeveren  
Mr. Terrence L. Lewis

## ADMINISTRATIVE ASSISTANTS

Ms. Maureen Fountain  
Mr. James M. Brown

THE ADVOCATE (USPS 435370) is published under the provisions of AR 360-81 as an informational media for the defense members of the U.S. Army JAGC and the military legal community. It is a bimonthly publication of The Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, VA 22041. 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. Controlled circulation postage paid at Falls Church, VA. SUBSCRIPTIONS are available from the Superintendent of Documents, U.S. Government Printing Office, ATIN: Order Editing Section/SSOM, Washington D.C. 20402. POSTMASTER/PRIVATE SUBSCRIBERS: Send address corrections to Superintendent of Documents, U.S. Government Printing Office, ATIN: Change of Address Unit/SSOM, Washington, D.C. 20402. The yearly subscription prices are \$8.00 (domestic) and \$10.00 (foreign). The single issue prices are \$2.00 (domestic) and \$2.25 (foreign).

# BRIEFLY WRIT

## Overview

The lead article in this edition examines the impact of the Federal and Military Rules of Evidence on the admissibility of polygraph results at courts-martial. The article addresses not only the central question of admissibility, but collateral matters as well, including protections against involuntary disclosure and self-incrimination; requirements to issue pre-examination warnings; and possibilities for using polygraphic evidence in non-testimonial or extra-trial capacities. The second article concisely analyzes the constitutional basis of the accused's right to defend himself, and examines the manner in which that right may be asserted in order to override evidentiary rules which would otherwise exclude relevant, reliable, and critical defense evidence.

## Preview of Coming Editions

The pervasive substantive and procedural changes effected by the Military Rules of Evidence obviously demand continued exploration. Accordingly, the staff and contributors are preparing articles dealing with the attorney-client privilege created in Section V of the Rules; the "official record" and "business entry" exceptions to the hearsay rule; and the "rape shield" rule. In addition, the staff plans to present a search and seizure primer by addressing, in successive editions, each recognized exception to the Fourth Amendment warrant requirement. Finally, the next issue of The Advocate will include the annual index, in which articles and case digests published during the year will be catalogued.

## Solicitation

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

ADMISSIBILITY OF POLYGRAPH RESULTS  
UNDER MILITARY AND FEDERAL RULES  
OF EVIDENCE

TABLE OF CONTENTS

I.	Introduction.....	256
II.	Admissibility Under Prior Military Law.....	260
III.	Impact of the Military Rules of Evidence.....	264
	A. Admissibility in General.....	264
	1. Demonstrating Relevance under Rule 401.....	267
	2. Policy Considerations Militating Against Admissibility.....	274
	B. Effect of Expert Opinion Rules.....	279
	C. Effect of Character Evidence Rules.....	281
	D. Effect of Hearsay Rules.....	284
IV.	Constitutional Considerations Bearing on Admissibility.....	286
V.	Protection of Polygraph Evidence from Involuntary Disclosure.....	288
VI.	Collateral Issues.....	291
VII.	Conclusion.....	296

ADMISSIBILITY OF POLYGRAPH RESULTS  
UNDER MILITARY AND FEDERAL RULES  
OF EVIDENCE

by Edward L. Van Oeveren\*

The new Military Rules of Evidence may significantly affect the admissibility of polygraph evidence at courts-martial. Unlike the previous provisions of the Manual for Courts-Martial,<sup>1</sup> the rules do not specifically address the admissibility of this form of evidence. Consequently, military judges must resolve the issue by interpreting those provisions dealing with relevancy, expert opinion evidence, character evidence, and hearsay. In addition, military judges must confront a number of allied issues raised by the operation of these rules, including the protection of polygraph evidence from involuntary disclosure; the potentiality of self-incrimination; the requirement to issue Article 31 warnings; the non-testimonial use of polygraph evidence; and the extra-trial admissibility of polygraph results.<sup>2</sup> Defense counsel should appreciate the competing considerations implicated by these questions and shape their arguments accordingly, since polygraph evidence can be effectively used by either the government or the accused.

I. Introduction

Any analysis of polygraph evidence must begin with the landmark decision in Frye v. United States.<sup>3</sup> That opinion enunciated a standard for the admissibility of scientific evidence in general, and polygraph evidence in particular, that has been widely endorsed:<sup>4</sup>

---

\*Mr. Van Oeveren received a B.A. degree from the University of Virginia in 1976 and is currently a third-year law student at the University of Virginia School of Law. He worked in the Defense Appellate Division as a legal intern during May-August 1980.

1. Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969]. See note 13 and accompanying text, infra.

2. The number and significance of these collateral issues will vary, depending upon the manner in which courts resolve the admissibility question.

3. 293 F. 1013 (D.C. Cir. 1923).

4. See, e.g., note 33 and accompanying text, infra.

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.<sup>5</sup>

The United States Court of Military Appeals has recognized this standard as a proper benchmark of the admissibility of expert evidence derived from scientific tests.<sup>6</sup> The crucial issue is whether the Military Rules of Evidence invalidate the Frye test.

This article will examine the status of polygraph evidence<sup>8</sup> under military law. It will address, seriatim, the admissibility of that

---

5. 293 F. at 1014. The court concluded that the primitive lie detector involved in that case had "not yet gained such standing and scientific recognition . . . as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." Id.

6. United States v. Hulen, 3 M.J. 275 (CMA 1977); United States v. Ford, 4 USCMA 611, 16 CMR 185, 187 (1954).

7. See Advisory Committee's Analysis of Mil. R. Evid. 702 [hereinafter cited as Analysis]: Rule 702 "may supersede Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), an issue now being extensively litigated in the Article III courts" (emphasis in original).

8. Although the scope of this article is limited to polygraph evidence, many of the same issues arise in connection with hypnotic and drug-induced testimony. Under prior military law, polygraph, hypnotic, and drug-induced evidence was inadmissible. See MCM, 1969, para. 142e. See also United States v. Massey, 5 USCMA 514, 18 CMR 138 (1955); United States v. Bourchier, 5 USCMA 15, 17 CMR 15 (1954); United States v. Johnson, 28 CMR 684 (NBR 1959) (drug-induced testimony excluded because it was found unreliable and potentially coerced); see U.S. Department of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition), paragraph 27-14 (July 1970) [hereinafter cited as DA Pam. 27-2]. Although no reported military opinions

evidence under the former provisions of the Manual and under existing military case law. The impact of the Military Rules of Evidence will then be assessed. That analysis will focus not only on admissibility, but also on protection against involuntary disclosure, and on collateral issues such as self-incrimination, the requirement to issue Article 31 warnings, and the non-testimonial and extra-trial use of polygraph evidence.

---

8. Continued.

have addressed the issue of the admissibility of hypnotically-induced testimony in a trial by court-martial, in at least one trial a military judge refused to admit an in-court identification of the accused which was based on hypnotic memory refreshing. United States v. Andrews, General Court-Martial No. 75-14 (N.E. Jud. Cir., Navy-Marine Corps Judiciary, Philadelphia, Pa., Oct. 6, 1975), discussed in Dilloff, The Admissibility of Hypnotically Influenced Testimony, 4 Ohio N.L. Rev. 1 (1977).

Analysis of the admissibility of hypnotic and drug-induced testimony under the Military Rules of Evidence should parallel the approach used in connection with polygraph evidence. But cf. Analysis, Mil. R. Evid. 702, which indicates that "[t]here is reason to believe that evidence obtained via hypnosis may be treated somewhat more liberally than is polygraph evidence." See, e.g., Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975). The three forms of evidence raise many common issues; as a result, the same rules are pertinent when the admissibility of any one type of evidence is sought. See generally, Jackson v. Denno, 378 U.S. 368 (1964); Townsend v. Sain, 372 U.S. 293 (1963); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Heller Corp., 503 F.2d 506 (9th Cir. 1974); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956); Greenfield v. Robinson, 413 F.Supp. 113, 1120-21 (W.D. Va. 1976); Herman, The Use of Hypno-Induced Statements in Criminal Cases, 25 Ohio St. L.J. 1 (1964); Spector & Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?, 38 Ohio St. L.J. 567 (1977); Note, Hypnosis, Truth Drugs and the Polygraph: An Analysis of Their Use and Acceptance By the Courts, 21 U. Fla. L. Rev. 541 (1969); Annot., Admissibility of Hypnotic Evidence at Criminal Trial, 92 ALR3d 442 (1979). Similarly, many of the same collateral matters arise in connection with narcoanalytic and hypnotic testimony as with polygraph evidence. See generally, United States ex rel. Townsend v. Twomey, 452 F.2d 350 (7th Cir. 1971); United States v. Miller, 411 F.2d 825 (2d Cir. 1969); Emmett v. Ricketts, 397 F.Supp. 1025 (N.D. Ga. 1975); Annot., Use or Administration of Drugs or Narcotics as Affecting Admissibility of Confession, 69 ALR2d 384 (1960).

## II. Admissibility under Prior Military Law<sup>9</sup>

Under prior military law, the results of a polygraph examination were inadmissible in a trial by court-martial as evidence of an individual's credibility.<sup>10</sup> Appellate military courts consistently refuse to admit such evidence because of doubts as to its validity and reliability,<sup>11</sup> and out of fear that the polygraphist's findings would eclipse an independent assessment of a witness' credibility in light of all the evidence.<sup>12</sup> In addition to these policy considerations, paragraph 142e

9. See generally Army Reg. No. 195-6, Criminal Investigation: Department of the Army Polygraph Activities (1977); Dep't. of Defense Directive No. 5210.48, The Conduct of Polygraph Examinations and the Selection, Training and Supervision of DOD Polygraph Examiners (1975).

10. E.g., United States v. Handsome, 21 USCMA 330, 45 CMR 104 (1972); United States v. Wolf, 9 USCMA 137, 25 CMR 399 (1958); United States v. Massey, 5 USCMA 514, 18 CMR 138 (1955); United States v. Adkins, 5 USCMA 492, 18 CMR 116 (1955) (dicta); United States v. Kloepfer, 49 CMR 68 (ACMR 1974) (dicta); United States v. Ortiz-Vergara, 24 CMR 315 (ABR 1957); United States v. King, 16 CMR 316 (ABR 1954) (dicta); United States v. Pryor, 2 CMR 365 (ABR 1951); United States v. Mouganel, 6 M.J. 589 (AFCMR 1978); United States v. Driver, 35 CMR 870 (AFBR 1965); United States v. Judd, 26 CMR 881 (AFBR 1958); United States v. Radford, 17 CMR 595 (AFBR 1954); United States v. Bras, 3 M.J. 637 (NCMR 1977); United States v. Martin, 9 M.J. 731 (NCMR 1979).

11. See, e.g., United States v. Masey, 16 CMR 316, 323 (ABR 1954), remanded for further consideration, 5 USCMA 514, 18 CMR 138 (1955); United States v. Cloyd, 25 CMR 908, 911, 914 (AFBR 1958); United States v. Johnson, 28 CMR 662, 685 (NBR 1959).

12. United States v. Ledlow, 11 USCMA 659, 29 CMR 475 (1960). Cf. United States v. Wright, 17 USCMA 183, 37 CMR 447, 752-53 (1967) (voiceprints held admissible despite some disagreement in scientific community as to their reliability and validity). Although the unreliability of voiceprints and polygraph results are arguably comparable, the court apparently distinguished the two techniques since (1) the tape recordings were played in court and could be directly and independently compared by court members; and (2) the voiceprints thus did not pose as great a danger of undue influence over the jury.

of the Manual specifically prohibits the admission of "conclusions based upon or graphically represented by a polygraph test."<sup>13</sup>

In spite of these restrictions, military courts have admitted polygraph evidence for limited purposes and under certain conditions.<sup>14</sup> A polygraph examiner's testimony that he informed the accused that the test detected falsehoods has been admitted, for example, as evidence pertaining to the voluntariness of the defendant's confession.<sup>15</sup> Similarly, one court determined that evidence of a defendant's polygraph examination was nonprejudicial when it was used solely to establish the sequence of events during interrogation.<sup>16</sup> Even admission of evidence of the test results themselves has been declared harmless where "the other proof in the case is such that there was no danger that the court members weighed the improper item in their deliberations."<sup>17</sup> Moreover, the Court of Military

13. MCM, 1969, para. 142e. This provision first appeared in the latest edition of the Manual. It codified previous military court rulings, see, e.g., notes 10-12 supra, and the prevailing civilian view. DA Pam. 27-2, para. 27-14.

14. Cf. United States v. Mouganel, 6 M.J. 589, 590-91 (AFCMR 1978): "In some jurisdictions the rule against admitting lie detector test results has given way to their use under certain circumstances" [e.g., to show the voluntariness of a confession or the credibility of an informant].

15. United States v. Radford, 17 CMR 595, 603 (AFBR 1954); United States v. King, 16 CMR 858, 863 (AFBR 1954) (admission under these circumstances is especially appropriate when defendant and government both seek admission of polygraph evidence); United States v. Johnson, 28 CMR 662, 679 (NBR 1959).

16. United States v. Kirkland, 25 CMR 797, 801 (AFBR 1957). In addition, the testimony was elicited by defense counsel during cross-examination of a prosecution witness, and the results of the examination were not presented. When courts admit polygraph-related evidence for such restricted purposes, limiting instructions are necessary. If given, they are presumed to be followed by the court members, in the absence of any proof to the contrary. See United States v. Radford, 17 CMR 595, 603 (AFBR 1954).

17. United States v. Ledlow, 11 USCMA 659, 29 CMR 475, 479 (1960). Ordinarily, reference to inadmissible polygraph test results during trial does not materially prejudice any substantial right of the accused if the judge properly instructs the court members to disregard that testimony. See United States v. Wolf, 9 USCMA 137, 25 CMR 399, 402 at n.3 (1958).

Appeals once suggested that a witness' reference to a polygraph examination in connection with his own testimony might fall "within the rule permitting the admission into evidence of a prior consistent statement when the witness' testimony is discredited by the imputation of bias, prejudice, or a motive to testify falsely."<sup>18</sup>

Those opinions which permit the non-testimonial use of polygraph evidence and promulgate standards for evaluating possible prejudice from improper testimony should remain valid even if polygraph results are held inadmissible under the Military Rules of Evidence.<sup>19</sup> Similarly, previous decisions by military appellate courts on various collateral matters should also retain their vitality. Thus, "[t]he fact that the accused was given a 'lie detector' test is in itself insufficient to render inadmissible a statement of the accused made subsequent thereto."<sup>20</sup> Also, a staff judge advocate may include the favorable results of an

---

17. Continued.

But cf. United States v. Ortiz-Vergara, 24 CMR 315, 318 (ABR 1957) (despite instructions, there may be prejudicial error if witness had been previously impeached, and polygraph results were used to bolster credibility).

18. United States v. Wolf, 9 USMA 137, 25 CMR 399, 402 at n.3 (1958) (dicta). But cf. note 17 and accompanying text, infra.

19. Clearly, if polygraph results are inadmissible at trial, they cannot be considered in ruling upon a petition for new trial submitted pursuant to Article 73, Uniform Code of Military Justice, 10 U.S.C. §873 (1976) [hereinafter cited as UCMJ]. See United States v. Massey, 5 USMA 514, 18 CMR 138 (1955); see also MCM, 1969, para. 109d. But cf. note 171, infra.

20. United States v. Smith, 12 CMR 519, 525 (ABR 1953) (accused was not coerced into submitting to a polygraph test, and no evidence of its results was revealed at trial); accord, United States v. McKay, 9 USMA 527, 26 CMR 307, 310-11 (1958); United States v. Kloepfer, 49 CMR 68, 69 (ACMR 1974) (dicta); United States v. Bostic, 35 CMR 511, 523 (ABR 1964); United States v. Driver, 35 CMR 870, 874 (AFBR 1965); United States v. Johnson, 28 CMR 662, 679 (NBR 1959).

The use of a polygraph to induce a confession may render the accused's statement inadmissible if the lie detector is employed in a manner calculated to obtain an untrue statement. See United States v. Bostic, 35 CMR 511 (ABR 1964). Cf. United States v. Lane, 34 CMR 744 (OGBR 1964) ("Falsely telling an innocent suspect that a polygraph showed him to be lying is not likely to produce an untrue confession"). The

extra-record polygraph examination in his post-trial review.<sup>21</sup> Even if the staff judge advocate declines to exercise that power, the convening authority may consider polygraphic evidence in the exercise of his broad discretionary power to disapprove findings of guilty.<sup>22</sup> The Courts of Military Review, however, may consider a polygraph report only if it is incorporated in the staff judge advocate's review.<sup>23</sup> Regardless of whether polygraph results are admitted or excluded under the new rules, the accused will retain his right to refuse a polygraph examination (based upon the privilege against self-incrimination),<sup>24</sup> and that refusal cannot be introduced at trial as a prior inconsistent statement.<sup>25</sup>

---

20. Continued.

Manual's exclusion of polygraph results in a court-martial implies that "use of such tests by the Government imposes a high burden of care on the polygraph operators and other interrogators to avoid using the test results in an improper way." *United States v. Handsome*, 21 USCMA 330, 45 CMR 104, 108 (1972)

21. *United States v. Martin*, 9 USCMA 84, 25 CMR 346 (1958). The staff judge advocate (SJA) has no affirmative duty to bring polygraph results to the convening authority's attention. Defense counsel can, however, submit a post-trial brief which includes the evidence. *Id.* at 347-48; *United States v. Bras*, 3 M.J. 637, 639-40 (NCOMR 1977). See also UCMJ, Article 38(c). If the SJA chooses to include the polygraph results, he may do so only to benefit the accused, i.e., they cannot be used to support a finding of guilty. *United States v. Inman*, 21 CMR 480, 481 (ABR 1956).

22. *United States v. Mazurkewicz*, 22 CMR 498, 501 (ABR 1956); accord, *United States v. Masey*, 5 USCMA 514, 18 CMR 138 (1955); *United States v. Mouganel*, 6 M.J. 589, 590 (AFCMR 1978); *United States v. Bras*, 3 M.J. 637, 639-40 (NCOMR 1977).

23. *United States v. Barker*, 35 CMR 779, 787 (AFBR 1965); *United States v. Moore*, 30 CMR 901, 908 (AFBR 1960); *United States v. Mazurkewicz*, 22 CMR 498, 500 (ABR 1956); *United States v. Hansford*, 46 CMR 670, 677-78 (lie detector results in conflict with detailed, credible, and consistent testimony held insufficient to justify reversal).

24. See *United States v. Cloyd*, 25 CMR 908, 911 (AFBR 1958).

25. *Id.* at 914 (refusal of a polygraph examination is not usually inconsistent with denial of guilt, and thus is not ordinarily admissible to impeach accused's credibility). Conversely, the prosecution cannot

### III. Impact of the Military Rules of Evidence<sup>26</sup>

#### A. Admissibility in General.<sup>27</sup>

Notwithstanding those provisions of the military rules which pertain to expert testimony, polygraph evidence might be admitted when both the accused and the government stipulate<sup>28</sup> that the test results will be

---

25. Continued.

bolster the credibility of its witness by proof that he offered to undergo a polygraph test. United States v. Dolan, 17 USCMA 476, 38 CMR 274, 275 (1968).

26. Regardless of the admissibility of these types of evidence at trial under the new rules, the defense counsel should be aware of the collateral matters discussed in Part I, supra, e.g., consideration of such evidence by the convening authority and the Court of Military Review; and accused's right to refuse examination by polygraph, "truth serum," or hypnosis.

