

THE ADVOCATE

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THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21 d, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General

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pairing "USA OS REPL STA (6A)" with "USA PERS CEN OAKLAND ARMY BASE (6A)" can the identity of the specific reporting unit or organization be ascertained.

The opinion of Chief Judge Darden then went on to explain how the appellant was protected from double jeopardy inasmuch as the specification accurately showed "the location of the unit" and "the dates concerned" in the unauthorized absence specification. What this apparently means is that so long as a person can't be tried again for the AWOL in question, the specification itself can supplement deficiencies in the documentary evidence in the government's case in chief, as if the specification had some independent evidentiary life and power of its own. But the specification itself is never evidence, and the real question in Bowman remains the highly technical evidentiary question of whether the Bowman morning report extract is admissible when the "official" morning report itself was not prepared in compliance with AR 680-1, 11 September 1969. Judge Darden disposed of this dilemma as follows:

"If inconsistent entries on morning reports affect only the weight but not the admissibility of these reports (United States v Anderten, supra), a fortiori a failure to record both a parent unit and a reporting unit should not make an extract inadmissible. The military judge therefore correctly admitted this exhibit into evidence."
United States v. Bowman, ___ USCMA ___,
___ CMR ___ (1971) Ms. Op. at 5.

The fault in this reasoning seems perfectly obvious. In United States v. Anderten, 4 USCMA 354, 15 CMR 354 (1954), there was no indication that the morning report regulation had not been followed. There, the inconsistent entries merely indicated that since two entries had been made, one was apparently wrong, resulting only in a conflict in evidence for resolution by a fact-finder no different from conflicting eyewitness statements that X was driving a car and that X was driving a red car. The defect in the Bowman morning report

extract was not that it contained inconsistent entries on its face, or that it did not set forth physical location, but that it didn't meet the threshold criterion of admissibility, because the morning report itself did not contain the identification required by AR 680-1, whose requirements are incorporated by reference into the official records exception to the hearsay rule. Paragraph 144b, Manual for Courts-Martial, United States, 1969 (Revised edition).

It is only Judge Quinn's concurring opinion which articulates the legal issue raised by the morning report error; however, he found the error to be "one of form, not substance," and consequently he held the extract to be admissible. Judge Quinn's citation of United States v. Williams, 6 USCMA 243, 19 CMR 369 (1955), however, appears to be irrelevant, for that case involves the question of when a deputy can act for an absent convening authority. His other citations are equally enigmatic: United States v. Larson, 20 USCMA 565, 43 CMR 405 (1971) involves a procedural irregularity in the conscientious objector regulation which was held not to invalidate a subsequent order which was disobeyed; United States v. Zilke, 16 USCMA 534, 37 CMR 154 (1967) is a reference to inclusion of the phrase "Dropped From Rolls" in unauthorized absence cases, which is an error of substance, rendering a morning report extract inadmissible under United States v. Hall, 10 USCMA 136, 27 CMR 210 (1959); and United States v. Heaney, 9 USCMA 6, 25 CMR 268 (1958) can support only the proposition that defects in the pretrial advice are waived unless raised at trial. None of Judge Quinn's cases, then, involve a determination whether the preliminary requirements for a hearsay exception have been met.

Had the Court of Military Appeals utilized the test of United States v. Anderten, supra, the Bowman question could have been rationally analyzed. Anderten stated the general principle that the admissibility of an official document is destroyed by an omission in the document only when the omission is material to the execution of the document. United States v. Anderten, supra. Found not to be material in Anderten was the failure to type the words "corrected entry" on subsequent morning reports whereon prior entries were corrected. Similarly, in United States v. Hagen, 2 USCMA 324, 8 CMR 124 (1953), a long delay in making the morning report entry was held not

to render an extract inadmissible. And in United States v. Phillips, 3 USCMA 557, 13 CMR 113 (1953) it was held that an inaccurate entry affects only the weight, not the admissibility of the morning report entry, therefore not reaching the complaint in Bowman, admissibility itself. By contrast, in United States v. Parlier, 1 USCMA 433, 4 CMR 25 (1952), a morning report extract was held inadmissible because it did not indicate that the morning report itself had been authenticated as required by regulation. The omission in Bowman is most like the omission in Parlier, because the failure to accurately identify the reporting unit for which the morning report was prepared goes to the very act of preparing the report, as does the authentication of the morning report. It is one thing to litigate the factual accuracy of particular entries on a morning report, but it is a different thing entirely to be faced with an official record whose very identity is questionable because the method of identification set out in the morning report regulation was not followed.