27. See generally Annot., Modern Status of Rule Relating to Admission of Results of Lie Detector (Polygraph) Test in Federal Criminal Trials, 43 ALR Fed. 68 (1979); Williams, Admissibility of Polygraph Results Under the Military Rules of Evidence, The Army Lawyer, Jun. 1980, at 1.

28. See United States v. DeBetham, 348 F.Supp. 1377, 1380 (S.D. Cal.) (noting "the general rejection of unstipulated polygraph evidence" (emphasis added)), aff'd per curiam 470 F.2d 1367 (9th Cir. 1972). If the government refuses to stipulate, the court can correctly reject the defendant's offer of polygraph evidence. See United States v. Jenkins, 470 F.2d 1061, 1064 (9th Cir. 1972). However, if polygraph results are held admissible even without stipulation, this holding would be mooted.

Also, note that defense counsel probably has little incentive to stipulate to admissibility if current Army investigatory practices are continued. See United States v. DeBetham, 348 F.Supp. 1377, 1389 (S.D. Cal. 1972) (noting testimony of a CID official that "he is aware of only two cases in which the Army elected to prosecute an individual who had 'passed' a polygraph test"), affirmed per curiam 470 F.2d 1367 (9th Cir. 1972). Under such a policy, submission to unstipulated examination offers great potential benefit, without the attendant risk of introduction of damaging evidence at trial. See also Annot., Enforceability of Agreement by State Officials to Drop Prosecution if Accused Successfully Passes Polygraph Test, 36 ALR3d 1280 (1971).

admissible regardless of the examination's outcome.<sup>29</sup> Some courts admit all such evidence, rationalizing that the defendant's stipulation estops subsequent objection.<sup>30</sup> Other tribunals impose certain prerequisites to the admission of test results, in order to insure intelligent consent to the test; judicial oversight of the examiner and the technique he employs; limitation on use of results by the jury; and the defendant's opportunity to cross-examine the polygraphist.<sup>31</sup> Several courts refuse to admit polygraph evidence, regardless of any stipulation between the parties.<sup>32</sup>

Many courts follow a per se rule of excluding polygraph results. This policy sometimes reflects uncritical adherence to precedent, with the court explicitly or implicitly declining to re-examine the admissibility issue.<sup>33</sup> Occasionally, this reliance upon precedent is buttressed with

---

29. See generally Annot., Admissibility of Lie Detector Test Taken Upon Stipulation that the Result Will Be Admissible in Evidence, 53 ALR3d 1005 (1973).

30. But cf. Cullin v. State, 565 P.2d 445, 460 (Wyo. 1977) (Rose, J., specially concurring) (stipulation was irrelevant since it could not render admissible that which was inadmissible in law.

31. See United States v. Oliver, 525 F.2d 731, 736-38 (8th Cir. 1975); Cullin v. State, 565 P.2d 445, 456-59 (Wyo. 1977).

32. See note 29, supra.

33. United States v. Fife, 573 F.2d 369, 373 (6th Cir. 1976): "This court has recently reiterated its position that the result of a polygraph test is not competent evidence," citing United States v. Mayes, 512 F.2d 637 (6th Cir. 1975). This reliance may well be misplaced; Mayes implies that refusal of polygraph evidence is discretionary with the trial judge. 512 F.2d at 648 n.6; United States v. Cardarella, 570 F.2d 264, 266-67 (8th Cir. 1978); United States v. Cochran, 499 F.2d 380, 393 (5th Cir. 1974); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (citing Frye, court held that trial court did not err in refusing to conduct evidentiary hearing on admissibility of polygraph test); United States v. Noel, 490 F.2d 89, 90 (6th Cir. 1974); United States v. Pacheco, 489 F.2d 554, 566 (6th Cir. 1974); United States v. Salazar-Gaeta, 447 F.2d 468, 469 (9th Cir. 1971). (See United States v. DeBetham, 348 F.Supp. 1377, 1379 n.2 (S.D. Cal. 1972) (noting that Sadrzadeh and Salazar-Gaeta "seem to operate on what might be termed a 'traditional' assumption that such evidence is inadmissible, since no reasons are advanced for the holdings therein.") United States v. Sadrzadeh, 440 F.2d 389, 390 (9th Cir. 1971); United States v. Rodgers, 419 F.2d 1315, 1319 (10th Cir. 1969).

the judicial statement that polygraph evidence still lacks sufficient reliability to be admissible.<sup>34</sup> Other courts, while acknowledging that some circuits grant a trial judge discretion in admitting polygraphic evidence, decline to depart from the strict traditional rule.<sup>35</sup>

Although no circuit has concluded that unstipulated polygraph results are always admissible in a federal criminal trial, a new trend has emerged in the courts' approach to this issue. Rather than parroting Frye's "general acceptance" standard, the courts increasingly recognize that polygraph evidence does have some probative value, although they disagree about the extent of its reliability. The opinions then weigh the probative value of the proffered expert testimony against the concomitant dangers posed by its admittance. Some circuits have concluded that the resulting balance justifies investing the trial judge with discretion to admit, or, more frequently, to exclude polygraph results.<sup>36</sup> Other

---

34. See, e.g., United States v. Alexander, 526 F.2d 161, 164-67 (8th Cir. 1975); United States v. Gloria, 494 F.2d 477, 483 (5th Cir. 1974).

35. United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979); United States v. Masri, 547 F.2d 932, 936 n.6 (5th Cir. 1977); United States v. Sockel, 478 F.2d 1134, 1136 (8th Cir. 1973); United States v. Frogge, 476 F.2d 969, 970 (5th Cir. 1973) (while acknowledging that "a trend may be emerging towards loosening the restrictions on polygraph evidence," the court refused to follow the discretionary approach of United States v. Ridling, 350 F.Supp. 90 (E.D. Mich. 1972)).

36. United States v. McIntyre, 582 F.2d 1221, 1226 (9th Cir. 1978); United States v. Radlick, 581 F.2d 225, 229 (9th Cir. 1978); United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977); United States v. Bursten, 560 F.2d 779, 785 (7th Cir. 1977); United States v. Smith, 552 F.2d 257, 260 n.3 (8th Cir. 1977); United States v. Sweet, 548 F.2d 198, 203 (7th Cir. 1977); United States v. Marshall, 526 F.2d 1249, 1360 (9th Cir. 1975); United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975); United States v. Demma, 523 F.2d 981, 987 (9th Cir. 1975); United States v. Mayes, 512 F.2d 637, 648 n.6 (6th Cir. 1975); United States v. Infelice, 506 F.2d 1358, 1365 (7th Cir. 1974); United States v. Watts, 502 F.2d 726, 728 (9th Cir. 1974); United States v. Bagsby, 489 F.2d 725, 726 (9th Cir. 1973); United States v. Alvarez, 472 F.2d 111, 113 (9th Cir. 1973); United States v. Levinson, 369 F.Supp. 575, 579 (E.D. Mich. 1973); United States v. Ridling, 350 F.Supp. 90, 94-96 (E.D. Mich. 1972); Cullin v. State, 565 P.2d 445, 458 n.13 (Wyo. 1977). Cf. United States v. Penick, 496 F.2d 1105, 1109-10 (7th Cir. 1974); United States v. Chastain, 435 F.2d 686, 687 (7th Cir. 1970).

circuits conclude that probative value is outweighed by the risks attending admission, and bar the introduction of the evidence.<sup>37</sup>

1. Demonstrating Relevance under Rule 401.

This balancing approach reflects the policy concerns underlying Rule 403, which states that relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>38</sup> In applying this rule, the logical relevance of the evidence must first be demonstrated.<sup>39</sup> According to Rule 401, evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>40</sup> In deciding whether scientific evidence is relevant, the following factors must be considered: (1) acceptance of the basic theory; (2) care used in conducting the test; (3) skill and qualification of the person interpreting the test; and (4) the materiality of the opinion, or its relationship to the issues in the case.<sup>41</sup> The second and third considerations vary

---

37. United States v. Alexander, 526 F.2d 161, 166-70 (8th Cir. 1975); United States v. Brown, 461 F.2d 134, 145-46 n.1 (D.C. Cir. 1972) (Bazelon, J. dissenting); United States v. Wilson, 361 F.Supp. 510, 514 (D. Md. 1973); United States v. Urquidez, 356 F.Supp. 1363, 1365-67 (D.C. Cal. 1973). Cf. United States v. Russo, 527 F.2d 1051, 1059 (10th Cir. 1975). But cf. United States v. DeBetham, 348 F.Supp. 1377, 1384, 1389, 1391 (S.D. Cal.) aff'd per curiam, 470 F.2d 1367, 1368 (9th Cir. 1972).

38. Mil. R. Evid. 403. This Rule is substantively identical to Fed. R. Evid. 403.

39. Evidence must be relevant in order to be admitted. See Mil. R. Evid. 402.

40. Mil. R. Evid. 401. This Rule is identical to Fed. R. Evid. 401.

41. United States v. Ridling, 350 F.Supp. 90, 94-95 (E.D. Mich. 1972); Romero, The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence, 6 N.M.L. Rev. 187, 202-03 (1976).

Note that since certain of the New Mexico Rules of Evidence are similar or identical to the Federal and Military Rules of Evidence, New Mexico case law construing them should be highly persuasive. Certain

with the particular case,<sup>42</sup> and must therefore be established at each trial. As applied to polygraph evidence, the fourth factor concerns the materiality of an expert's opinion regarding a person's credibility in answering certain test questions. Such evidence is clearly material when a person's credibility is directly at issue,<sup>43</sup> but the centrality of credibility to the case may depend upon the particular charge. Thus, as the court noted in United States v. Ridling,<sup>44</sup> the central issue in a perjury case is whether the defendant is lying. "In other cases in which the question of truthfulness is less directly involved, e.g., murder, the defendant and the government would be more limited in the use of the opinion," and presumably it would be admissible only as character evidence.<sup>45</sup> Thus, only the acceptability of the basic theory may be addressed in general terms in assessing the relevance of polygraph evidence.

Ironically, the validity and reliability of the polygraph is precisely the issue that has most confounded courts in ruling upon the admissibility of test results:

Whether scientific evidence has any probative value, or, in the terms of Rule 401, any tendency to prove credibility, is the critical question . . . . The question of whether the polygraph examination is

---

41. Continued.

other state evidence codes also closely follow the Federal and Military Rules. See generally S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 265-310 (2d ed. Supp. 1980).

42. Cf. United States v. Oliver, 525 F.2d 731, 738 (8th Cir. 1975) (comparing qualifications of two polygraphists).

43. See Mil. R. Evid. 404(a) and 608(a).

44. 350 F.Supp. 90 (E.D. Mich. 1972).

45. Id. at 98. The court concluded in Ridling, a perjury case, that "[t]here can be no doubt but that the standard of relevancy . . . is fully met." Id. at 96 n.5. See also United States v. Oliver, 525 F.2d 731, 737 n.11 (8th Cir. 1975) (Fed. R. Evid. 401's relevancy standard was "fully met" by proffered polygraph results); Cullin v. State, 565 P.2d 445, 456, 458 (Wyo. 1977) (citing Fed. R. Evid. 401); State v. Dorsey, 88 N.M. 184, 539 P.2d 204, 205 (1975) (citing Fed. R. Evid. 401).

valid and reliable is . . . the center of the controversy. Since this controversy is critical to the issue of relevancy, the method of its resolution is all important.<sup>46</sup>

In this sense, Rule 401 in no way recasts the debate that has raged since the Frye decision.

The crucial inquiry is whether polygraph evidence is sufficiently reliable and valid to render "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>47</sup> Although this standard apparently applies uniformly to all evidence,<sup>48</sup> the relevance of polygraph results cannot be assessed without expert assistance:

Whether scientific evidence has any tendency to make the existence of a fact more probable . . . is not a matter of experience and logic. For example, neither the judge nor the jury has any basis for knowing whether . . . results from a polygraph examination make the existence of truthfulness or untruthfulness, more probable. Whether such a relationship exists is a matter for scientific knowledge. Thus expert testimony is necessary to provide the logical nexus between the scientific evidence and the fact that it is offered to prove.

The nexus that makes scientific evidence relevant is one of reliability . . . . Unlike general relevancy questions, scientific evidence thus requires foundation evidence regarding reliability before it is relevant.<sup>49</sup>

---

46. Romero, supra note 41, at 201; accord, United States v. DeBetham, 348 F.Supp. 1377, 1384 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972) (reliability is integral aspect of technique's probative value).

47. Mil. R. Evid. 401.

48. See Romero, supra note 41, at 203-04.

49. Id. at 202-03.

The admissibility of expert evidence, therefore, is initially dependent upon the preparation of a foundation which renders polygraph results logically probative of credibility, and therefore relevant. Both the proponent and opponent of the proffered evidence may introduce expert testimony. The demonstration of any degree of reliability, however, should render the test results relevant to the credibility issue.<sup>50</sup>

50. Id. at 204-05. Only if the proponent fails to demonstrate any nexus between the polygraph evidence and credibility should the evidence be excluded as logically irrelevant. See Mil. R. Evid. 402. If reasonable men could differ on the degree of the polygraph's validity, the evidence should be admitted, with its weight to be determined by the jury. Romero, supra note 41, at 204, 206-207 (rejecting a "general acceptance" requirement and arguing that "[t]estimony that the polygraph device is supported by valid scientific principles should suffice to make more probable the existence of the polygraph's reliability").

If at some time in the future the proponent of polygraph evidence feels that he can demonstrate its general acceptance in the scientific community, he may request that the court take judicial notice of the validity of the scientific theory underlying polygraph examination. See Mil. R. Evid. 201; United States v. Ridling, 350 F.Supp. 90, 94 n.3 (E.D. Mich. 1972); cf. People v. Reagan, 395 Mich. 306, 235 N.W.2d 581, 584-85 (1975) ("We take judicial notice of the fact that polygraph use by prosecutor's offices . . . is a useful investigatory device, though its use is not approved at trial.") If successful, this could potentially significantly shorten the length of trials in which such evidence is proffered. See Romero, supra note 41, at 209-11 (noting that foundation evidence regarding the examiner's qualifications and the proper conduct of the test would still be required). Note, however, that other considerations may require exclusion of the evidence, despite its logical relevance. See e.g., Mil. R. Evid. 403, 405, and 608. In order to clarify this issue, Professor Romero suggests that a special provision, outlining the relevance theory of the admissibility of scientific evidence, be added to the Federal Rules of Evidence:

- 401(a). Scientific evidence is relevant according to Rule 401 if there is foundation evidence having any tendency to make more probable that the scientific evidence is in some degree reliable in showing what it purports to show.

Id. at 205-06.

Decisions excluding polygraph evidence because of an inadequate foundation of expert testimony underscore the crucial importance of this stage of litigation.<sup>51</sup>

Since Rule 401 requires a lesser degree of reliability than "general acceptance,"<sup>52</sup> the proponent of the evidence will probably encounter little difficulty in establishing the logical relevance of polygraph testimony. Both attorneys, however, should be thoroughly familiar with the factors affecting the test's validity and reliability.<sup>53</sup> Should the

51. United States v. Chastain, 435 F.2d 686, 687 (7th Cir. 1970); United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969). Noting that the defendant laid no predicate for admissibility of polygraph evidence, the court stated:

But no judgment can be made without relevant expert testimony relating to the probative value of such evidence. Wainwright totally failed to supply the condition noted by Wigmore that before such evidence be admitted an expert testify "that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications." 3 Wigmore on Evidence (3d Ed. 1940) §990. The trial court properly excluded it even though in a proper case it may be admissible (emphasis added).

Cf. United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975) (proponent of polygraph evidence has burden of laying proper foundation showing underlying scientific bases and reliability of expert's testimony); United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975) (noting foundation requirement, even for stipulated polygraph evidence); Cullin v. State, 565 P.2d 445, 457, 458 (Wyo. 1977) (noting foundational requirement).

52. See note 50 supra.

53. Courts have reached different conclusions regarding the reliability of the polygraph. Some have held that it is now established as "a useful tool for detecting deception." United States v. Zeiger, 350 F.Supp. 685, 688, 689-90 (D.D.C. 1972), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972); accord, United States v. Oliver, 525 F.2d 731, 736-37 (8th Cir. 1975); United States v. Ridling, 350 F.Supp. 90, 93-95 (E.D. Mich. 1972); United States v. DeBetham, 348 F.Supp. 1377, 1384-85 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972). Other courts hold that the polygraph is

court mistakenly apply the Frye standard at this stage, the controversy over "general acceptance" will turn on the polygraph's reliability, since the reliability of a scientific technique "is one of the most important factors that courts should consider in determining whether that technique is generally accepted in the scientific community."<sup>54</sup> In addition, information pertaining to the polygraph's reliability is essential if admissibility is sought under Rule 803(24).<sup>55</sup> These factors must also be presented upon admission of the evidence, since they will assist the jury in assigning proper weight to the expert testimony.<sup>56</sup> Finally, the court must assess these and additional considerations in the next phase of its admissibility determination.

---

53. Continued.

either unreliable, or that its reliability is not yet sufficiently demonstrated. United States v. Alexander, 526 F.2d 161, 164-166 (8th Cir. 1975); United States v. Gloria, 494 F.2d 477, 483 (5th Cir. 1974); United States v. Grant, 473 F.Supp. 720, 723 (D.S.C. 1979); United States v. Wilson, 361 F.Supp. 510, 511-514 (D. Md. 1973); United States v. Urquidez, 356 F.Supp. 1363, 1365-67 (D.C. Cal. 1973); United States ex rel. Monks v. Warden, N.J. State Prison, 330 F.Supp. 30, 34 (D.N.J. 1972) (dictum).

54. United States v. Alexander, 526 F.2d 161, 163 (8th Cir. 1975); United States v. Grant, 473 F.Supp. 720, 723 (D.S.C. 1979).

55. See note 23 and accompanying text, infra. Mil. R. Evid. 803(24) enables the admission of certain hearsay evidence not included within one of the recognized exceptions.

56. The major factors influencing the test's validity and reliability are: (1) the examiner's expertise and acquaintance with the subject matter of the investigation; (2) the physical condition of the examinee, e.g., drugged, or ill; (3) the equipment's condition; (4) the construction of the test, e.g., content, order, and length of the questions; (5) the conduct of the test and the conditions under which it was administered, e.g., pre-test interview and number of tests given; and (6) the examinee's mental condition, e.g., no fear of detection, pathological liar, or psychotic. See United States v. Alexander, 526 F.2d 161, 165 n.9 (8th Cir. 1975); United States v. Oliver, 525 F.2d 731, 736-37 (8th Cir. 1975); United States v. Wilson, 361 F.Supp. 510, 512-514 (D.C. Md. 1973); United States v. Urquidez, 356 F.Supp. 1363, 1366-67 (D.C. Cal. 1973); United States v. Zeiger, 350 F.Supp. 685, 690 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972); United States v. Ridling, 350 F.Supp. 90, 93, 96 (E.D. Mich. 1972); United States v. DeBetham, 348 F.Supp. 1377, 1385-1388 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972). J. Reid & F. Inbau, Truth and Deception: The Polygraph ("Lie-Detector") Technique

Although polygraph evidence may well satisfy the threshold criteria of logical relevance, it is much less clear that it is legally relevant. While one court "found the proffer of expert polygraph testimony . . . to be probative," it noted that "this finding must be qualified by a weighing of the probative value of [the] evidence against the policy considerations which militate against its admission."<sup>57</sup> This balancing approach comports

---

56. Continued.

(2d ed. 1977). Reliability of Polygraph Examination, 14 Am.Jur. Proof of Facts 2d 1 (1977) (especially useful for trial tactics to demonstrate or disprove the reliability of a polygraph examination).

In receiving expert testimony, a dispute may arise as to who is an expert on the polygraph. This dispute is the natural outgrowth of the controversy over the "particular field" within which polygraphy must gain "general acceptance" in order to satisfy the Frye standard. The Frye court entertained testimony from "physiological and psychological authorities." Frye v. United States, 293 F. 1013, 1014 (D.C. App. 1923). More recent opinions have stated that polygraphists (those who conduct examinations and study polygraph technique), as well as experts in the theoretical disciplines upon which polygraphy is based, may testify as to the validity and acceptance of the tests. See United States v. Wilson, 361 F.Supp. 510, 511 (D. Md. 1973); United States v. Zeiger, 350 F.Supp. 685, 689 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972); United States v. Ridling, 350 F.Supp. 90, 93 (E.D. Mich. 1972). But cf. United States v. Alexander, 526 F.2d 161, 164-65 n.6 (8th Cir. 1975) (rejecting argument that polygraphy need only attain general acceptance among polygraph operators themselves to be admissible, and requiring that experts in neurology, psychiatry, and physiology testify on the basic premises of polygraphy); United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975) (apparently requiring a foundation established by both polygraphists and related experts); United States v. Grant, 473 F.Supp. 720, 723 (D.S.C. 1979) (requiring scientific acceptance by experts in polygraphy, psychiatry, physiology, psycho-physiology, neurophysiology, and other related disciplines); United States v. DeBetham, 348 F.Supp. 1377, 1381-82 (S.D. Cal.) (considering the opinions of physiologists and psychologists), aff'd, 470 F.2d 1367 (9th Cir. 1972).

57. United States v. Zeiger, 350 F.Supp. 685, 691 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972); accord, United States v. Alexander, 526 F.2d 161, 167-68 (8th Cir. 1975); United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975); Cullen v. State, 565 P.2d 445, 458 (Wyo. 1977).

with Rule 403.<sup>58</sup> Most exclusionary decisions today are predicated on this basis, rather than on a complete denial of the polygraph's probative value.<sup>59</sup>

## 2. Policy Considerations Militating Against Admissibility.

Courts have identified four major countervailing policy considerations which militate against the admission of polygraph results. First, substantial amounts of time may be consumed by laying the foundation for admission of the evidence, establishing the qualifications of the polygraphist(s), and presenting and cross-examining expert testimony. In United States v. Urquidez,<sup>60</sup> the hearing on admissibility alone lasted three full days,<sup>61</sup> and the court concluded that:

[i]n a given case, the time required in order to explore and seek to adjudge such factors [affecting reliability] would be virtually incalculable (we did little more than make a beginning in the present case). Accordingly, this court is impelled to the conclusion that the administration of justice simply cannot tolerate the burden of litigation inherently involved in such a process.<sup>62</sup>

The court in United States v. Wilson<sup>63</sup> feared that the "examination, cross-examination and battle of experts" would transform trial by jury into "trial by polygraph,"<sup>64</sup> particularly if examination of non-party witnesses were permitted. On the other hand, proper judicial instructions

58. See note 38 and accompanying text, supra. Romero, supra note 41, at 207-08.

59. See notes 33-37 and accompanying text, supra.

60. 356 F.Supp. 1363 (D.C. Cal. 1973).

61. 356 F.Supp. at 1364-1365. See United States v. Flores, 540 F.2d 432, 436 (9th Cir. 1976); United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975); United States v. DeBetham, 470 F.2d 1367, 1368 (9th Cir. 1972); United States v. Grant, 473 F.Supp. 720, 724 (S.D.C. 1979).

62. 365 F.Supp. at 1367.

63. 361 F.Supp. 510 (D. Md. 1973).

64. 361 F.Supp. at 513.

and supervision may minimize this problem.<sup>65</sup> In addition, because of the time and expense involved, polygraph evidence may be tendered only in longer or more complex trials; the frequency and acuteness of the problem would thereby be limited.<sup>66</sup> Moreover, if polygraphic testimony is recognized as valid and admissible, it is likely that more cases will be dismissed, and more pleas will be negotiated.<sup>67</sup> In cases which do reach trial, however, the litigation of polygraph-related matters will probably be time-consuming.<sup>68</sup> In certain cases, this problem may be substantial enough to divert the attention of the judge and jury from the central issues of the case; that would constitute a second ground for exclusion under Rule 403.<sup>69</sup>

65. See United States v. Zeiger, 350 F.Supp. 685, 691 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972). One commentator suggested that pretrial hearings may somewhat alleviate the problem (although possibly presenting the additional issue of the propriety of removing validity and reliability determination from the jury). Because of burdens on the court's time presented by such a "trial within a trial," he concluded that "the issue of admissibility can be much more efficiently dealt with through legislative hearings than on a case-by-case basis in pretrial hearings." Abell, Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials, 15 Am. Crim. L. Rev. 29, 50-51 (1972). See also note 50, supra.

66. Abell, supra note 65, at 51 n.87. This conclusion is questionable. Since the defendant's credibility is probably at issue in a large proportion of all trials (either directly or indirectly), the only internal restriction on the defendant would be cost. Thus the cost-benefit analysis of offering polygraph evidence would turn on the severity of the sanction. Therefore, testimony would be expected in a large percentage of felony cases.

67. See United States v. Ridling, 350 F.Supp. 90, 98 (E.D. Mich. 1972).

68. The burden on the court's time should decrease significantly as polygraph admissibility is increasingly recognized. At some point, the courts will judicially notice the basic underlying theories and premises, thereby reducing the range of testimony offered. See United States v. Ridling, 350 F.Supp. 90, 94-95 (E.D. Mich. 1972).

69. Abell, supra note 65, at 52.

The numerous factors affecting the validity both of the polygraph device and the results in any given case<sup>70</sup> are so complex that the evidentiary issue itself may distract the fact finder from the central questions of the case.<sup>71</sup> The court may be able to minimize this problem to some extent by employing limiting instructions and its general supervisory powers.<sup>72</sup> Specifically, the court can permit only the defendant to be examined,<sup>73</sup> and can eliminate disputes over experts' qualifications by utilizing court-appointed examiners.<sup>74</sup>

Evidence may also be excluded under Rule 403 if its admission would be attended by "unfair prejudice." Although this consideration has been

70. See notes 37 and 56 supra. For example, modern polygraphs detect physiological changes in up to six modes per instrument.

71. *United States v. Flores*, 540 F.2d 432, 436-37 (9th Cir. 1976); *United States v. Marshall*, 526 F.2d 1349, 1360 (9th Cir. 1975).

72. *United States v. Zeiger*, 350 F.Supp. 685, 691 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972).

73. The defendant's character is not collateral to the case. See *Mil. R. Evid.* 404 and 608(a). But limitations on the defendant's right to have witnesses examined may raise claims of denial of due process and confrontation rights.

74. *United States v. Alexander*, 526 F.2d 161, 170 n.17 (8th Cir. 1975): "[I]t would be advisable for the trial judge to undertake an active role in directing and controlling the taking of the examination. This would avoid the introduction in evidence of inconsistent test results at trial which may be subject to varying interpretations, thus inducing a 'battle of experts'"; *United States v. Infelice*, 506 F.2d 1358, 1365 (7th Cir. 1974) (appointment of polygraph examiner is within trial judge's discretion); *United States v. Ridling*, 350 F.Supp. 90, 96-97 (E.D. Mich. 1972).

While *Mil. R. Evid.* 706(a) gives the court-martial the power to appoint experts, it explicitly provides that "[n]othing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense." *Mil. R. Evid.* 706(c). Thus, the court may be unable to foreclose disputes over experts' qualifications and chart interpretations. But cf. *United States v. Oliver*, 525 F.2d 731, 738 (8th Cir. 1975) (exclusion of testimony of defendant's polygraphist held not an abuse of discretion, in light of his inadequate qualifications and defense-imposed limitations on conduct of examination).

cited by two courts,<sup>75</sup> neither explained why polygraph evidence was prejudicial;<sup>76</sup> presumably they feared that the jury would give undue weight to the polygraphist's testimony.<sup>77</sup> This danger is more commonly expressed in terms of "misleading the members."<sup>78</sup>

Frequent reference to the polygraph as a "lie detector" by the general population capsulates the fourth concern generally perceived by the courts:

When polygraph evidence is offered, in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi . . . . Based upon the presentment of this particular form of scientific evidence, present-day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to a polygraphist's opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case.<sup>79</sup>

---

75. United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975); United States v. Grant, 473 F.Supp. 720, 724 (D.S.C. 1979).

76. One commentator has stated that prejudice may arise if only polygraphs taken by the defendant (rather than by key witnesses) are admissible, if only certain key witnesses may be examined, or if polygraph results become admissible and so routinely introduced that juries will infer guilt if such testimony is not presented. Abbell, supra note 65, at 52.

77. See Romero, supra note 41, at 208.

78. This factor is arguably less threatening when trial is by judge alone. See United States v. DeBetham, 348 F.Supp. 1377, 1380, 1391 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972); Abbell, supra note 65, at 53 n.94.

79. United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975); accord, United States v. Oliver, 525 F.2d 731, 737 (8th Cir. 1975). See Abbell, supra note 65, at 52-53. Cf. United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975) (referring to "the polygraph's misleading reputation as a 'truth teller.'").

The Court must always be alert to prevent the use of evidence that has marginal utility in the process of truth seeking if it is of such a nature so as to over-impress the jury.<sup>80</sup>

Courts fear that polygraphic evidence will awe the fact-finder to the extent that the polygraph will usurp the jury's role,<sup>81</sup> and create a "trial by machine."<sup>82</sup> While some tribunals feel that limiting instructions, vigorous cross-examination, and education of the jurors by foundation testimony will be sufficient to prevent improper use of the testimony,<sup>83</sup> others hold that such traditional safeguards are inadequate in this context.<sup>84</sup>

---

80. United States v. Ridling, 350 F.Supp. 90, 95 (E.D. Mich. 1972).

81. United States v. Zeiger, 350 F.Supp. 685, 691 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972).

82. United States v. Bursten, 560 F.2d 779, 785 (7th Cir. 1977). The Eighth Circuit has suggested that the impressiveness of the polygraph, coupled with the fact that such testimony sometimes addresses the ultimate issue in the case, may effectively deny a defendant his constitutional right to a jury trial. While recognizing that Fed. R. Evid. 704 permits expert opinion on the "ultimate issue to be decided by the trier of fact," the court found polygraph evidence sui generis. The court concluded, however, that "[t]he resolution of this dilemma can await another day." United States v. Alexander, 526 F.2d 161, 168-69 (8th Cir. 1975). See Abell, supra note 65, at 53.

83. See United States v. Zeiger, 350 F.Supp. 685, 691 (D.D.C.), rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972); United States v. Ridling, 350 F.Supp. 90, 95-96, 98 (E.D. Mich. 1972).

84. United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975); United States v. Wilson, 361 F.Supp. 510, 513 (D. Md. 1973). This position is somewhat questionable. While the polygraph may enjoy a reputation as a "lie detector," its theory and methods are arguably less complex than those of other techniques, the results of which are routinely admitted. Moreover, since the defendant and government can each introduce its own expert, opposing "infallible" views can be pitted against each other in a dialectic from which the jury can extract the truth.

The rules pertaining to relevance are applicable regardless of any other provisions of the Military Rules of Evidence.<sup>85</sup> They therefore constitute both the threshold test and the final hurdle in determining admissibility. If evidence is absolutely barred by some other rule, the judicial discretion of Rule 403 will not overcome that prohibition. If evidence is otherwise admissible, however, Rule 403 is a provision "upon which counsel can rely to urge exclusion of almost any type of evidence."<sup>86</sup> The other rules which bear upon the admissibility of polygraph evidence address (1) expert opinion testimony; (2) character evidence; and (3) hearsay.

#### B. Effect of Expert Opinion Rules.

Rule 702 sets the basic standard for admission of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.<sup>87</sup>

Since the polygraphist interprets measurements which purportedly correspond to involuntary body responses to stresses accompanying knowing deception, his opinion arguably constitutes expert testimony. At the same time, since the "specialized knowledge" which he offers must "assist the trier of fact to understand the evidence or to determine a fact in issue," Rule 702 implicitly requires that polygraph evidence be reliable; reliability, of course, actually embraces the concept of logical relevance. Thus, "the question of whether the polygraph reliably reflects truth or deception is really a matter of relevancy," which is a matter "beyond the scope of Rule 702."<sup>88</sup> Even if a court finds the evidence

---

85. See, e.g., Analysis, Mil. R. Evid. 402: "Rule 402 is potentially the most important of the new rules for neither the Federal Rules of Evidence nor the Military Rules of Evidence resolve all evidentiary matters."

86. Saltzburg and Redden, supra note 41, at 115.

87. Mil. R. Evid. 702.

88. Romero, supra note 41, at 198. See id. at 196-97. See also United States v. Ridling, 350 F.Supp. 90, 95 (E.D. Mich. 1972) (stating that Rule 702 "is only the beginning point in assessing the admissibility of

logically relevant, however, it might be excluded since the varacity of witnesses or the accused is not generally considered a technical issue about which laymen are unqualified to reach intelligent decisions.<sup>89</sup>

An independent avenue to admissibility is not created by the provision in Rule 703 that facts or data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . need not be admissible in evidence."<sup>90</sup> If polygraph results are held inadmissible under Rules 401-403 and 702 because of inadequate reliability, there is necessarily no field of specialized knowledge, and thus no expert. In such a case, Rule 703 would never apply.<sup>91</sup>

---

88. Continued.

the evidence"); *United States v. Wilson*, 361 F.Supp. 510, 511 (D. Md. 1973); *Analysis*, Mil. R. Evid. 702. "[S]uch [polygraph] evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact 'assist the trier of fact'").

89. *Abbell*, *supra* note 65, at 55 (citing *United States v. Stromberg*, 179 F.Supp. 278, 280 (S.D.N.Y.), *rev'd in part on other grounds*, 268 F.2d 256 (2d Cir. 1959)). This second exclusionary ground may be mistakenly predicated on the common law criteria for admissibility of expert opinion, *i.e.*, the subject matter must be "beyond the lay comprehension" before an expert may be employed. Under the rule, "an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, not beyond ordinary understanding." *Saltzburg and Redden*, *supra* note 41, at 413 (emphasis added). *Cf.* *Frye v. United States*, 293 F. 1013, 1014 (D.C. App. 1923) (appellant sought admissibility of polygraph evidence on basis of common law standard, but court focused on test's validity rather than jury's ignorance). *But see* *United States v. Ridling*, 350 F.Supp. 90, 93 (E.D. Mich. 1972); *Cullin v. State*, 565 P.2d 445, 458 (Wyo. 1977); *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204, 205 (1975).

90. Mil. R. Evid. 703.

91. *Romero*, *supra* note 41, at 198; *see* *Abbell*, *supra* note 65, at 56. *Cf.* *Analysis*, Mil. R. Evid. 703: "[W]hether Rule 703 has modified or superseded the *Frye* test for scientific evidence . . . is unclear and is now being litigated within the Article III courts."

The remaining rules which deal with expert testimony are unlikely to bar the admission of polygraph results. The fact that the examiner's opinion may purport to resolve the ultimate issue to be decided by the trier of fact is not, in itself,<sup>92</sup> a basis for excluding his testimony.<sup>93</sup> Rule 706's provision for court-appointed experts<sup>94</sup> may actually facilitate admissibility by avoiding controversy over the polygraphist's qualifications.<sup>95</sup> At the same time, it specifically accords trial and defense counsel an equal opportunity to obtain their own experts. One commentator has concluded that:

Rule[s] 702 and 703 by themselves do not support any theory of admissibility for scientific evidence. Only in examination with the rules of relevancy do Rule[s] 702 and 703 apply to the polygraph examination and scientific evidence in general. Rules 702 and 703, therefore, cannot be said to constitute a basis for the admissibility of scientific evidence. Admissibility must be determined according to the rules of relevancy.<sup>96</sup>

### C. Effect of Character Evidence Rules.

A second area of the Military Rules of Evidence which potentially affects admissibility of polygraph evidence consists of those provisions dealing with character evidence. Rule 404(a)(1) provides that while evidence of a person's character or character trait is ordinarily not admissible to prove that he acted in conformity therewith on a particular occasion, evidence of a pertinent character trait of the accused, offered by the defense or by the prosecution in rebuttal, can be admitted.<sup>97</sup> If

---

92. See Advisory Committee's Note to Fed. R. Evid. 704.

93. Mil. R. Evid. 704; *United States v. David*, 564 F.2d 804, 845 (9th Cir. 1977); *United States v. Wilson*, 361 F.Supp. 510, 511 (D. Md. 1973); see *United States v. Ridling*, 350 F.Supp. 90, 98 (E.D. Mich. 1972). But see *Abbell*, supra note 65, at 55-56.

94. Mil. R. Evid. 706.

95. See note 74 supra.

96. *Romero*, supra note 41, at 199-200.

97. Mil. R. Evid. 404(a)(1).

the defendant's character is an element of the crime or of a defense, "[i]t does not stretch the law at all to hold that the opinion of a polygraph examiner that the defendant is telling the truth . . . is evidence of a trait of character . . . ."98 In such a case, where the character trait is direct evidence of the crime or of a defense, Rule 405(b), rather than Rule 404, is controlling.99 Under Rule 405(b), specific instances of conduct may be used as proof.100 Since an individual's truthfulness in answering the test questions constitutes such a specific instance of conduct,101 this provision may permit admission of polygraph evidence in cases in which "character or a trait of character . . . is an essential element of an offense or defense;"102 a perjury case is one example.103

Rule 404 addresses the situation where character evidence is circumstantial proof of one's actions on a particular occasion.104 In this event, only reputation or opinion evidence may be introduced.105 The defense counsel who attempts to admit polygraph evidence under Rule 404(a) faces three hurdles. First, since polygraph results are arguably instances of specific conduct106 rather than reputation or opinion, they may be barred absent an exception under another rule.107 Second, if the

---

98. United States v. Ridling, 350 F.Supp. 90, 98 (E.D. Mich. 1972).

99. Saltzburg and Redden, supra note 41, at 129.

100. Id. at 130.

101. Polygraph results relate primarily to an individual's truthfulness in answering several questions on one particular occasion. Thus they reflect only specific instances of conduct, rather than reputation or opinion within the meaning of Rule 405(a). Abbell, supra note 65, at 57.

102. Id.

103. See United States v. Ridling, 350 F.Supp. 90 (E.D. Mich. 1972).

104. Mil. R. Evid. 404.

105. Saltzburg and Redden, supra note 41, at 149. Note that opinion and reputation evidence (in addition to proof by specific instances of conduct) may also be used as a mode of proof when character is "in issue."