The most disturbing aspect of the opinions in Bowman by the Court of Military Appeals is the failure to realize how much this decision lowers the quality of "official" evidence in AWOL prosecutions. It is bad enough that the morning report exception to the hearsay rule permits criminal convictions on the basis of an "official" record which actually may itself be documented only by hearsay information, in contrast to most of the exceptions to the hearsay rule based on official or business records which are founded on the presumption that the person preparing the record had first-hand knowledge of the information recorded and made the entry in the regular course of events. But when the highest military appellate court accepts and excuses errors in the preparation and identification of the "official" morning report, and eschews strict construction of hearsay exceptions in favor of what seems like an amorphous standard of harmless error, then American military members can be tried on second class evidence.

Defense counsel should not allow the Bowman decision to dissuade them from continuing to attack morning report and extract deficiencies. Hopefully, military trial judges will be able to see the flaws in the Bowman opinion's rationale as they decide other cases with different facts.

MORNING REPORTS -- SHOULD THEY BE ACCORDED A
PRESUMPTION OF REGULARITY?

The Court of Military Appeals has long indulged in according to the morning report a presumption of regularity, and, among its earliest decisions, held that, "in the absence of a showing to the contrary, this court must presume that the Army and its officials carry out their administrative affairs in accordance with regulations and that morning reports reach the level of other official documents." United States v. Masusock, 1 USCMA 32, 35, 1 CMR 32, 35 (1951). Thus, the morning report is "prima facie evidence of the facts or events" it recites. Id.

This presumption of regularity may now be open to an evidentiary attack at the trial level on the basis of information disclosed in a General Accounting Office study of the records of 12 military installations for the months of September and November 1969 and January 1970. In its report to the Congress dated April 2, 1971, the GAO estimates that "errors in accounting for leave in the Army could result in almost \$23 million in overpayments annually to servicemen and about \$3 million in underpayments." Report to the Congress, "Serious Problems in Accounting for Military Leave, B-125037, Department of the Army, by the Comptroller General of the United States, April 2, 1971. The source of most of the errors, said the Report, were "unreliable morning reports" at the installations visited. Of particular interest to defense counsel are the following excerpts from the Report:

"In our review at installations in the United States, we relied on morning reports to establish the dates members officially arrived at the installations and to verify the leave postings. In addition to errors where the reporting dates shown on travel vouchers differed from those shown on morning reports, there were errors in the reporting dates on a significant number of morning reports. Officials at these installations had to refer to official personnel registers, guest house registers, or other documents

to learn the dates servicemen officially arrived at the stations to determine whether travel voucher or morning report dates were correct. The reporting dates on morning reports were wrong in 229 out of 1,384 cases, for an error rate of 16.5 percent. In a number of instances at several installations the names of newly arrived members were not picked up on the morning reports at all.

The unreliability of morning reports points up a serious deficiency not only in recording leave but in other areas involving the Army's personnel accounting practices. Army regulations stipulate that the morning report be the basic record reflecting the official daily status of the reporting organization and of each person assigned or attached thereto. The morning report is used for official strength and other statistical reports. It is used as evidence in military court-martial proceedings and in the adjudication of claims based on the duty status of the claimant at any particular time.

The procedures and practices for posting ordinary leave must emphasize the examination of morning reports as the principal means to identify dates servicemen departed and returned to duty. The Army must improve controls over morning reports in order to restore credibility to this important document. Better controls should improve their accuracy, timeliness, and correct processing." Id. at 12, 13 and 15. (Emphasis supplied.)

Following the GAO study, a letter was promulgated by The Adjutant General (AGDA (M) (11 Jun 71) DCSPER-DPS) whose subject is "Serious Problems in Accounting for Military Leave." After quoting the relevant portions of the study, the letter continues:

"6. Command emphasis is required to implement a comprehensive and aggressive program to reduce the number of errors being made on morning reports. Commanders must assure that maximum effort is directed toward reduction of these errors. The following actions should improve the accuracy of accounting for leave:

a. The unit personnel officer having custody of individual personnel records should determine that effective control procedures insure that:

(1) All documents representing absences are received by the custodian of the morning report, placed in the suspense file, and appropriate entries recorded in the morning report. Reporting dates should be checked with the official personnel sign-in registers.

(2) Organizational morning reports are promptly transmitted to the finance and accounting office.

(3) There is an adequate supervisory review of work performed.

b. Internal review should determine, through independent evaluation, that:

(1) Prescribed internal controls and existing procedures pertaining to the administration of military leave are functioning as intended.