106. See note 101 and accompanying text, supra.

107. See note 109-114 and accompanying text, infra.

prosecution is the proponent of the test results, it may do so only to rebut character evidence offered by the accused.<sup>108</sup> Finally, evidence of truthful character is specifically covered by Rule 608, which permits admission of such evidence only after a witness' character for truthfulness "has been attacked by opinion or reputation evidence or otherwise."<sup>109</sup>

In its general provision that a witness' credibility may be attacked or supported only by opinion or reputation evidence, Rule 608(a) reflects the same philosophy underlying Rule 404(a).<sup>110</sup> Rule 608(b), however, recognizes the admissibility of evidence of specific instances of conduct in certain situations. As in Rule 405(a), specific instances of conduct may be addressed during cross-examination of a witness who has testified concerning the character for truthfulness or untruthfulness of another witness,<sup>111</sup> including, for example, a polygraphist who has testified as to the results of the test performed on a witness. Although the applicability of the rule is explicitly limited to cross-examination, the legislative history of the provision and the policy considerations underlying it indicate that it should be construed to allow both the direct and cross-examiner to impeach witnesses with evidence of specific acts. In contrast, the party seeking to bolster a witness' credibility generally may not use specific instances of conduct.<sup>112</sup> Moreover, the military judge is invested with discretion to exclude evidence of specific acts.<sup>113</sup> The Federal Rules Advisory Committee Note delineates the parameters of that discretion:

---

108. See Mil. R. Evid. 404(a)(1); Analysis, Mil. R. Evid. 404. See also United States v. Ridling, 350 F.Supp. 90, 98 (E.D. Mich. 1972). This offers strategic possibilities for the defense counsel, e.g., by not offering any evidence regarding the accused's trait of truthfulness, he may be able to foreclose admission of the test results proffered by the trial counsel. See also United States v. DeBetham, 348 F.Supp. 1377, 1390 n.58 (S.D. Cal.), aff'd 470 F.2d 1367 (9th Cir. 1972).

109. Mil. R. Evid. 608(a)(2).

110. Analysis of Mil. R. Evid. 608. See Note, Problems Remaining for the "Generally Accepted" Polygraph, B.U.L.Rev. 375, 388 (1973).

111. Mil. R. Evid. 405(a) and 608(b)(2).

112. Analysis, Mil. R. Evid. 608 (citing Saltzburg & Redden, supra note 41, at 312-13).

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

Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury . . . .<sup>114</sup>

Thus the fundamental criteria for admissibility are again reduced to logical and legal relevance.<sup>115</sup>

#### D. Effect of Hearsay Rules.

The final set of rules which may influence the admissibility of polygraph evidence deals with hearsay.<sup>116</sup> As the court in United States v. Ridling<sup>117</sup> recognized, the test questions and the subject's answers are not received in evidence to prove the truth of the fact asserted, and thus are arguably not hearsay.<sup>118</sup> What is admitted for its truth is the opinion of the polygraphist as to whether the examinee is being knowingly deceptive. If the examiner's testimony is itself admissible, there is no

114. Fed. R. Evid. Advisory Committee's Note, Subdivision (b)(2).

115. Cf. Abbell, supra note 65, at 58: "In view of the probable prejudicial effect of polygraph results, they almost invariably should be held to be inadmissible proof of the character trait of credibility even for purposes of cross-examination."

116. Cf. United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975) (asserting that polygraph evidence presents a hearsay problem).

117. 350 F.Supp. 90 (E.D. Mich. 1972).

118. 350 F.Supp. at 99. See Mil. R. Evid. 801(a), (b), & (c). But see Note, supra note 110, at 401 (rejecting Ridling's conclusion, and stating that the examiner's opinion was merely a way to determine truthfulness).

apparent reason to exclude the basis of his opinion, if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."<sup>119</sup>

On the other hand, if the polygraphist testifies that the subject was not being consciously deceptive, the questions and the examinee's answers are, for all practical purposes, offered for the truth of the matter asserted.<sup>120</sup> Consequently, the evidence may be objectionable unless it can be subsumed under one of the recognized exceptions to the hearsay rule. Three provisions are arguably applicable. First, Rule 801(d)(1)(B) excepts, by definition, a statement which is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."<sup>121</sup> No opinion has addressed this provision in connection with polygraph evidence, but one commentator has opposed admissibility on the grounds that there is no clear indication of an intent to so expand the exception.<sup>122</sup>

<sup>119</sup> Mil. R. Evid. 703. See Mil. R. Evid. 705, which states that an "expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

<sup>120</sup> United States v. Ridling, 350 F.Supp. 90, 99 (E.D. Mich. 1972). Note that the expert opinion on deceptiveness would appear to be admissible separately from the questions and answers. Rule 705 is permissible in allowing voluntary testimony as to the data underlying the opinion; if the opposing party elicits such information on cross-examination, he should be estopped from complaining later. However, introduction of the opinion without testimony as to the underlying facts or data may be barred on the grounds of an inadequate foundation. See notes 50-51 and accompanying text, supra.

<sup>121</sup> Mil. R. Evid. 801(d)(1)(B). Note that if the testimony of a witness who has previously taken a polygraph examination is inconsistent with his test responses, the latter are not admissible under Mil. R. Evid. 801(d)(1)(A).

<sup>122</sup> Abbell, supra note 63, at 58-59.

Alternatively, the questions and responses might be admitted under the "records of regularly conducted activity" exception of Rule 803(6). The test records could reasonably be analogized to forensic laboratory analyses, one of the enumerated examples of acceptable reports. Rule 803(24) offers a final possible avenue of admissibility, if a court determines that the questions and answers have circumstantial guarantees of trustworthiness equivalent to the other exceptions of Rule 803, and "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of [the] rules and the interests of justice will best be served by admission of the statement into evidence."<sup>123</sup> A court could logically adopt this approach if it preliminarily found polygraph evidence reliable.<sup>124</sup>

#### IV. Constitutional Considerations Bearing on Admissibility

The proponent of polygraph evidence might argue that, apart from the provisions of the Military Rules of Evidence, his rights to due process of law and compulsory process require admission of such evidence. Although courts have generally rejected this contention,<sup>125</sup> it has received some support from legal commentators.<sup>126</sup> The rationale of Chambers v. Mississippi<sup>127</sup> embodies the essential elements of the argument:

---

123. Mil. R. Evid. 803(24); see Note, supra note 110, at 401-02.

124. See United States v. Ridling, 350 F.Supp. 90, 99 (E.D. Mich. 1972). Rule 803(5) may present a means of introducing the questions and responses under the "prior recollection recorded" exception. Rule 803(6) embodies the same underlying guarantees of trustworthiness, however, and is more specifically applicable. Consequently, a court could more logically grant admissibility under the latter rule.

125. See United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979); Conner v. Auger, 595 F.2d 407, 411 (8th Cir. 1979); United States v. Bohr, 581 F.2d 1294, 1303 (8th Cir. 1978); United States v. Penick, 496 F.2d 1105, 1109-10 (7th Cir. 1974); Shrader v. Riddle, 401 F.Supp. 1345, 1351 (W.D. Va. 1975). Cf. Masri v. United States, 434 U.S. 907, 908 (1977) (White and Marshall, JJ., dissenting). See also Weiland v. Parratt, 530 F.2d 1284, 1288 (8th Cir. 1976); United States ex rel. Jacques v. Hilton, 423 F.Supp. 895, 900-02 (D.N.J. 1976).

126. E.g., Silving, Testing of the Unconscious in Criminal Cases, 69 Harv. L. Rev. 683, 687-95 (1956).

127. 410 U.S. 284 (1973).

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process.

. . . [O]f course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process . . . . But its denial or significant diminution calls into question the ultimate "integrity of the fact finding process" and requires that the competing interest be closely examined.<sup>128</sup>

The presentation of polygraph evidence may be essential to "a fair opportunity to defend" by providing both exculpatory evidence (from examination of the defendant) and material with which to conduct a meaningful cross-examination (from examination of opposing witnesses). The former use presents the more compelling due process claim and the more difficult philosophical quandry; indeed, "rejection of this argument . . . involves sacrifice of an essential ethical tenet, that man is an ultimate value, not as a member of a species, but as an unique historical event. Such rejection can be justified only by the limitations inherent in democratic law as a social ideal."<sup>129</sup> Exclusion of polygraph evidence is thus justified only when the damage to the integrity of the judicial process outweighs possible short-term benefits to the accused. This balancing process is to a large extent codified in Rule 403; the constitutional ramifications of the process, however, may well imply more favorable consideration of the defendant's interests and stricter scrutiny of governmental concerns.<sup>130</sup>

---

128. 410 U.S. at 294-95.

129. Silving, supra note 126, at 693. See also Chambers, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense").

130. Chambers also implies that exclusion of testimony which bears "persuasive assurances of trustworthiness" and which is critical to a defense may violate constitutional guarantees, 410 U.S. at 302. To the extent that polygraph evidence in a particular case satisfies these criteria, admission may be mandated. Due process arguments may also be

## V. Protection of Polygraph Evidence from Involuntary Disclosure<sup>131</sup>

The use of polygraph examinations raises several issues concerning the withholding of that evidence from opposing counsel. Testing may produce two types of damaging evidence. If polygraph results are held admissible, they may be used as direct evidence.<sup>132</sup> Even if the test results themselves are inadmissible, the examination may yield derivative evidence which could be useful to the opposing party, both in investigation and as impeachment evidence at trial. Unrelated admissions and confessions which might occur during answers to control questions are potentially the most damaging examples of the latter variety.<sup>133</sup> Three doctrines affect the disclosure of polygraph evidence: (1) the work-product doctrine; (2) the attorney-client privilege; and (3) constitutionally-mandated disclosure rules pertaining to evidence favorable to the defense.

---

130. Continued.

raised to oppose the admission of polygraph results. First, such testing arguably denies the individual's dignity and treats him as a mere object by surveying his unconscious. To the extent that the subject must cooperate in order to be effectively examined, however, this argument is weakened. Second, insofar as polygraph evidence conclusively influences the jury's verdict, its admission may render the trial process fundamentally unfair (especially if the test results are offered against the criminal defendant). Note, The Admissibility of Lie Detector Evidence, 51 N.D.L. Rev. 679, 696-698 (1975). In extreme cases, the polygraph may even usurp the role of the jury, thereby violating the defendant's right to jury trial. See notes 75-78 and accompanying text, supra. A defendant may also have a constitutional right to be examined by a polygraphist of his attorney's choice, to assist in pretrial investigation, under the Sixth and Fourteenth Amendments. *Pinson v. Williams*, 410 F.Supp. 1387 (S.D. Ohio 1975).

131. See generally, Axelrod, The Need for an Evidentiary Privilege for the Use of Lie Detectors in Criminal Cases: Investigation as Risk, 31 S.C.L. Rev. 469 (1980).

132. One of the few federal cases to advert to this issue assumed, without discussion, that the results of a private polygraph examination are protected from involuntary disclosure. *United States v. Wilson*, 361 F.Supp. 510, 514 (D. Md. 1973).

133. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971). Such admissions and confessions are probably admissible under Rule 801(d)(2). See Axelrod, supra note 131, at 483-85.

The qualified protection afforded by the work-product doctrine does not adequately shield polygraph evidence.<sup>134</sup> Although the examination materials arguably qualify as work-product,<sup>135</sup> opposing counsel may secure them upon a showing of materiality and unavailability of the information through alternative sources.<sup>136</sup> The absolute nature of the attorney-client privilege offers a more promising sanctuary. Rule 502 defines the scope of this privilege.<sup>137</sup> Polygraph evidence might come within its parameter in two ways. First, the polygraphist could be analogized to the interpreter, and described as an expert conduit of information necessary for attorney-client communication. While this approach satisfies the traditional policy reasons underlying the third-party exceptions to the confidential communication requirement, it is not properly applicable to a polygraphist. The conduit of communications exception demands that the expert be essential to the communication; a polygraph test is not necessary to communicate the truth. Courts are unlikely to expand the attorney-client privilege to include polygraphists because of the high evidentiary cost of that categorical protection.<sup>138</sup>

The second approach focuses on the definition of "representative of a lawyer" as "a person employed by or assigned to assist a lawyer in providing professional legal services."<sup>139</sup> In light of the Federal Rules Advisory Committee's Note,<sup>140</sup> a polygraphist could well be included within the Rule's coverage:

---

134. Axelson, supra note 131, at 490-500.

135. Id. at 493-96 (the polygraphist's status as an independent expert does not defeat coverage).

136. Id. at 496-500.

137. Mil. R. Evid. 502. Note that this rule has no counter-part in the Federal Rules of Evidence. It is substantially identical to Proposed Federal Rule of Evidence 503, which was approved by the Supreme Court but rejected by Congress.

138. Axelson, supra note 131, at 508-518.

139. Mil. R. Evid. 502(b)(3).

140. The note refers to proposed Fed. R. Evid. 503. See note 132, supra.

The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice . . . . It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to qualify as a witness . . . . The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material.<sup>141</sup>

In order to qualify, the examiner must be employed to assist in pretrial preparation; for example, he may be utilized as an expert source of investigatory information.<sup>142</sup> A recent decision of the New York Supreme Court indicates that courts may be receptive to the attorney-client privilege argument. Based on a New York statute, the court held that a polygraphist hired by the defense counsel was the attorney's agent. Consequently, the client's confession during the course of the examination was protected, since the examiner was "standing in his lawyer's shoes."<sup>143</sup>

---

141. Advisory Committee's Note to Proposed Fed. R. Evid. 503, subdivision (a)(3).

142. One commentator has argued for extension of the attorney-client privilege, reasoning that the examination is administered at the attorney's request to aid him in legal preparation of the case. In advancing this "agency" rationale (citing *Daniel v. Hadley Memorial Hospital*, 63 FRD 583 (D.D.C. 1975)) he recommended that (1) defense counsel be retained before the polygraph examination; (2) defense counsel (rather than the client) hire and pay the examiner; and that (3) the polygraphist be paid before the test, to forestall allegations of improper influencing of the test results. *Matte, Privileged Communication Between Attorney-Client-Polygraphist*, 51 N.Y. St. B.J. 466 (1979). But see Axelrod, supra note 131, at 507-08 (arguing that protection of evidence gathering and strategy-planning is more appropriately left to the work-product doctrine).

143. *People v. George*, 48 U.S.L.W. 2825-26 (June 24, 1980).

Any invocation of privilege by the government is complicated by constitutional considerations. Under Brady v. Maryland,<sup>144</sup> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>145</sup> The applicability of Brady to the facts of a particular case depends upon the materiality both of the evidence withheld and of other evidence that the withheld information may preclude.<sup>146</sup> While the polygraph may seldom generate Brady material in actual practice,<sup>147</sup> several courts have recognized that prosecutorial suppression of exculpatory<sup>148</sup> polygraph evidence definitely implicates constitutional concerns.<sup>149</sup> Consequently, both defense and government counsel should be alert to this issue whenever the government has examined witnesses, victims, or the accused.

## VI. Collateral Issues

Several issues not specifically addressed by the Military Rules of Evidence frequently arise when polygraph evidence is involved in litigation. Defense counsel should be alert to those issues since their resolution in a particular case may render questions of admissibility and privilege moot. The United States Supreme Court recognized that submission to a polygraph examination may constitute self-incrimination:

<sup>144.</sup> 373 U.S. 83 (1963).

<sup>145.</sup> 373 U.S. at 87.

<sup>146.</sup> Axlerod, supra note 131, at 528-536; see generally King, Favorable Evidence Under Brady v. Maryland, An Accused's Right, 11 The Advocate 272 (1979).

<sup>147.</sup> Id. at 535-36.

<sup>148.</sup> "Exculpatory" evidence includes polygraph results that impeach opposing witnesses.

<sup>149.</sup> United States v. Grant, 473 F.Supp. 720, 725 (D.S.C. 1979); United States v. Hart, 344 F.Supp. 522, 523-24 (E.D.N.Y. 1971); United States v. Mouganel, 6 M.J. 589, 592 (AFCMR 1978) ("Although not admissible in court-martial, the results of polygraph tests indicating the informant was untruthful could be of great benefit to the accused in preparing for trial"). But see Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975) (polygraph evidence withheld was insufficiently material to produce fundamental unfairness to the defendant).

Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.<sup>150</sup>

Several other courts have voiced a similar concern.<sup>151</sup> In view of the often coercive impact of a lie detector test,<sup>152</sup> a compulsory polygraph examination may violate one's privilege against self-incrimination if the results are considered "testimonial;"<sup>153</sup> at least one court has so held.<sup>154</sup>

150. Schmerber v. California, 384 U.S. 757, 764 (1966) (dicta).

151. United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975); United States v. Zeiger, 350 F.Supp. 685, 692 n.33 (D.D.C.) rev'd per curiam, 475 F.2d 1280 (D.C. Cir. 1972); United States v. DeBetham, 348 F.Supp. 1377, 1380 n.6 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972).

152. United States v. Little Bear, 583 F.2d 411, 414 (8th Cir. 1978).

153. Bowen v. Eymann, 324 F.Supp. 339, 341 (D. Ariz. 1970). See generally Mil. R. Evid. 301.

154. Id. Accord, Note, supra note 104, at 400. But see United States v. Ridling, 350 F.Supp. 90, 97-98 (E.D. Mich. 1972) (suggesting that no privilege is involved since there is no coercion aimed at obtaining a "statement," and holding that since polygraphist's opinion is vehicle for attacking or supporting credibility, admission of evidence does not constitute violation of privilege against self-incrimination); United States v. DeBetham, 348 F.Supp. 1377, 1389 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972) (government demand that a defendant submit to polygraph examination by a government examiner "would not seem unreasonable").

Since Article 31 of the UCMJ offers significantly broader protection against self-incrimination than the Fifth Amendment, United States v. Musquire, 9 USCMA 67, 25 CMR 329, 330 (1958); see also Mil. R. Evid. 301(a), polygraph results are even more likely to be held "testimonial" under military law. Cf., e.g., United States v. White, 17 USCMA 211, 38 CMR 9 (1967) (handwriting exemplars are testimonial); United States v. Greer, 3 USCMA 576, 13 CMR 132 (1953) (voice exemplars are "statements within the meaning of Article 31).

It is arguable, however, that compulsory polygraph examination is impossible, since the subject must cooperate in order to produce valid results.<sup>155</sup> In any event, a suspect may waive his privilege against self-incrimination, and particularly when Miranda warnings are given, a submission to the test is itself a waiver of the privilege.<sup>156</sup>

The importance of adequate pre-test warnings<sup>157</sup> was underscored in United States v. Little Bear:<sup>158</sup>

[F]ull instructions of the suspect's rights should be furnished whenever such examinations are administered to persons under criminal investigation . . . . As part of the effort to remove, or mitigate the pressures toward self-incrimination generated by a polygraph situation, we deem it essential that a person subject to polygraph examination be apprised, at a minimum, of the rights to refuse to take the test, to discontinue at any point, and to decline to answer any individual questions.<sup>159</sup>

The warnings are issued in order to insure that the defendant's consent to the polygraph was given "voluntarily, without duress, coercion, threats, promises of reward or immunity" and after an explanation of the examination and its possible use against him.<sup>160</sup> Strategically, defense counsel

---

155. See United States v. Oliver, 525 F.2d 731, 735 (8th Cir. 1975); United States v. Ridling, 350 F.Supp. 90, 97-98 (E.D. Mich. 1972).