(2) Effective liaison is maintained between personnel office and finance and accounting personnel." Id.

The implications of the GAO study in the trial of AWOL cases should be plain: if the one-in-six rate in morning report entries in the study occurs Army-wide (and there is no evidence that it does not), it would seem that the same rate of error also occurs in other areas of personnel accounting. As a matter of fact, the report itself says, "the unreliability of morning reports points up a serious deficiency not only in recording leave but in other areas of personnel accounting practices." (Emphasis supplied.) As a caveat, THE ADVOCATE would take note of the fact that the GAO study, in a technical sense, was directed only at leave accounting practices; nevertheless, it is extremely relevant to personnel accounting practices, generally, for AWOL occurs often in conjunction with leave and reassignment transfers.

Defense counsel at trial should consider a challenge to the admissibility of the morning report extract on the ground that it should not be accorded a presumption of regularity. The DCSPER letter (available from its Army level addressees) and the GAO study itself can serve as the evidentiary basis of the attack. Defense counsel should also inquire into the compliance with the directives of the DCSPER letter herein on the expectation that defects in the entries themselves might be found. In addition to an attack on the admissibility of morning report entries, an alternative or supplementary approach is a motion for a finding of not guilty on the theory that the morning report extract and its entries are not prima facie evidence of guilt because of the high incidence of error uncovered by the GAO sample.

In appropriate cases trial defense counsel should give serious consideration to requesting the presence or the depositions of the GAO personnel who prepared the morning report segment of the leave study; in an expert witness capacity, to testify to the unreliability of morning reports generally on the basis of the rate of error in the GAO sample.

In any case, only a well-reasoned and provoking inquiry into the true worth of morning reports on the part of trial defense counsel will properly focus the issue for appellate review, if trial judges resist full acceptance of counsel's position.

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* CORRECTION *
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* In "Statistical Comparison *
* of Military Judge-Military Jury *
* Conviction Rates and Sentence *
* Differentials," THE ADVOCATE, *
* Vol. 3, No. 5, June and July *
* 1971, the heading for Table 2 *
* should be corrected to read *
* "1 July 1970 - 31 December 1970." *
*
* * * * *

MORE ON AR 600-32: A POSSIBLE LOOPHOLE IN BARBITURATE CASES

[ED. NOTE: The Editors wish to express our thanks to Captain Kenneth I. Jonson, JAGC, currently stationed in Japan, who thoughtfully provided us with his briefs in a recent drug case, and whose suggestions form the basis for this article.]

When Army Regulation 600-32 became effective on or about 1 December 1970 [a DA Message dated 9 November 1970 announced that it be effective upon receipt], Army commanders had, in a single regulation, a punitive prohibition of all forms of drug abuse by members of the military, including use, possession, sale, distribution, delivery, processing, compounding, or manufacture of any "narcotic, marihuana, or other dangerous drugs," as defined therein. The term, "dangerous drugs" was designed to be the catch-all, and the regulation defined it as "those nonnarcotic substances which the Attorney General or his designee, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of their depressant or stimulant effect on the central nervous system or their hallucinogenic effect." Para. 1-2c, AR 600-32. After the regulation's definition, the reader is paranthetically invited to "See Title 21 of the Code of Federal Regulations." Id.

The appropriate section of the CFR to which the Army Regulation makes reference is the former (now rescinded) Part 320 of Title 21. In that section of the CFR's, the Director of the Bureau of Narcotics made, with respect to

certain substances, a finding that the drugs in question had a "potential for abuse" because of their stimulant, depressant or hallucinogenic effect. Barbiturates, however, were not so classified, but instead were contained under the labeling "depressant or stimulant drugs". This designation, however, is irrelevant, because AR 600-32 requires a designation of "potential for abuse." This regulatory classification continued until 1 May 1971, when the former Part 320 was rescinded by the new schedules of controlled substances, in accordance with the 1970 Controlled Substances Act. (See 21 CFR §308.1 et seq.)

Thus, AR 600-32 leaves open an apparent loophole in barbiturate prosecutions laid under its provisions between 1 December 1970 and 1 May 1971, and specifications alleging a violation of Article 92 for possession, etc., of barbiturates during that period fail to allege an offense. Counsel should be mindful to make an appropriate relief motion in cases that may be pending, urging dismissal of such specifications; and, more importantly, should file an Article 38(c) brief citing this error as soon as possible after trial.