156. United States v. Oliver, 525 F.2d 731, 734-36 (8th Cir. 1975); United States v. Ridling, 350 F.Supp. 90, 97 (E.D. Mich. 1972). Cf., Keiper v. Cupp, 509 F.2d 238, 241 (9th Cir. 1975); Axelrod, supra note 131, at 520-21 (noting that once the defendant has willingly taken the polygraph test, he has no Fifth Amendment standing to prevent the polygraphist from testifying as to the results since the compulsion to produce testimonial information is then directed at the examiner rather than at the defendant); Mil. R. Evid. 301(d) & (e).

157. See Mil. R. Evid. 305.

158. 583 F.2d 411 (8th Cir. 1978).

159. 583 F.2d at 414.

160. Tyler v. Peyton, 294 F.Supp. 1351, 1352 (E.D. Va. 1968).

must object to admission of the test results, where no rights warnings were given, at the time the government attempts to introduce the tainted evidence. Failure to make a proper and timely objection constitutes a waiver.<sup>161</sup>

Even if polygraph results are held inadmissible at trial under the Military Rules of Evidence, it does not follow that all references to polygraph examinations are improper under the rules. Thus, testimony pertaining to the circumstances of the test will probably be admissible if offered for a nonsubstantive purpose, e.g., to explain the conditions preceding a confession.<sup>162</sup> In such cases, the court should instruct counsel as to the limits within which the evidence may properly be used.<sup>163</sup> On the other hand, courts generally exclude testimony relating to a witness' willingness or unwillingness to take a polygraph examination, since such evidence is principally used to bolster or impeach the individual's credibility, thereby indirectly buttressing or undermining the truth of his substantive testimony.<sup>164</sup> Moreover, evidence of the

---

161. Chavez v. State, 456 F.2d 1072, 1073 (5th Cir. 1972); See Mil. R. Evid. 304(d)(2), 305(a)-(c). But see Mil. R. Evid. 103.

162. See United States v. Bad Cobb, 560 F.2d 877, 882 n.10 (8th Cir. 1978); United States v. Little Bear, 583 F.2d 411, 413-14 (8th Cir. 1978); United States v. McDevitt, 328 F.2d 282 (6th Cir. 1964); Tyler v. United States, 193 F.2d 24, 31 (D.C. Cir. 1952). See generally Annot., Admissibility of Polygraph Evidence at Trial on Issue of Voluntariness of Confession Made by Accused, 92 ALR3d 1317 (1979); Annot., Propriety and Prejudicial Effect of Informing Jury that Accused Has Taken a Polygraph Test Where Results of Tests Would Be Inadmissible In Evidence, 88 ALR3d 227 (1978). The fact that a defendant's confession followed a polygraph examination usually does not by itself render the confession inadmissible. See Annot., Admissibility in Evidence of Confession Made by Accused in Anticipation of, During, or Following Polygraph Examination, 89 ALR3d 230 (1979).

163. See Mil. R. Evid. 105.

164. United States v. Cardarella, 570 F.2d 264, 267 (8th Cir. 1978); United States v. Bursten, 360 F.2d 779, 785 (7th Cir. 1977); Shrader v. Riddle, 401 F.Supp. 1345, 1351 (W.D. Va. 1975) (dicta); Bowen v. Eyman, 324 F.Supp. 339, 341 (D.Ariz. 1970); see Annot., Propriety and Prejudicial Effect of Comment or Evidence as to Accused's Willingness to Take Lie Detector Test, 95 ALR2d 819 (1964). But cf. United States v. Bursten, 360 F.2d 779, 785 (7th Cir. 1977).

defendant's unwillingness to be tested could become tantamount to an admission of guilt. One court noted that "[a]s soon as the test is admitted in any case, failure to submit to it will be interpreted as an admission of guilt, and we shall be faced with the awkward phenomenon of 'lie detector sex offenders' along with 'Fifth Amendment Communists.'"<sup>165</sup> For the same reasons, evidence that a defendant took a polygraph test is usually held inadmissible, even if he makes no attempt to introduce the results.<sup>166</sup>

Defense counsel should also be aware of the possible use of polygraph evidence outside the trial setting.<sup>167</sup> Notwithstanding the widespread exclusion of test results at trial, civilian courts have sometimes admitted such testimony within other contexts,<sup>168</sup> such as grand jury hearings,<sup>169</sup> in pre-sentence reports,<sup>170</sup> and in a post-conviction motion for a new trial.<sup>171</sup>

---

<sup>165.</sup> Silving, supra note 126, at 692.

<sup>166.</sup> Annot., Propriety and Prejudicial Effect of Informing Jury that Accused has taken Polygraph Test Where Result of Test would be Inadmissible in Evidence, 88 ALR3d 227 (1978). See, e.g., United States v. Fife, 573 F.2d 369, 373 (6th Cir. 1976); cf. United States v. Bagsby, 489 F.2d 725, 726 (9th Cir. 1973). Note that if polygraph evidence is held admissible under the Military Rules of Evidence, these subsidiary exclusionary rules would no longer be required.

<sup>167.</sup> See notes 21-23 and accompanying text, supra, for current military law regarding extra-trial admissibility of polygraph results.

<sup>168.</sup> See Note, supra note 110, at 390.

<sup>169.</sup> See United States v. Narciso, 446 F.Supp. 252, 298 (E.D. Mich. 1977).

<sup>170.</sup> See People v. Davis, 270 Cal. App.2d 841, 76 Cal.Rptr. 242 (1969). Cf. United States v. Francis, 487 F.2d 968, 972 (5th Cir. 1973); Note, supra note 110, at 390.

<sup>171.</sup> See People v. Barbara, 400 Mich. 352, 255 N.W.2d 171 (1977); State v. Brown, 177 So.2d 532 (Fla. Ct. App. 1965); Note, Criminal Law-Polygraph Examination Results Admissible in Post-Conviction Hearings, 56 N.C.L. Rev. 380 (1978) (concluding that (1) under Barbara, the standard for admission of polygraph evidence in Michigan new trial hearings based on newly discovered evidence is demonstrated probative value, rather than demonstrated scientific approval; and (2) limited admission of polygraph

## VII. Conclusion

A policy which invests the military judge with discretionary power to admit or exclude polygraph evidence offered for testimonial purposes seems most suitable. It comports with the approach adopted by a substantial (and apparently burgeoning) number of Article III courts.<sup>172</sup> It also recognizes the constantly increasing sophistication of polygraph equipment and techniques, and would avoid the disadvantages inherent in an inflexible exclusionary rule.<sup>173</sup> Moreover, this procedure implements the balancing approach endorsed in Rule 403. Finally, such a policy represents a logical and principled extension of the present trend in military case law pertaining to the admissibility of expert scientific evidence.<sup>174</sup>

---

171. Continued.

evidence in such hearings "permits the court to test the utility of the polygraph under strictly controlled conditions," such that if the evidence passes muster here, the Frye general scientific acceptance standard will be satisfied and polygraph evidence may become generally admissible for impeachment purposes); Note, supra note 110, at 390. But see United States v. Stromberg, 179 F.Supp. 278, 279-80 (S.D.N.Y. 1959) (new trial motion predicated upon polygraph evidence was denied, in part, because the results were inadmissible at trial and consequently could not produce different outcome).

172. See note 36 and accompanying text, supra.

173. A discretionary policy also has drawbacks, most notably the necessity of relitigating the admissibility issue at virtually every trial in which polygraph evidence is proffered. However, in light of the measures available to the court to alleviate this problem, and the potentially crucial importance of the evidence in some cases, a case-by-case "cost-benefit" approach is justified. See notes 60-69 and accompanying text, supra.

174. See United States v. Hicks, 7 M.J. 561 (ACMR 1979). In Hicks, the court held that "a measure of discretion in the trial judge should be recognized 'even assuming arguendo the existence of a demonstrable scientific principle.'" 7 M.J. at 563 (quoting United States v. Hulen, 3 M.J. 275, 277 (CMA 1977) (Cook, J.)). The exercise of that discretion should be guided by a four-pronged test which considers: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect. Id. The Hicks court also cited with approval Fed. R. Evid. 403 and 702. Id. at 565 n.11, 566. See also United States v. Courts, 9 M.J. 285 (CMA 1980).

Although the articulation of the attorney-client privilege in Rule 502 has no analogue in the Federal Rules of Evidence, and although there is consequently no body of case law to illuminate its terms, the scope of this rule appears sufficiently broad to encompass polygraph evidence obtained during trial preparation. Even if the courts exclude such evidence (using either a discretionary or per se rule), protection of this information could be crucial in light of its preparatory, investigative value. Depending upon the facts of the particular case, however, the government may be unable to invoke the privilege, in light of the constitutional requirements enunciated in Brady.

Regardless of the courts' holdings with respect to the testimonial admissibility of polygraph evidence at trial, the military justice system affords significant opportunities to mitigate the impact of restrictive decisions by resorting to extra-trial or non-substantive utilization of examination results. In light of current military case law<sup>175</sup> and civilian precedent,<sup>176</sup> such evidence should be admissible at Article 32 hearings, in sentencing proceedings, in a post-conviction motion for new trial, in the staff judge advocate's post-trial review (if results are favorable to the accused), and in a convening authority's exercise of his power to disapprove findings of guilty. Similarly, testimony

---

174. Continued.

The committee which drafted the rules also appears to have favored a balancing approach:

The deletion of the explicit prohibition on [polygraph, hypnotic, and drug-induced] evidence is not intended to make such evidence per se admissible. Rather it is the committee's intent to allow the courts to determine whether such evidence will, in any given case, "assist the trier of fact to understand the evidence or to determine a fact in issue." Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact-finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact."

Analysis, Mil. R. Evid. 702.

175. See notes 14-18 and 21-23 and accompanying text, supra.

176. See notes 162-71 and accompanying text, supra

regarding the administration of a polygraph examination should be admissible at trial to explain the circumstances surrounding a confession.

Even if polygraph evidence is admitted for improper purposes, reversal is unlikely if other proof of guilt is so overwhelming as to eliminate the danger of prejudice. Collateral issues, such as the necessity of Article 31 warnings, the accused's right to refuse examination, and the inadmissibility of that refusal as incriminating evidence, provide efficacious means with which to temper the effects of unfavorable rulings on admissibility. The interaction of polygraph evidence with the Military Rules of Evidence, in sum, presents numerous opportunities for creative advocacy. Close analysis and reasoned argument by defense counsel can be instrumental in charting the course which the courts will follow.

# THE ACCUSED'S CONSTITUTIONAL RIGHT TO DEFEND

by Terrence Lewis\*

## The Basis of the Right

Defense attorneys traditionally use the Bill of Rights as a shield to protect their clients from governmental activities. Some recent United States Supreme Court decisions indicate that the Sixth Amendment may also be used as a sword to override evidentiary rules which would otherwise exclude critical and reliable defense material.<sup>1</sup> The court's decision in Washington v. Texas<sup>2</sup> represents the first step in forging this sword.

## Competency of Witness

In 1964, the State of Texas charged Jackie Washington and Charles Fuller with murder. Fuller was tried first and convicted. Washington wanted to call Fuller as a defense witness at his trial, and he submitted an offer of proof that Fuller would testify that Washington had tried to prevent him from firing the fatal shot. The trial judge ruled that Fuller was incompetent as a witness, based upon two Texas statutes concerning the competency of co-conspirators to testify for one another, and Washington was convicted. The conviction was upheld by the Texas court of criminal appeals. On appeal, the United States Supreme Court reversed the lower courts' decision. Writing for the majority, Chief Justice Warren indicated that the Sixth Amendment's express right to compulsory process implies a right to present the testimony that was excluded at trial. Without the implied right, the express right is a facade:

---

\*Mr. Lewis received his B.S. and J.D. degrees from St. John's University. He formerly served as trial and defense counsel at VII Corps; Command Judge Advocate for the 2d Support Command (Corps); and appellate defense attorney and Case Notes Editor for The Advocate at the Defense Appellate Division. He also served as the Army Representative to the Dept. of Defense Joint Service Review Activity. He is currently employed as the Director, General Counsel, Christians for a Better America, Inc.

1. For an analysis of certain aspects of the accused's Sixth Amendment right to prepare his defense, see Imwinkelried, The Constitutional Right to Present Defense Evidence, 62 Mil. L. Rev. 225 (1973).

2. 388 U.S. 14 (1967).

[I]t could hardly be argued that a State would not violate the [compulsory process] clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.<sup>3</sup>

Although the Chief Justice's reasoning may be somewhat strained,<sup>4</sup> the Court has definitely grounded the right to present defense evidence on the Sixth Amendment.

### Content of Testimony

This recognition of the accused's right, in appropriate cases, to testify suggests that rules limiting the subject matter of testimony may also be susceptible to challenge by the defense. Indeed, this second step in the forging of the defense sword took place in Chambers v. Mississippi.<sup>5</sup> That case resolved the disagreement among lower courts as to whether the right to present defense evidence could override specific exclusionary rules, such as the prohibition of hearsay. In Chambers, the accused was charged with murder. Another person, McDonald, originally confessed to the same murder and made several incriminating statements, but subsequently repudiated the inculpatory remarks. At trial, the defense called McDonald as a witness and read his confession to the jury. On cross-examination, McDonald again repudiated the confession and denied committing the murder. The judge denied a defense request that it be allowed to treat McDonald as an adverse witness.

The defense then attempted to call the acquaintances to whom McDonald had made incriminating statements. The trial judge sustained the prosecutor's hearsay objection. Under Mississippi law, both of the judge's rulings were correct. Mississippi courts adhere to the "witness voucher rule," which stipulates that the party calling a particular witness vouches for that witness and may not subsequently attack his credibility.

3. Id. at 22. Cf. Manual for Courts-Martial, United States, 1969 (Revised edition), para. 142e.

4. Imwinkelried, supra note 1, at 235-37.

5. 410 U.S. 284 (1973).

In addition, Mississippi only recognized a declaration against pecuniary, rather than penal interests, as an exception to the hearsay rule. Leon Chambers was convicted.

Mr. Justice Powell, speaking for the Supreme Court in its reversal of the conviction, dismissed Mississippi's voucher rule as a "remnant of primitive English trial practice,"<sup>6</sup> and stated that "[t]he availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State."<sup>7</sup> Mr. Justice Powell next addressed the excluded statements to McDonald's acquaintances, and noted that while most states exclude penal interest from the "declaration against interest" exception, many scholars had criticized the limitation and some jurisdictions had abandoned the distinction. Mr. Justice Powell stressed that the excluded statements in Chambers were both reliable and critical to the defense. Citing Washington, he held that the exclusion was improper.<sup>8</sup> Thus, while Washington struck down the denial of a witness, Chambers eliminated rules which prevent presumably unreliable testimony.

### Privileges

These decisions left unresolved the question as to the competency of evidence excluded not because of its presumed unreliability, but because of common law privileges designed to promote social policy, such as the attorney-client and husband-wife privileges. Although a footnote in Washington<sup>9</sup> indicates that the Court was not disapproving testimonial privileges, another case recognized that in appropriate cases, an accused's right to prepare his defense may override a recognized privilege against disclosure of particular testimony. In Roviaro v. United States,<sup>10</sup> the Court balanced the defendant's interest in a

---

6. Id. at 296.

7. Id. at 297-98.

8. Id. at 300-02.

9. 388 U.S. at 23.

10. 353 U.S. 53 (1957). In dicta, the Court of Military Appeals has cited Roviaro in support of the principle that "the interests of a defendant in having available at trial all the evidence bearing on guilt or innocence" may sometimes override the privilege against disclosing an informant's identity. See United States v. Killebrew, 9 M.J. 154, 160 n.8 (CMA 1980).

fair trial against the state's interest in protecting an informant's identity, and decided that the defendant's interests were more compelling. These conflicting premises set the stage for the court's decision in Davis v. Alaska.<sup>11</sup>

The defendant in Davis was charged with burglary. The key government witness was Richard Green, a juvenile delinquent who was himself on probation for burglary. Davis' defense counsel sought to introduce evidence of Green's juvenile adjudication as a specific source of bias; he intended to show that Green might fear probation revocation if he did not "cooperate" and, moreover, dispell any suspicion of his own criminal liability. Pursuant to its request, the prosecution was granted a protective order preventing the defense from eliciting the juvenile adjudication; the order was based upon Alaskan statutes banning the use of juvenile records as evidence. As in Washington and Chambers, the trial court's conviction of the accused was reversed by the United States Supreme Court.

In Washington and Chambers, the Supreme Court dealt with rules which exclude logically relevant, but presumably unreliable evidence. Here, the logically relevant evidence was excluded because of a public policy interest in protecting juveniles. In Davis, as in Roviaro, the Supreme Court employed a balancing test. Speaking for the Court, Mr. Chief Justice Burger called Green a "crucial witness" in the State's case against Davis. The critical nature of Green's testimony and the high probative value of his probationary status<sup>12</sup> buttressed Davis' interest in a fair trial vis a vis the State's interest in protecting juveniles. Mr. Chief Justice Burger concluded that "the State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."<sup>13</sup>

#### Exercising the Right

When the defendant desires to attack an exclusionary rule, he must show that the evidence he seeks to admit is highly relevant, reliable, and critical to the defense. In Washington, Mr. Chief Justice Warren noted that the testimony was "vital to the defense."<sup>14</sup> Mr. Justice Powell twice

---

11. 415 U.S. 308 (1974).

12. Id. at 317-18.

13. Id. at 320.

14. 388 U.S. at 16.

refers to the "critical" nature of the defense evidence in Chambers,<sup>15</sup> and Mr. Chief Justice Burger, in Davis, mentions the "crucial" nature of the material excluded at trial.<sup>16</sup> The defense counsel must demonstrate that the evidence is reliable as well as crucial. Once he makes this preliminary showing, counsel must ascertain the type of competency rule under attack. If the rule is based upon the presumed unreliability of the type of evidence excluded, the Chambers test applies. That decision defeated a hearsay rule grounded on the notion that "untrustworthy evidence should not be presented to the triers of fact."<sup>17</sup> Once the defense demonstrates that the particular evidence offered is critical and has "considerable assurance of . . . reliability,"<sup>18</sup> the general rule must yield since there is no longer any reason to exclude the proffered evidence. A contrary decision would constitute an arbitrary application of a general rule to a specific, anomalous factual setting. On the other hand, if the competency rule is based upon social policy, the Davis procedure must be followed, and the judge must balance the parties' competing interests. In this situation, a particular social policy may be more compelling than the defendant's interest in a fair trial. However, Davis indicates that the judge, in making his determination, should attach great weight to the defendant's interest.

#### Judicial Acceptance of the Right

Courts have willingly invoked the accused's right to invalidate statutory and decisional bars to defense evidence. Judges have forbidden prosecutors from silencing defense witnesses with threats of prosecution if they present testimony favorable to the defendant.<sup>19</sup> In United States v. Walton,<sup>20</sup> the court declared that witnesses are not the exclusive property of either the government or defense, and that an accused is entitled to access to a government witness even if the witness is in protective custody. The courts have also forbidden judicial interference

---

15. 410 U.S. at 302.

16. 415 U.S. at 310.

17. 410 U.S. at 298.

18. Id. at 300.

19. United States v. Morrison, 535 F.2d 233 (3d Cir. 1976); United States v. Smith, 478 F.2d 976 (D.C. Cir. 1973); Commonwealth v. Jennings, 225 Pa. Super. 489, 311 A.2d 720 (1973).