In another vein, it still appears that many commanders are prosecuting drug offenders under the General Article, notwithstanding the promulgation of AR 600-32. In a number of cases currently pending before the Army Court of Military Review, appellate defense counsel are urging the court to adopt a rule that AR 600-32 is a regulatory preemption of the General Article in prosecuting drug offenders. Many of these cases, however, would be substantially strengthened were trial defense counsel to raise the issue at an Article 39(a) session prior to trial, and make a record of the reasons that may have actuated a prosecution under the General Article rather than Article 92.

Since the General Article can, in some cases, expose a client to a ten-year maximum punishment rather than the two-year ceiling imposed for a violation of Article 92, a decision to prosecute under the former might be laden with a capricious or arbitrary design to treat some drug offenders differently than others, in hopes of inducing a guilty plea in the face of a long period of confinement, or taking a hard line with

some individuals and being more lenient with others. Thus, trial defense counsel are strongly urged to call commanders who prefer drug charges under the General Article and examine them carefully on the record to determine what motivated the preferral of charges under that Article and not Article 92. Strict attention should be given as to how they were advised prior to preferring charges and by whom (SJA? Chief of Military Justice? Provost Marshal?); counsel should also make every attempt to discover any command policy directives that tend to favor the General Article. If defense counsel can make a clear showing of prejudice or arbitrariness on the record, he may find the court favorably disposed to a motion to dismiss on that basis.

DEFENSE COUNSEL AND THE GUILTY PLEA

What interest does a trial defense counsel have in insuring the providency of his client's plea of guilty? In a recent case reviewed before the Army Court of Military Review, the accused pleaded guilty to a charge of desertion, even though his pretrial offer of a negotiated plea proffered to the convening authority had been rejected. The thrust of the defense case prior to sentencing by the judge alone was an attempt to demonstrate that, at the inception of the alleged desertion and during the first half thereof, the accused had been a heavy drug user, and was at times unable to distinguish reality from his drug state. In order to overcome any inference that the accused's incursion into Canada during the alleged desertion was prompted by an intent to remain away permanently from the Army, the defense produced evidence that the accused crossed the border with no other purpose than trafficking in drugs.

At the conclusion of the accused's sworn testimony to this effect, the judge began his own inquiry as to the extent of the accused's drug abuse, and then indicated, on the record, that he had some doubt whether the accused had the ability to formulate an intention to desert. Calling upon counsel for advice, he then permitted the defense to lead his client, through several pages of the record, into a reestablishment of the providency of accused's plea, to the apparent satisfaction

of the judge. The issue, of course, is whether the defense counsel abandoned his role as an advocate for his client by insuring his conviction on the plea alone. [This question, raised collaterally in the Court of Military Review, was mooted by the Court's disposition of the case, in which the conviction of desertion was set aside. United States v. Hill, No. 425069 (ACMR 27 July 1971).]

In the first place, it is the role of the judge, and not of counsel, to inquire into the circumstances surrounding an offense in order to personally satisfy himself that a plea of guilty was providently entered. United States v. Care, 18 USCMA 535, 40 CMR 247 (1969); United States v. Hook, 20 USCMA 516, 43 CMR 356 (1971); United States v. Dunbar, 20 USCMA 478, 43 CMR 318 (1971). On the other hand, defense counsel may have some worthy interest in insuring that his client's guilty plea finds acceptance by the trial judge, but the basis of that interest must be carefully considered.

Of course, if counsel has been able to negotiate a substantial reduction in the sentence to which his client may have been exposed except by virtue of the pretrial agreement, his concern that the plea be accepted is well founded. But even in that instance, counsel's efforts should concentrate on thorough preparation of his client prior to trial; then, in the event the plea is unacceptable to the judge, he should pray for a continuance in order to negotiate another plea to a lesser charge, whenever possible. In some cases, of course, it is clear that the possible improvidency is simply the result of an accused's misunderstanding of the judge's question; but by no means should counsel attempt to clear up the inconsistency on the record. He should request a recess in order to resolve the matter privately with his client, and if the latter clings tenaciously to his reply, permit the ambiguity to stand for the judge's resolution in court.

Another salutary effect that may flow from a guilty plea is the possibility that it will head off the introduction of other misconduct not charged; but counsel may often find that objective defeated in the presentencing portion of trial anyway.