20. 602 F.2d 1176 (4th Cir. 1979).

which precludes a defense witness from testifying. In People v. Berry,<sup>21</sup> a trial judge was reversed when, as a matter of law, he ruled a defense witness' testimony incredible.<sup>22</sup> If a defense requested witness indicates that he will invoke his Fifth Amendment or Article 31 rights,<sup>23</sup> the judge may not exclude the witness. The defense may call the witness, who may selectively invoke his right not to incriminate himself as to certain questions.<sup>24</sup> Some courts have held that the defense may cross-examine prosecution witnesses about any misdeeds which might cause them to ingratiate themselves with the government.<sup>25</sup> The hearsay barrier has not prevented the admission of a third-party confession to the crime with which the defendant is charged.<sup>26</sup> The barriers are also falling in the area of scientific evidence. Hughes v. Mathews<sup>27</sup> and Schimmel v. State<sup>28</sup> deal with restrictions on the admissibility of psychiatric evidence, and courts have even determined that limitations on the admissibility of polygraph evidence may violate the defendant's rights in some cases.<sup>29</sup>

The Court of Military Appeals has also recognized the priority of the accused's Sixth Amendment rights. In United States v. Johnson,<sup>30</sup>

21. 403 N.Y.S. 761, 62 A.2d 1021 (1978).

22. See State v. Jones, 354 So.2d 530 (La. 1978); Dunas v. State, 350 So.2d 464 (Fla. 1977).

23. Article 31, Uniform Code of Military Justice, 10 U.S.C. §831 (1976).

24. United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976); Royal v. Maryland, 529 F.2d 1280 (4th Cir. 1976).

25. United States v. Garrett, 542 F.2d 23 (6th Cir. 1976); United States v. Deleon, 498 F.2d 1327 (7th Cir. 1974); see Gillespie v. United States, 368 A.2d 1136 (D.C.C.A. 1977).

26. Commonwealth v. Hackett, 225 Pa. Super. 222, 307 A.2d 334 (1973). See United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977).

27. 576 F.2d 1250 (7th Cir. 1978).

28. 84 Wisc.2d 287, 267 N.W.2d 271 (1978).

29. State v. Sims, 52 Ohio Misc. 31, 369 N.E.2d 24 (1977); State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (1975).

30. 3 M.J. 143 (CMA 1977).

for example, the appellant was convicted of premeditated murder. At trial, the defense counsel unsuccessfully attempted to introduce a handwritten third-party confession to the homicide. The Court found that the evidence, which was excluded at trial on hearsay grounds, "bore persuasive assurances of trustworthiness," and, citing Chambers, held that the military judge erred by failing to admit it. According to the Court, when the accused's "fair opportunity [to defend himself] is compromised by the unthinking and inflexible exclusion from evidence of matters which are relevant and trustworthy, the process to which [he] is subject is not that to which he is due."<sup>31</sup> In a more recent case, the court again recognized the principle that the accused's Sixth Amendment rights may bar the admission of evidence which could otherwise be properly considered as an exception to the hearsay rule.<sup>32</sup>

In order to further the state's interest in encouraging victims of sexual offenses to come forward, many jurisdictions are enacting rape laws which prevent disclosure of the complainant's past conduct. These statutes are subject to the balancing test in Davis.<sup>33</sup> Privileged communications have also been subjected to this analysis, and have been found to be insufficiently compelling to deny a defendant the right to present them in court.<sup>34</sup> A defendant's Sixth Amendment rights may even override a witness' Fifth Amendment protection against self-incrimination. The government may be required to immunize a witness so that he may testify for the defense,<sup>35</sup> and some courts have suggested that the

---

31. Id. at 148.

32. See United States v. McConnico, 7 M.J. 302 (CMA 1979).

33. See State v. Green, 260 S.E.2d 257 (W.Va. 1979) (discussing the West Virginia Supreme Court's reaction to that state's rape shield law vis a vis the Sixth Amendment). See also, People v. Patterson, 79 Mich.App. 393, 262 N.W.2d 835 (1977); State v. Jalo, 2/ Or.A. 845, 557 P.2d 1359 (1976).

34. Salazar v. State, 559 F.2d 66 (3d Cir. 1976) (husband-wife privilege); Salem v. North Carolina, 374 F.Supp. 1281 (W.D.N.C. 1974) (attorney-client privilege); State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975) (doctor-patient privilege).

35. See references listed in United States v. Rocco, 587 F.2d 144, 146 n.8 (3d Cir. 1978); Virgin Islands v. Smith, 48 U.S.L.W. 2602 (3d Cir. 1980). But see United States v. Lenz, 27 Cr.L.Rep. 2051 (6th Cir. 1980).

defendant is entitled to immunized witnesses when the government is using immunized witnesses.<sup>36</sup>

### Conclusion

The Bill of Rights not only protects a defendant from the excesses of governmental activity, it also vests in him an independent right to actively defend himself. Even if evidentiary rules would normally exclude defense material, a showing that the evidence is nevertheless relevant, reliable, and critical may persuade the court to override the provisions in order to insure the fairness of the judicial proceeding. Frequently, a perfunctory application of these rules unjustly circumscribes the accused's rights. The defense counsel must recognize those instances in which the rationale underlying a rule is inapplicable, and urge that its application be suspended if the accused's constitutional right to defend himself cannot otherwise be fully exercised.

---

36. *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978); *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976); *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966). *United States v. Herman*, 589 F.2d 1191, 1205-1214 (3d Cir. 1978) (Garth, J. dissenting). Cf. *Kastigar v. United States*, 406 U.S. 411 (1972). See also *United States v. LaDuca*, 477 F.Supp. 779 (D. N.J. 1978).

## "SIDE BAR"

### *A Compilation of Suggested Defense Strategies*

#### 1. Challenging Photographic Identifications

Military police authorities frequently use photographic identification techniques as a convenient and expedient investigatory tool. Generally, these techniques either require a witness to indicate whether a particular suspect is included within a "mug book," or to extract his picture from a set of photographs of subjects with similar appearances. Defense counsel often assume that these techniques yield unimpeachable evidence unless the witness views the suspect before examining the photographs. The courts, however, have established a two-stage test designed to determine the admissibility of this evidence. The accused's availability for a physical lineup must first be ascertained; the court must then determine whether the process was attended by a substantial likelihood of irreparable misidentification.

Four factors are relevant to this latter determination, including (1) the length of time during which, and the conditions under which the witness observed the accused; (2) any conduct by law enforcement officers which may have focused attention on a single suspect; (3) the presence of other witnesses during the identification process and any prejudicial effect of their opinions; and (4) similarities between the description rendered by the witness immediately after the crime and the characteristics of the individual he subsequently identifies. See Simmons v. United States, 390 U.S. 377, (1968); United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976); United States v. Valdivia, 492 F.2d 199 (9th Cir. 1973), cert. den. 416 U.S. 940 (1974). These factors address the reliability of a witness' identification. Accordingly, counsel should focus their attack not only on the police procedures employed during the photographic lineup, but on the extent and accuracy of the witness' perception and memory. The first and fourth factors are especially pertinent to such an approach, since the accuracy of eyewitness accounts of criminals and criminal acts is often undermined by poor lighting conditions, as well as the stress of the occurrence and its typically short duration.<sup>1</sup>

---

1. In his assessment of these elements, counsel should consult P. Wall, Eye-Witness Identification in Criminal Cases (1965). This work is cited with approval by the United States Supreme Court in Simmons v. United States, *supra*. See also Brower, Attacking the Reliability of Eyewitness Identification, 12 The Advocate 62 (1980); United States v. Field, 27 Crim. L. Rep. (BNA) 2516 (9th Cir. 1 Aug. 1980).

Once counsel discounts the witness' reliability, he should ascertain whether the accused was available for a physical lineup at the time of the photographic identification. In Mata v. Summer, 611 F.2d 754, 757 (9th Cir. 1979), the court stated that although the accused's availability for a physical lineup does not require exclusion of resulting evidence, the necessity of a photographic, as opposed to a physical identification is nevertheless "an important factor to be considered in judging the validity of identification procedures." Thus, the failure to conduct a physical lineup despite the availability of the accused may constitute a sufficient basis for excluding the results of a photographic identification process.

The issue of whether the results of such a process are admissible when the accused was available for a physical lineup is presently before the Supreme Court in Summer v. Mata, 49 U.S.L.W. 3885 (Sup. Ct. 16 July 1980). Counsel should therefore explore this approach, since military suspects are nearly always available for physical lineups. When coupled with skillful inquiry into the four factors previously enumerated, this tactic may enable the suppression of photographic identifications. In this connection, Military Rule of Evidence 321 should be studied: that provision delineates the procedures governing the submission of motions to suppress pretrial identifications, and establishes the proper grounds for those motions.

## 2. Avoiding Charges Of Inadequate Representation

The defense counsel's primary responsibility is to represent his client in a manner consistent with the latter's legal and ethical desires. The attorney who supplants his client's legitimate decisions with regard to the disposition of substantive, non-tactical issues may thereby ineffectively represent the client. In United States v. Spiker, NCM 791345 (NCMR 28 Mar. 1980) (unpublished), the Navy Court of Military Review noted "substantial doubt" as to the effectiveness of a counsel who ignored his client's unsworn statement during sentencing that he desired to avoid further military service and instead argued that the accused should complete his period of enlistment and should not be discharged. The sentence was reassessed in order to cure the defect.

In United States v. Carsjeans, NCM 790587 (NCMR 20 Jun. 1970) (unpublished), the defense counsel, pursuant to his client's wishes, introduced a document during sentencing which reflected the accused's willingness to accept a bad-conduct discharge. The accused instructed his counsel to advocate a bad-conduct discharge, but permitted him to argue for leniency with regard to other forms of punishment. The counsel refused to urge the members to impose a punitive discharge, and declined to raise arguments pertaining to other sanctions; the court held that these actions raised a "substantial doubt" as to effective assistance of counsel. The sentence was reassessed.

The Navy Court of Military Review observed that in both cases the accused was apparently unaware of his options; that is, if his counsel could not argue in accordance with his client's requests, counsel could seek permission to withdraw, and that another counsel might be willing to so argue. Counsel must use extreme caution, however, in citing personal disagreements over substantive issues as a justification for terminating the relationship. The ethical principles which address this issue are expounded in ABA Code of Professional Responsibility, DR 2-110(c) and were noted by the Court of Military Appeals in United States v. Weatherford, 19 USCMA 424, 42 CMR 26 (1970).

### 3. Submitting Speedy Trial Requests

Appellate review of records of trial recently received at the Defense Appellate Division indicates that trial counsel may be neglecting opportunities to submit speedy trial motions when the government does not expeditiously bring an accused to trial. In several cases, delays from preferral of charges to the date of trial totaled 130 to 200 days. While in many instances the accused is not under restriction or in pretrial confinement during this interval, he nevertheless has a right to a speedy trial. The second facet of the test enunciated in United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971), requires the government to expeditiously respond to an accused's request for an immediate trial or to adequately explain the reasons for further delay. See United States v. Johnson, 1 M.J. 101 (CMA 1975), affirming 49 CMR 13 (ACMR 1974); United States v. Mohr, 21 USCMA 360, 45 CMR 134 (1972); United States v. Terry, 2 M.J. 915 (ACMR 1976). Defense counsel should devote particular attention to cases in which the accused is released from extensive pretrial confinement immediately prior to the expiration of the 90-day period, in an effort to avoid the Burton presumption that his right to a speedy trial was violated.

Defense counsel often request trial delays while government action is pending on their clients' applications for administrative discharges. The processing of charges is occasionally postponed under these circumstances, apparently under the assumption that delays are attributable to the defense as long as requests for administrative discharge are pending. However, in United States v. Ellerbe, CM 438825 (ACMR 30 July 1980) (unpublished), the Army Court of Military Review held that the pendency of discharge requests does not relieve the government of its burden to expeditiously prepare charges for trial. According to the court, discharge requests "should not be construed as an invitation to the government to cease pretrial processing of [the accused's] case." Therefore, defense counsel should not be dissuaded from tendering speedy trial motions in response to dillatory government processing merely because an application for administrative discharge has been submitted. The principle announced in Burton pertains to the requisite degree of diligence in processing charges. See United States v. Walker, 50 CMR 213 (ACMR 1975); United States v. Anderson, 49 CMR 37 (ACMR 1974); United States v. O'Brien, 22 USCMA 557, 48 CMR 42 (1973).

## USCMA WATCH

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

Within the next few months, the Court is expected to decide several "lead" cases and thereby considerably reduce its docket. Following its recent decision in United States v. Salley, 9 M.J. 189 (CMA 1980), the Court summarily affirmed approximately twenty "trailer" cases involving related issues. The Court also heard argument in United States v. Mack, United States v. Cox, United States v. Spivey, and United States v. Turrentine, four cases which deal with the application of United States v. Booker, 5 M.J. 238 (CMA 1977), and United States v. Mathews, 6 M.J. 357 (CMA 1979). Decisions\* in these cases will enable summary disposition of a substantial portion of the Court's pending docket.

### GRANTED ISSUES

#### INSANITY DEFENSE: Standard of Mental Responsibility

In United States v. Cortes-Crespo, pet. granted, 9 M.J. \_\_\_\_ (CMA 1980), the Court will examine the Army Court of Military Review's interpretation of the American Law Institute (ALI) standard for determining mental responsibility, which was adopted by the Court of Military Appeals in United States v. Frederick, 3 M.J. 230 (CMA 1977). In its opinion, the lower court expressed dissatisfaction with the failure of the ALI/Frederick standard to adequately define the "mental disease or defect" from which mental irresponsibility must stem. See United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980). Federal circuit courts have encountered difficulty in applying the ALI standard, and have consequently formulated various definitions of the term "mental disease or defect."

The Army Court of Military Review, however, regarded these definitions as overly broad, and stated that they tend to blur traditional distinctions between mental diseases and defects on one hand, and personality, character, and behavioral disorders on the other. The court concluded that a "mental disease or defect" includes "any abnormal

---

\* As this edition went to press, the Court announced that the opinions in these cases had been written, and were awaiting publication in early October. The Court did release the opinion in United States v. Mack, 9 M.J. 300 (CMA 6 October 1980), in which it held that a properly completed DA Form 2627 is admissible in aggravation at courts-martial unless the accused can overcome the presumption of administrative regularity arising from its proper completion.

condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls and [is] the result of deterioration, destruction, malfunction, or nonexistence of the mental, as distinguished from the moral faculties." United States v. Cortes-Crespo, 9 M.J. 717, 725 (ACMR 1980). The Court of Military Appeals must determine whether the lower court correctly interpreted and applied the ALI/Frederick standard when it affirmed Specialist Cortes-Crespo's conviction of premeditated murder.

JURISDICTION: Activated National Guardsmen

United States v. Pearson, pet. granted, 9 M.J. 198 (CMA 1980), is the second case on the Court's docket which raises the issue of whether national guardsmen on "hold-over" status are amenable to courts-martial jurisdiction. See United States v. Self, 8 M.J. 519 (ACMR 1979), pet. granted, 8 M.J. 136 (CMA 1979). The Court must determine whether in personam jurisdiction continues over a national guardsman who was retained in the Army on "administrative hold" pending a criminal investigation. In both Pearson and Self, the guardsmen were performing active duty pursuant to self-executing orders issued by the respective states in which they resided. Each soldier was "flagged" under the provisions of Army Reg. No. 600-31, Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings (1 Jan. 1980), and involuntarily detained beyond their expiration of term of service (ETS) date without authorization by state officials.

In Private Self's case, state authorities issued amendatory orders at the Army's request, and extended his obligatory period of active duty. Private Pearson's self-executing orders were never amended. Under present law, court-martial jurisdiction terminates on the effective date of self-executing orders activating national guardsmen, unless the issuing state amends the orders or the government takes some affirmative action "with a view toward trial" before the ETS date. See U.S. Const. art. I, §8, cl. 16; United States v. Smith, 4 M.J. 265 (CMA 1978); United States v. Peel, 4 M.J. 28 (CMA 1977); paragraph 11d, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969].

PRETRIAL AGREEMENT: Legality of Terms

In United States v. Mills, 9 M.J. 687 (ACMR 1980), pet. granted, 9 M.J. \_\_\_\_ (CMA 1980), the Court will evaluate the legality of certain provisions included in an offer to stipulate tendered prior to a rehearing on sentencing. The first issue raised by the case involves the

extent to which an accused can bargain away his right to call witnesses in extenuation and mitigation. In exchange for a sentence limitation, the accused in Mills agreed to forego personal testimony by certain defense witnesses and stipulate to their expected testimony. The lower appellate court found nothing objectionable with this form of bargaining, provided the accused initiates the offer and is not thereby precluded from presenting any evidence in extenuation and mitigation.

The Court will also consider the effect of a provision which conditions the pretrial agreement upon final appellate approval of the adjudged sentence. The Court must determine whether the provision is void on due process and public policy grounds, in view of the possible "chilling effect" it imposes on the appellant's exercise of his statutory right to appeal under Articles 66 and 67, Uniform Code of Military Justice, 10 U.S.C. §§866 and 867 (1976).

#### POST-TRIAL REVIEW: Service on Civilian Counsel

In United States v. Clark, 9 M.J. 539 (ACMR 1980), pet. granted, 9 M.J. 198 (CMA 1980), the Court must determine whether service of the post-trial review on detailed military defense counsel rather than civilian defense counsel fulfills the requirements enunciated in United States v. Goode, 1 M.J. 3 (CMA 1975). In this case, the military defense counsel in Germany examined the post-trial review but submitted no rebuttal. He was present throughout the trial. The civilian defense counsel, who was in Maine when the staff judge advocate submitted the review, neither delegated nor withheld authority to act in his behalf on post-trial matters.

The Army Court of Military Review recognized the desirability of serving a copy of the review on both civilian and military counsel; nevertheless, it concluded that the military defense counsel had authority to act and that the appellant suffered no prejudice. See United States v. Jeanbaptiste, 5 M.J. 374 (CMA 1978). In a spirited dissent, Senior Judge Carne concluded that the failure to serve the review on the civilian defense counsel abridged the appellant's Sixth Amendment right to counsel. Judge Carne would permit service on military defense counsel only when there is evidence of an agreement between the accused and both counsel that the military attorney would be solely responsible for evaluating and commenting upon the post-trial review.

IMMUNIZATION: Defense Witness

United States v. Martin, pet. granted, 9 M.J. 194 (CMA 1980) and United States v. Villines, cert. filed, 9 M.J. 210 (CMA 1980), raise the issue of whether an accused can challenge, at trial, a convening authority's refusal to immunize a defense witness. The Court will ascertain whether a military judge has the authority to correct a convening authority's abuse of discretion and, if so, the standard he must apply in order to determine if an abuse has occurred. See Side Bar, 12 The Advocate 163 (1980), for a detailed discussion of recent federal decisions pertaining to this question.

CHARGES: Revival After Prior Withdrawal

The issue confronting the Court in United States v. Cook, 9 M.J. 763 (NCMR 1980), cert. filed, 9 M.J. 194 (CMA 1980), is whether charges which are previously withdrawn can be revived at a subsequent trial in the absence of a provision in the pretrial agreement authorizing the government to take that action. The Navy Court of Military Review held that retrial on the previously withdrawn charge is precluded unless the parties agreed to allow retrial. In his dissenting opinion, Judge Michel supported the military judge's conclusion that the pretrial agreement impliedly embraced an understanding that the withdrawal of designated charges was predicated upon a provident plea of guilty by the accused; the finding that the plea was improvident therefore released the government from its obligation to refrain from retrying the withdrawn charges.

REPORTED ARGUMENTS

SELF-INCRIMINATION: Establishing Admissibility of Records of Prior Punishment

In United States v. Spivey, pet. granted, 9 M.J. 16 (CMA 1980) and United States v. Turrentine, pet. granted, 9 M.J. 17 (CMA 1980), argued 3 September 1980, the Court will address the issue of whether an accused may be compelled to engage in a colloquy with the military judge conducted pursuant to United States v. Booker, 5 M.J. 238 (CMA 1977), reconsidered on other grounds, 5 M.J. 246 (CMA 1978), and United States v. Mathews, 6 M.J. 357 (CMA 1979). In each case, the accused pleaded guilty in accordance with a pretrial agreement. During the extenuation and mitigation phase of the trial, the prosecution offered certain exhibits into evidence under the authority of paragraph 75d, MCM, 1969. In Spivey, the proffered evidence consisted of records of nonjudicial punishment, while in Turrentine the subject document was a record of a previous

summary court-martial conviction. In both cases, trial defense counsel argued not only that the prosecution exhibits were inadmissible, but also that the military judge's inquiry was improper. The military judge nevertheless conducted a colloquy with the accused pursuant to Booker and Mathews, and then admitted most of the exhibits.

Defense appellate counsel contended that the judge's inquiry violated the appellant's right under the Fifth Amendment and Article 31, UCMJ, to remain silent during presentencing proceedings. He argued that the right to remain silent during this stage of the trial is specifically and independently extended to an accused by paragraphs 53h and 75c(2), MCM, 1969. Counsel also maintained that by conducting the inquiry, the military judge abandoned his neutrality and assumed a prosecutorial role in the proceedings. The appellate defense counsel distinguished Mathews, which held that protections afforded under Article 31, UCMJ, are inapplicable to presentencing proceedings, by noting that the trial defense counsel in Spivey and Turrentine lodged objections to the inquiry.

The government appellate counsel asserted that under present law, neither the Fifth Amendment nor Article 31 applies during presentencing proceedings. He argued that the appellants had no right to refuse to answer the judge's questions during the Mathews inquiry since there was no danger of self-incrimination. The allocution rights expounded in paragraphs 53h and 75c(2), MCM, 1969, are not tantamount to the constitutional or statutory right against self-incrimination; instead, they merely recognize an accused's right to address the court, and the military judge's authority to conduct a Mathews inquiry is not circumscribed by these provisions. Counsel also maintained that the military judge did not abandon his neutrality by engaging in a colloquy with the accused, since that practice was endorsed in Booker and Mathews. Finally, the appellate government counsel argued that regardless of the legality of the judge's decision to admit the exhibits after conducting the inquiry, the appellant's rights were not thereby prejudiced.

The questions posed by the Court focused primarily on the Fifth Amendment's applicability to presentencing proceedings, and the adverse consequences that might stem from the responses of an accused who is compelled to provide information pertaining to the prosecution exhibits. Chief Judge Everett asked the government counsel whether the rationale he set forth upholds the spirit of the Fifth Amendment and Article 31, UCMJ. His questions highlighted the sanctions that might result from compelled answers, such as sentence enhancement and prosecution for uttering false statements. He also noted that the appellant's express desire to remain silent in these cases is a matter of fundamental concern.

Judge Cook's questions, on the other hand, pointed out the minimal prejudice suffered by the appellants, assuming, arguendo, that the inquiry was unlawful.

SEARCH AUTHORIZATION: "Neutral and Detached" Standard

In United States v. Rivera, pet. granted, 7 M.J. 64 (CMA 1979), the appellant contends that the commander who authorized a search of his barracks room and his person was not a "neutral and detached magistrate" as required by Fourth Amendment jurisprudence, and that the military judge erred when he admitted evidence, over defense objection, seized as a result of that search. The appellant's unit commander conducted an investigation, ostensibly to determine whether probable cause existed, before he authorized the search. Accompanied by the unit executive officer, the commander searched the appellant and his room on 14 April 1978, prior to the decision in United States v. Ezell, 6 M.J. 307 (CMA 1979).

Defense appellate counsel argued that the commander was not a "neutral and detached magistrate" under the law in effect on 14 April 1978, citing, inter alia, United States v. Guerette, 23 USCMA 281, 49 CMR 530 (1975); United States v. Staggs, 23 USCMA 111, 48 CMR 672 (1974). Although he cited Ezell for the proposition that participation in the authorization process and presence at the scene of the search raise a presumption of a disqualifying affiliation with law enforcement activities, he did not ask the Court to apply that decision retroactively. He contended in rebuttal that the question of whether to apply Ezell retroactively or prospectively was not in issue, and that the decision merely established a new factor to be considered in applying the "neutral and detached magistrate" standard that was applicable when Ezell was decided.

The government counsel's argument focused on Ezell. First, he contended that Ezell is overbroad, that its "presence" language does not recognize situations where a commander's attendance is necessary, and that Army officers ought to be able to conduct investigations in order to determine whether probable cause exists. Counsel then stressed the commander's reliance on Fourth Amendment standards prior to the announcement of the Ezell decision. He argued that this reliance was proper, and that therefore the Ezell rationale should only be applied prospectively. However, when asked by the Chief Judge whether the intermediate court below was correct in stating that "[a] commanding officer need not be a neutral and detached magistrate to authorize a search under present [i.e., 16 January 1979] military law," the government

responded that it was not their position that a commander need not be neutral and detached when authorizing a search.

SEARCH AND SEIZURE: Barracks Security Inspection System

In United States v. Hayes, pet. granted, 8 M.J. 271 (CMA 1980), argued 5 September 1980, the Court must ascertain the lawfulness of a barracks security inspection system, which is challenged on Fourth Amendment grounds. The appellant contends that the military judge erred by admitting evidence seized from a box that he carried into his barrack. Pursuant to an inspection system then in effect, the charge of quarters required the appellant to divulge the contents of the box upon entry into the building. The inspection scheme was devised in an attempt to combat barrack larcenies, and to eliminate the presence of drugs, alcoholic beverages, and explosives. The defense argued that the inspection procedures did not comply with Fourth Amendment standards since they were vague and incomplete, and incapable of adequately limiting discretionary searches; the written procedures were never introduced at trial. Counsel also contended that there was no showing of an adequate justification for the intrusion, which was effected without the appellant's consent. Government counsel, on the other hand, argued first that the procedures were reasonable and constituted a minimal privacy intrusion since no search of the person or his private room was involved. He also contended that since the appellant received adequate prior notice of the inspection scheme, he possessed no reasonable expectation of privacy. Finally, counsel maintained that the appellant consented to the inspection. The Court's questions focused on legal problems raised in analogous factual settings, such as gate searches and airport inspections.

RIGHT TO COUNSEL: Interrogation

In United States v. Muldoon, pet. granted, 7 M.J. 379 (CMA 1979), the Court will determine whether the military judge erred by admitting a confession obtained by CID agents after the appellant refused to make a statement and stated that he wanted to confer with a lawyer. The appellant was one of three suspects apprehended by CID agents in Germany. All three individuals were placed in detention cells and subsequently interviewed. During his interview, the appellant requested counsel and declined to make any statement. The interviewing agent returned him to his cell but made no effort to contact an attorney. A short time later, a different agent interrogated one of the other suspects and obtained a confession which implicated the appellant. This agent and a third agent then proceeded to the appellant's cell and recited portions of the confession obtained from his accomplice. The appellant then announced that

he wanted to make a statement. A fourth agent readvised the appellant of his rights, and made a specific reference during the warning to the appellant's prior statement indicating his desire to consult with a lawyer.

The defense appellate counsel contended that the CID agents, in obtaining the confession, violated the appellant's Sixth Amendment right to counsel. He asked the Court to find that the government must give an accused or suspect a reasonable opportunity to obtain counsel after he requests legal assistance. He argued that if no such opportunity is extended, the right to counsel is "vulnerable to sabotage," especially where the person has no freedom of movement. Relying particularly on United States v. Clark, 499 F.2d 802 (4th Cir. 1974), Combs v. Wingo, 465 F.2d 976 (9th Cir. 1972), and United States v. Hill, 5 M.J. 114 (CMA 1978), counsel contended that the facts did not demonstrate a voluntary waiver of the appellant's right to counsel.

During extensive questioning by the Court, the opposing counsel stated that the government was not asking the Court to overrule Hill, in which the Court found a violation of the Sixth Amendment's right to counsel. He sought instead to distinguish Hill factually. Chief Judge Everett's questions manifested his concern that a suspect's right to counsel would be undermined if the government was afforded latitude to try to "persuade" him to withdraw a non-waiver. The questions he posed to government counsel focused on the application of the definition of interrogation expounded in Rhode Island v. Innis, 48 U.S.L.W. 4506 (U.S. Sup. Ct. 12 May 1980).

#### SEARCH WARRANTS: Oath or Affirmation Requirement

In United States v. Stuckey, pet. granted, 5 M.J. 178 (CMA 1978), argued 10 September 1980, the Court confronts the issue of whether military warrants and authorizations to search must be based upon probable cause supported by an oath or affirmation. The government appellate counsel relied upon Chief Judge Everett's memorandum to the decision to deny reconsideration in United States v. Firmano, 8 M.J. 197 (CMA 1980), reconsideration denied, 9 M.J. \_\_\_\_ (CMA 31 July 1980), and stated that the Firmano decision should be disavowed by the present Court. Although the appellant in Stuckey was tried prior to the decision in Firmano, which was to be applied prospectively only, the defense appellate attorney argued that the Court should reassert the rationale underlying the Firmano decision, since that opinion merely reaffirms long-standing constitutional principles to which no military exception has been established.

## CASE NOTES

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

### COURT OF MILITARY REVIEW DECISIONS

#### INSTRUCTIONS: Reasonable Doubt

United States v. Crumb, 9 M.J. \_\_\_\_ (ACMR 4 Sep. 1980).  
(ADC: CPT Brower)

During his instructions on findings, the military judge defined the concept of "reasonable doubt" by reciting, over defense objection, the standard explanation expounded in Dept. of Army Pamphlet 27-9, Military Judges' Guide, para. 2-4 (19 May 1969). The defense counsel unsuccessfully requested that the military judge inform the members of the court-martial that:

A "reasonable doubt" is just what the words imply, that is, a doubt founded in reason arising from the evidence, or from a lack of it, after consideration of all of the evidence. A "reasonable doubt" is not a fanciful or fictitious doubt, since such doubts can be raised about anything and everything in the human experience. Rarely, if ever, can anything be proved to an absolute or mathematical certainty, and such a burden is not required of the government here. Rather, a "reasonable doubt" is a doubt which would cause a reasonably prudent person to hesitate to act in the more important and weighty of his own personal affairs.

In considering the evidence in this case, before you may vote for a finding of guilty, you must be convinced to a moral certainty that the evidence is such as to exclude every fair and rational hypothesis or theory of innocence. If you are not so convinced, then the presumption of the accused's innocence must prevail, and it is your duty to find the accused not guilty.

The rule as to reasonable doubt extends to every element of each offense. That means that the government must prove beyond a reasonable doubt each and every element of an offense before you may vote for a finding of guilty as to that offense.

In one of the first appellate cases to apply United States v. Salley, 9 M.J. 189 (CMA 1980), the Army Court of Military Review determined that the military judge abused his discretion by refusing to provide the "fair and rational hypothesis" instruction and by instead issuing the standard explanation despite the objection and a reasoned argument by defense counsel that certain words and phrases were potentially misleading. See United States v. Hamill, 21 CMR 873 (AFBR 1956). Accordingly, the court set aside the findings and sentence and authorized a rehearing.

The court, however, did not unequivocally approve of the requested instruction. It found the semantic difference between "willing to act" and "hesitate to act" to be negligible because both terms are potentially misleading. Any comparison between the bases on which decisions relating to important personal matters are made should, according to the court, be avoided in any instructions on findings. The court found nothing objectionable, however, with the statement that every "fair and rational" theory of guilt must be excluded by the evidence, because that portion of the suggested instruction is derived from paragraph 74a(3), Manual for Court-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969]. See United States v. Offley, 3 USCMA 276, 280, 12 CMR 32, 36 (1953).

#### TRIAL COUNSEL: Disqualification

United States v. Diaz, NCM 79-1975 (NCMR 30 Apr. 1980) (unpub.).  
(ADC: LCDR Haskel, USN)

The appellant was convicted of two unauthorized absences and several specifications of exceeding ration limitations on whiskey, beer, and cigarettes. During the initial stages of the trial, the prosecutor disclosed that he had previously provided legal assistance to the appellant with regard to a marital separation. The government counsel provided no further information concerning the extent of this prior relationship. During the presentencing phase of the trial, the appellant indicated that marital turbulence caused the misconduct of which he was convicted. The Navy Court of Military Review held that the government counsel was disqualified per se under Article 27(a), Uniform Code of Military Justice, 10 U.S.C. §827(a) (1976) [hereinafter UCMJ], and that the military judge had a duty to inquire into the possibility of disqualification in view of the appellant's testimony. Although the court noted that the defense counsel neither objected at trial nor in his Goode response, it rejected the possibility of waiver because the "procedural safeguards erected to preclude abuses must be scrupulously observed." See United States v. Barnes, 3 M.J. 406 (CMA 1977); United States v. Stringer, 4 USCMA 494, 16 CMR 68 (1954).

PRESENTENCING EVIDENCE: Admissibility

United States v. Kuehl, 9 M.J. 850 (NCMR 1980) (en banc), cert. for review filed, 9 M.J. 205 (CMA 1980).  
(ADC: LT Durbin, USNR)

The Navy Court of Military Review, sitting en banc, has reexamined its decision on the admissibility of summary court-martial convictions. See United States v. McLemore, 9 M.J. 695 (NCMR 1980), cert. for review filed, 9 M.J. 134 (CMA 1980) (admissibility of nonjudicial punishment). Weighing the implications of United States v. Syro, 7 M.J. 43 (CMA 1979), United States v. Mathews, 6 M.J. 357 (CMA 1979), and United States v. Booker, 5 M.J. 238 (CMA 1977), the court held that prior disciplinary proceedings are admissible under para. 75d, MCM, 1969, as evidence of the character of the accused's prior service, upon a general showing that the accused was advised in writing of his right to confer with counsel prior to accepting the punishment. The court distinguished this use of the evidence from cases in which similar documents are introduced as evidence of a prior conviction pursuant to paras. 75b, 127c, and 153b, MCM, 1969. Admission of the evidence for the latter purpose would depend upon a showing of affirmative compliance with the additional requirements enunciated in Booker. The court reiterated its observation in McLemore that the language in Syro controls the opinion in Mathews, which would require an affirmative showing of waiver of counsel even if the evidence is introduced to illustrate the quality of the accused's prior military service.

INSTRUCTIONS: Included Offenses

United States v. Waldron, 9 M.J. 811 (NCMR 1980), cert. for review filed, 9 M.J. 211 (CMA 1980).  
(ADC: LT Curlee, USNR)

Charged with premeditated murder, the appellant was convicted of involuntary manslaughter. During the court members' deliberation on sentencing, the president requested further instruction on the original charge and all lesser included offenses. The defense counsel objected to the original and supplemental instructions. After further deliberation, the members announced that upon reconsideration of their original findings, they had concluded that the appellant was guilty of an assault in which grievous bodily harm was intentionally inflicted. The Navy Court of Military Review endorsed the staff judge advocate's conclusion in his post-trial review that the only contested issue at trial was the unlawfulness of the force or violence used by the appellant, since he asserted the theory of self-defense. In light of this single contested

issue, the appellate court held that the military judge erred by instructing the court members on any lesser included offense when the elements of the offense were not reasonably raised by the evidence. See, e.g., Sansone v. United States, 380 U.S. 343 (1964); Sparf v. United States, 156 U.S. 51 (1895); United States v. Harary 457 F.2d 471 (2d Cir. 1972); United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971); United States v. Johnson, 1 M.J. 137 (CMA 1975); United States v. Craig, 2 USCMA 650, 10 CMR 148 (1953). The appellate court found that the least severe offense of which an element was in dispute was involuntary manslaughter, and because the court-martial had found appellant not guilty of this offense, the appellate court set aside the findings and sentence and dismissed the charge.

CHARGES AND SPECIFICATIONS: Sufficiency of Allegations

United States v. Canfield, SPCM 14758 (ACMR 15 July 1980) (unpub.).  
(ADC: CPT Moriarty)

Pursuant to his pleas, the appellant was found guilty, inter alia, of larceny of government property and wrongful disposition of military property. The appellate court determined that the property belonged to the post exchange, rather than the United States Government as erroneously alleged; therefore, the appellant's pleas were rendered improvident. See United States v. Underwood, 41 CMR 410 (ACMR 1969); United States v. Rexach, 40 CMR 488 (ABR 1969). But see United States v. Harvey, 6 M.J. 545 (NCMR 1978).

REVIEW OF COURTS-MARTIAL: Disqualification of Convening Authority and Staff Judge Advocate

United States v. Christopher, 9 M.J. \_\_\_\_ (ACMR 21 July 1980).  
(ADC: MAJ Ganstine)

At trial, the appellant, a first lieutenant, was convicted of several specifications of possession and sale of hashish. The issue on appeal was whether the convening authority and the staff judge advocate were disqualified from reviewing the appellant's conviction. Prior to trial, the appellant's brigade commander, who also served as the special court-martial convening authority, summoned several prosecution witnesses into his office and enjoined them to testify truthfully at trial. He assured them that no action would be taken against them should they incriminate themselves. The government counsel also attended the meeting in his capacity as legal advisor to the brigade commander. In addition, a prosecution witness was informed prior to trial that he had been granted immunity by the brigade commander in order to testify. Another witness

against the appellant was similarly informed of his immunity prior to testifying. Finally, one of the witnesses present at the meeting in the brigade commander's office had been previously tried by general court-martial. After the appellant's trial, the witness was granted clemency beyond that previously provided for in a pretrial agreement, solely because of his cooperation with the CID.

The Army Court of Military Review held that the division commander who reviewed the appellant's conviction was not disqualified because he was not in command at the time of the meeting in the brigade commander's office. See United States v. Lochausen, 8 M.J. 262 (CMA 1980). The court also held that even though the division commander granted clemency in his post-trial action on one of the witness' convictions, neither he nor the staff judge advocate were disqualified because there was no showing that the testimony at trial was the result of an agreement to testify. See United States v. Hines, 1 M.J. 623 (ACMR 1975). Finally, the court held that the staff judge advocate was not disqualified by his trial counsel's actions because there was no showing that the latter negotiated any arrangements for immunity or clemency or that a "unity" existed within the staff judge advocate's office. See United States v. Sierra-Albino, 23 USCMA 63, 48 CMR 534 (1974).

SEARCH AND SEIZURE: Standing to Object;

PRESENTENCING INSTRUCTIONS AND ARGUMENTS: Perjury by Accused

United States v. Johnson, SPCM 14284 (ACMR 31 July 1980) (unpub.).  
(ADC: MAJ Ganstine)

Based on evidence seized from another servicemember, the appellant was convicted of possessing cocaine. During his closing argument, the trial counsel stated that the appellant's testimony denying the offense was false; the defense counsel objected. During the presentencing argument, the trial counsel embellished his prior statement concerning the appellant's statements at trial. As part of his presentencing instructions, the military judge informed the court members that because their findings reflected a determination that the appellant had committed perjury, they could consider that fact as a matter in aggravation during their sentence deliberation.

The Army Court of Military Review, relying upon United States v. Salvucci, 100 S.Ct. 2547 (1980), and Rawlings v. Kentucky, 100 S.Ct. 2556 (1980), held that the appellant had no legitimate expectation of privacy in the contraband he relinquished to the servicemember from whom it was ultimately seized. Accordingly, he had no standing to object to

the search for and seizure of the contraband. The court therefore found no error in the admission of the seized evidence. The court determined sub silentio that the recent decisions by the United States Supreme Court abolishing the "automatic standing" rule announced in Jones v. United States, 362 U.S. 257 (1960), also abolish the "automatic standing" provision found in para. 152, MCM, 1969. See Mil. R. Evid. 311(a).

With regard to the military judge's perjury instruction, the court, relying upon United States v. Grayson, 438 U.S. 41 (1978), and United States v. Young, 5 M.J. 797 (NCOMR 1978), pet. denied, 6 M.J. 100 (CMA 1978), found that no error was committed. See also United States v. Manning, SPCM 14583 (ACMR 30 June 1980) (unpub.) (digested below). Additionally, the court found nothing objectionable with the government counsel's argument. See United States v. Arnold, 6 M.J. 520 (ACMR 1978), pet. denied, 6 M.J. 157 (CMA 1978).

PRESENTENCING EVIDENCE: Matters in Aggravation;  
PRESENTENCING INSTRUCTIONS: Perjury by Accused

United States v. Manning, SPCM 14583 (ACMR 30 June 1980) (unpub.).  
(ADC: CPT Wheeler)

During the presentencing phase of the trial, government counsel, without defense objection, elicited testimony from the appellant's platoon sergeant indicating his opinion that the appellant had a drinking problem and would benefit from enrollment in the local Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). The platoon sergeant further testified that he asked the appellant to enter the program on several occasions, but that he does not know whether the appellant ever enrolled.

During his presentencing instructions, the military judge, at the specific request of government counsel and over defense objection, informed the court-members, inter alia, that:

If you find beyond a reasonable doubt that the defendant under oath today, made a material false statement that he did not then believe to be true, you may consider this as a matter in aggravation. A defendant does not have the right to make a false statement to effect the determination of his guilt or innocence.

The Army Court of Military Review determined that the admissibility of the platoon sergeant's testimony did not hinge upon the appellant's

express consent to disclosure of privileged information from ADAPCP records, because the matter was relevant to an appropriate sentence. The trial court therefore had an official "need to know," which is a regulatory exception. See Army Reg. No. 600-85, Alcohol and Drug Abuse Prevention and Control Program, paras. 1-20, 1-21b, 1-22, 1-23, and 1-26, (1 Sep. 1976).

According to the court, the military judge's instruction essentially informed the court-members of the elements of perjury, and that if they found beyond a reasonable doubt that the appellant had committed perjury, they could consider that fact as a matter in aggravation. The court concluded that the judge did not thereby abuse his discretion, since such an instruction did not "chill" the accused's right to testify truthfully in his own behalf. See United States v. Grayson, 439 U.S. 41 (1978). [This instruction should be compared with that presented in United States v. Johnson, SPCM 14284 (ACMR 31 July 1980) (unpub.) (digested above), wherein the court-members were specifically told that by their findings of guilty they also found that the accused committed perjury.]

#### FEDERAL COURT DECISIONS

##### ADMISSIONS AND CONFESSIONS: Right to Counsel

United States v. Mohabir, 27 Crim. L. Rep. (BNA) 2341 (2d Cir. 23 June 1980).

After the appellant was arrested, he was given a copy of the indictment against him as well as a form which set out his rights to bail, to remain silent, and to retain legal counsel. The form also advised the appellant that he had a right to a court-appointed attorney if he lacked funds to retain one, and that he could refuse to answer any question during his interview. The appellant stated that he understood all of his rights. An assistant U.S. attorney interrogated him for over an hour and he answered every question. Although the appellant clearly indicated that he would need appointed counsel, the interview continued. An attorney was subsequently appointed to represent the appellant. At trial, all parties agreed that the pre-interrogation warnings complied with the requirements of the Fifth Amendment and Miranda v. Arizona, 384 U.S. 436 (1966). The court, however, found that the examination abridged the appellant's Sixth Amendment right to counsel.

Referring to extensive precedent within the Second Circuit, the court reiterated the principle that mere compliance with Fifth Amendment voluntariness standards does not constitute a waiver of the Sixth Amend-

ment right to counsel. See Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979); United States v. Ford, 565 F.2d 831 (2d Cir. 1977); United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976); United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, C.J., dissenting). The court held that a valid waiver must be preceded by a federal judicial officer's explanation of the content and significance of the Sixth Amendment right. The court found that in this case the appellant received no explanation of what it meant to be indicted, nor did he "appreciate the gravity of his legal position or the urgency of his need for a lawyer's assistance." The court hypothesized that because the appellant did not understand the gravity of his situation, he attempted to aid his case by "telling his side of the story." The court found this to be insufficient to sustain the government's heavy burden of proving that the appellant's waiver of counsel was attended by a full understanding of the nature and importance of that right.

SEARCH AND SEIZURE: Standing to Object;  
SEARCH AND SEIZURE: Waiver of Objection

United States v. Arboleda, 49 U.S.L.W. 2034 (2d Cir. 9 Jan. 1980).

Three New York police officers arrived at the appellant's apartment in order to interview him and arrest his brother. While two of the officers went to the front door of the apartment, the third approached the apartment from the rear, using the fire escape and a narrow ledge that ran along the outside of the building. While observing the apartment from the ledge, the police officer noticed the appellant toss a foil package out of the window. Retrieving the package, the officer determined that it contained cocaine. The officer then forcibly entered the apartment, arrested the appellant, and seized other evidence. At trial, the defendant unsuccessfully moved to suppress the seized evidence because of the forcible entry and warrantless arrest.

On appeal, the appellant questioned the existence and validity of the arrest warrant for his brother. The United States Court of Appeals for the Second Circuit rejected this argument because it had not been raised at trial. The court stated that the moving party has the burden of production and persuasion at a suppression hearing and the government bears no burden unless and until the moving party at least questions the existence of a warrant. In the alternative, the court found that neither the fire escape nor the ledge were areas in which the appellant had any legitimate expectation of privacy. The court, citing Rakas v. Illinois, 439 U.S. 128 (1978), enumerated three factors to be addressed in determining whether a legitimate expectation of privacy exists: (1) whether the

appellant exercised any exclusive control over the area searched; (2) the manner in which the appellant previously used the searched area; and (3) whether the appellant took normal precautions to maintain his privacy in the searched area. The court concluded that the appellant took no action which would vest him with an expectation of privacy in the ledge around his apartment building.

SEARCH AND SEIZURE: Surveillance

United States v. Tabor, 27 Crim. L. Rep. (BNA) 2324 (D.C.N.Y. 9 June 1980).

Utilizing a high-powered telescope, agents of the Drug Enforcement Administration observed a suspected cocaine distributor's apartment, where they saw two males and a female apparently preparing cocaine for distribution. Based on these observations, the officers obtained a search warrant, and the appellant was subsequently convicted of possessing 230 grams of cocaine with the intent to distribute.

The Federal District Court for the Eastern District of New York held that a warrant must be secured before law enforcement agents may use a high-powered telescope to watch suspects. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Katz v. United States, 389 U.S. 347 (1967); United States v. Kim, 415 F.Supp. 1252 (D.C. Ha. 1976). But see Fullbright v. United States, 392 F.2d 432, 435-36 (10th Cir. 1968) (use of binoculars); Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A.2d 904 (1970) (use of binoculars). The court rejected the government's argument that by conducting his activities beside an unshuttered window, the appellant abandoned any legitimate expectation of privacy. The court found that, at a minimum, an individual may reasonably harbor an expectation of privacy unless a policeman can see or hear him from a place accessible to persons who are not abnormally inquisitive or curious. The Fourth Amendment only excludes from its protection that which a person "knowingly exposes to the public."

SEARCH AND SEIZURE: Electronic Surveillance

United States v. Bailey, 49 U.S.L.W. 2135 (6th Cir. 31 July 1980).

Applying the United States Supreme Court's decision in Katz v. United States, 389 U.S. 347 (1967), the Court of Appeals for the Sixth Circuit held that the government violated the appellant's "legitimate expectation of privacy" when it monitored an electronic beeper planted in a chemical drum which the government sold to the appellant in a drug transaction. The court found that no expectation had been violated

when the beeper was installed, but by subsequently monitoring it after the appellant placed the drum first in his automobile trunk and later in his apartment, the government agents committed a search within the meaning of the Fourth Amendment.

SEARCH AND SEIZURE: General

United States v. Williams, 27 Crim. L. Rep. (BNA) 3293 (5th Cir. 31 July 1980) (rehearing en banc).

In what may be recognized as a landmark decision, a federal court of appeals has adopted a "good faith" exception to the Fourth Amendment exclusionary rule. Thirteen of the twenty-four judges sitting on the United States Circuit Court of Appeals for the Fifth Circuit adopted the principle that:

[W]hen evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence. [See Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exceptions to the Exclusionary Rule, 69 J.Crim.L. & Criminology 635 (1978). See also Stone v. Powell, 428 U.S. 405, 538 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring).]

Noting that the United States Supreme Court has so restricted the exclusionary rule that it is no longer coextensive with the Fourth Amendment [see, e.g., Michigan v. DeFillippo, 443 U.S. 31 (1979), Rakas v. Illinois, 439 U.S. 128 (1978), Stone v. Powell, supra] and that its purpose is to deter police misconduct, the majority stated that the rule should not be applied when law enforcement authorities commit a technically improper action in reliance upon a reasonable, good-faith belief in its propriety. The court observed that "[w]here the reason for a rule ceases, the rule should also cease." Acknowledging that deterrence is the raison d'etre for the exclusionary rule, the majority found that excluding the truth at trial is too high a price to pay for a "continued wooden application of the rule beyond its proper ambit to situations that its purposes cannot serve." But see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Kamisar, The Exclusionary Rule in Historical Perspec-

tive; The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337 (1979). The majority characterizes the exception as a "sensible" and "just" solution which can be applied without "cutting away at the Fourth Amendment and, at the same time, without removing the deterrent effect of the Exclusionary Rule." The dissenting opinion, in which ten judges joined, asserted that the majority was "'reach[ing] out' for a vehicle to change a long line of precedent," and that it had spawned a host of interpretive problems.

IDENTIFICATION EVIDENCE: Police Misconduct

United States v. Field, 27 Crim. L. Rep. (BNA) 2516 (9th Cir. 1 Aug. 1980).

During a momentary span on 6 March 1979, two men robbed a bank. At the trial, which was held two months later, two bank tellers and a customer identified the appellant as one of the robbers. Eight days after the incident, one of the tellers, who testified that the shorter of the two robbers stood in front of her for a full minute, could not identify either of the men after examining photographs of six individuals. One week prior to trial, she observed a photographic lineup conducted with other tellers wherein the appellant was identified as one of the men arrested for the robbery. On the day of the trial, she saw the appellant outside the courtroom in handcuffs.

The other teller, who had seen the shorter of the two men for a few seconds from a distance of twenty feet, was also unable to identify the robber but did indicate that the appellant's photograph closely resembled the robber. She was also present when an FBI agent later indicated that the appellant's photograph depicted one of the arrestees, and she saw the appellant standing outside the courtroom in handcuffs on the day of the trial. The customer, who observed the shorter robber from a distance of 25 feet during the incident, examined a collection of photographs two weeks before trial. When he identified a picture which did not depict the appellant, the FBI agent informed him that he had made an "incorrect" selection. The witness then selected the appellant's photograph and the agent confirmed his choice. Prior to testifying, he observed the appellant at the courtroom and assumed that he was the accused.

The United States Court of Appeals for the Ninth Circuit reversed the appellant's conviction, finding that the pretrial identification process "tainted" the in-court identification rendered by at least two and possibly all three witnesses. Citing Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); and Simmons v. United

States, 390 U.S. 377 (1968), the court stated that five factors are pertinent to an assessment of witness reliability in this context: the witness' opportunity to view the criminal during the offense; the witness' degree of attention; the accuracy of his prior description of the criminal; the level of certainty he demonstrated at the confrontation; and the length of the interval between the crime and the confrontation. A reviewing court must balance these indicia of reliability against the effect of the suggestive identification. See Parker v. Swenson, 332 F.Supp. 1225 (E.D. Mo. 1971) (four-factor approach). The court rejected any argument that different standards should apply to out-of-court, as opposed to in-court, identifications.

The court, in dicta, acknowledged that deterrence of improper police conduct is a worthy goal, but stated that when such conduct is directed only at a witness and does not taint the reliability of the identification, the appellant cannot complain. The court stated that probative evidence should not be kept from the finder-of-fact at the behest of an accused whose rights have been unaffected by police misconduct. The focus is thus upon the reliability of the identification testimony rather than police conduct, except as it bears on reliability.

#### STATE COURT DECISIONS

##### SEARCH AND SEIZURE: Search Warrants

Gilluly v. Commonwealth, \_\_\_ Va. \_\_\_, 267 S.E.2d 105 (1980).

The Virginia State Supreme Court held that a warrant which fails to specify the offense in relation to which a search is to be conducted is invalid under both state law and the United States Constitution. The police investigator who sought the warrant did prepare a sworn affidavit which specified that the alleged offense was rape. The evidence of record, however, established that this affidavit was not attached to the warrant until after its execution; the search had already been conducted. Citing Berger v. New York, 388 U.S. 41 (1967), the court held that under the Fourth Amendment a warrant must recite the offense in relation to which the search is to be conducted. Without that degree of specificity the document is merely a general warrant, which is forbidden by both the Fourth Amendment and Article I, Section 10, of the Virginia State Constitution.

SEARCH AND SEIZURE: Reasonableness

State v. Peters, 611 P.2d 178 (Kan. Ct. App. 1980).

Pursuant to a valid search warrant, five police officers conducted a search for drugs at a house in Wichita, Kansas. Approximately one and one-half hours after the search began, the appellant, who did not own or reside in the house and was absent when the officers initiated their activities, approached the front door and knocked. One of the police officers admitted him. After the police identified themselves, they searched the appellant without his objection. The search revealed that the appellant was possessing heroin.

The Kansas State Court of Appeals reversed the appellant's conviction because there was no showing that he was connected with the premises being searched. See People v. Dukes, 48 Ill. App.3d 237, 6 Ill. Dec. 533, 363 N.E.2d 62 (1977). The court, citing Ybarra v. Illinois, 444 U.S. 85 (1979), and Terry v. Ohio, 392 U.S. 1 (1968), held that without probable cause to believe that the appellant was engaged in criminal activity, or a reasonable suspicion that he was armed, the officers could not search him simply because he was present at the premises identified in the warrant.

TRIAL: Withdrawal of Waiver of Jury

State v. Cantanese, 385 So.2d 235 (La. Sup. Ct. 1980).

The Louisiana State Supreme Court held that it is within a trial court's discretion to permit an accused to withdraw his waiver of a jury trial. The court held that the cost of conducting a jury trial is not a proper factor to consider. Instead, the trial judge should determine whether reinstatement of the right will interfere with the orderly administration of the hearing, unduly delay or inconvenience witnesses, or prejudice the legitimate interests of the prosecution. See People v. Melton, 125 Cal. App.2d 901, 271 P.2d 962 (1954). See also Thomas v. Commonwealth, 218 Va. 553, 238 S.E.2d 834 (1977); Staten v. State, 13 Md. App. 425, 283 A.2d 644 (1971).

SEARCH AND SEIZURE: Investigatory Stops

People v. Howard, 27 Crim. L. Rep. (BNA) 2391 (N.Y. Ct. App. 3 July 1980).

While patrolling a high-crime area in an unmarked car, plainclothes police officers observed the appellant carrying a woman's-style vanity

case. The officers watched the appellant furtively change directions and alter his walking pace. After observing these actions, the police officers approached the appellant, identified themselves, and asked to speak with him. The appellant ignored the officers, and when they stepped out of their car he began to run. The officers chased the appellant into the corner of a basement, where he threw the vanity case into a pile of garbage. The police officers arrested the appellant, seized the vanity case, and searched it.

A majority of the New York State Court of Appeals, relying, inter alia, on United States v. Mendenhall, 100 S.Ct. 1870 (1980), held that a suspect who is not under arrest has a constitutional right to refuse to answer a police officer's questions and even to flee from such an encounter. In addition, in the absence of probable cause, the police have no right to pursue a fleeing suspect. Accordingly, a majority of the court found that the appellant did not abandon or relinquish his Fourth Amendment rights when he threw aside the vanity case. The case and its contents were therefore inadmissible.

#### CONFESSIONS AND ADMISSIONS: Warnings

State v. Wiberg, 27 Crim. L. Rep. (BNA) 2374 (Mont. Sup. Ct. 3 July 1980).

Police officers arrested the appellant and her boyfriend during an authorized search of their house. During the search, a pistol was found in a handbag in a closet. The officers advised the appellant of her Miranda rights, and she declined to make a statement. Shortly thereafter, an officer who had overheard the warnings asked the appellant if she owned the handbag. The appellant replied that she did. Prior to trial, the appellant was interviewed by the police, waived her Miranda rights, and admitted ownership of the handbag, but denied any knowledge of the pistol.

The Montana State Supreme Court, noting the brief interval between the original declination to speak and the subsequent admission of ownership, as well as the coercive atmosphere of a late-night search, concluded that the appellant's constitutional rights had not been "scrupulously honored" and held that her initial admission of ownership of the handbag should have been suppressed by the trial court. See Michigan v. Mosley, 423 U.S. 96 (1975). The appellate court remanded the case to the trial court for retrial without deciding whether the subsequent statements, which were rendered some fifty-seven hours later, were "tainted" by the first admission.

# ON THE RECORD

or

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

TC: There is another witness that I was going to call. However, the roads are pure ice right now, and it has been some time since he left. If I may have a moment, Your Honor, to see if he's here. If not, I am through.

DC: Your Honor, the government maintains the roads.

\* \* \* \* \*

DC: Have you learned anything from this?

ACC: A whole lot, sir.

DC: What?

ACC: Don't harass anybody—man, woman, or anything/anybody—unless you first have their consent.

\* \* \* \* \*

TC: What prompted W to swing the punch at M?

WIT: They were having an argument over who was stupider.

\* \* \* \* \*

MJ: Are both counsel aware that one of the court members was the accused in this very court room a few months ago?

\* \* \* \* \*

(Civilian DC to members on findings)

DC: We're not trying to necessarily hide anything other than what the law and the rules of evidence permit.

\* \* \* \* \*

Q: How far from the main road were you?

A: Should I express it in meters?

Q: Yes, please.

A: I don't know.

\* \* \* \* \*

TC: I don't know that there's a definition of what is or what is not normal malingering . . .

MJ: I suppose if there is such a thing it consists of shooting oneself in the foot. I've seen it done many times in court, as a matter of fact.

\* \* \* \* \*

MJ: You indicated that you come from a town in Louisiana, is that a fairly small town?

WIT: Well, I would say so sir.

MJ: About how many people live there?

WIT: Let's see, -- (Pause)

MJ: You don't have to count them.