A most curious aspect about improvident plea situations is the implication that judges are more sensitive to possible

defenses after the entry of a guilty plea than they would have been had the defenses been raised on the merits in a contested case. Making a "clean" record is a point of personal pride to many trial judges, and a glimmer of a defense during a providency inquiry tends to make them very chary of the possibility of adverse appellate review. While we do not encourage counsel to enter guilty pleas they know will not find acceptance by the judge, we make this point to counter the apparent uneasiness some counsel have when the judge balks during the providency inquiry.

SECTION B, TABLE OF MAXIMUM PUNISHMENTS
AND TAINTED PRIOR CONVICTIONS

The Table of Maximum Punishments, Section B, Permissible Additional Punishments, Paragraph 127, Manual for Courts-Martial, United States, 1969 (Revised edition) is the military equivalent of the "enhancement" statutes found in most jurisdictions which authorize increased penalties upon proof of previous convictions. Briefly, Section B authorizes increased maximum penalties upon proof of previous convictions in two situations where Section A alone would authorize a lesser penalty: (1) a dishonorable discharge, total forfeitures, and confinement at hard labor for one year is authorized upon "proof of three or more previous convictions adjudged by a court during the year next preceding the commission of any offense of which the accused stands convicted"; and (2) a bad conduct discharge, total forfeitures, and confinement at hard labor for three months is authorized upon "proof of two or more previous convictions adjudged by a court during the three years next preceding the commission of any offense of which the accused stands convicted."

There are very few cases initially referred for trial to a general court-martial or a BCD-special court-martial where Table B must be utilized to authorize a punitive discharge because of the petty nature of the charges. Mostly, Table B is utilized in a multiple charge case where the serious charges are dismissed on motion or the accused is found guilty only of some minor or lesser offenses. In any case, the time for counsel to be alerted to the possible use of Table B is usually after findings.

In addition to objecting to evidence of previous convictions on technical grounds, e.g., improperly authenticated extract copies of record of previous convictions, Para. 75b(2), MCM, 1969 (Rev.), such previous convictions may be inadmissible for enhancement purposes when the prior conviction is tainted with constitutional infirmities. Burgett v. Texas, 389 U.S. 109 (1967) held that a state enhancement statute cannot be used to increase a sentence if any of the prior convictions were obtained in the absence of sixth amendment counsel. Likewise, in Stubbs v. Mancusi, ___ F.2d ___ (2d Cir. 1971); 9 Crim. L. Rep. 2106, the Court of Appeals held that a second offender sentence cannot validly be imposed when the prior conviction was tainted by a failure to comply with sixth amendment's confrontation clause. So long as the underlying constitutional infirmity is not harmless error, the prior conviction cannot be used to trigger an enhanced penalty. Trial defense counsel should be prepared to litigate the constitutional infirmities inhering in prior convictions in these situations.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

CHARGES AND SPECIFICATIONS -- LESSER INCLUDED OFFENSES -- Before a military judge sitting alone, the accused was tried, among other things, for robbery. He was found not guilty of robbery, but guilty of being an accessory after the fact to robbery. Both the military judge and the staff judge advocate, the latter in his post-trial review, considered that the holding in United States v. McFarland, 8 USCMA 42, 23 CMR 266 (1957), that the crime of accessory after the fact is not a lesser included offense of robbery, was no longer viable in view of the change in language in Paragraph 158, Manual for Courts-Martial, United States, 1969 (Revised edition), as distinguished from that contained in Paragraph 158, Manual for Courts-Martial, United States, 1951. Respectively, they provide as follows:

"An included offense exists when a specification contains allegations which are sufficient, either expressly or by fair implication, to put the accused on notice that he must be prepared to defend against it in addition to the offense specifically charged . . . [T]his requirement of notice, depending on the allegations in the specification of

the offense charged, may be met although an included offense requires proof of an element not required in the offense specifically charged, for example, assault in which grievous bodily harm is intentionally inflicted may be included in assault with intent to murder, although the actual intentional infliction of bodily harm required in the former is not an element of the latter. Similarly, unpremeditated murder (Art. 118(2)) may be included in felony murder . . . and riot may be included in mutiny by violence.

"An offense found is necessarily included in an offense charged if all of the elements of the offense found are necessary elements of the offense charged. An offense is not included within an offense charged if it requires proof of any element not required in proving the offense charged or if it involves acts of which the accused was not apprised upon his arraignment." United States v. Brown, CMR (ACMR 24 May 1971). (Emphasis added by the Court.)

In concluding that the military judge and staff judge advocate were in error the Court of Military Review stated:

"Necessarily, the position of the military judge and the staff judge advocate presupposes that the President of the United States is vested with the power to prescribe substantive law. However, his authority under Articles 36 and 56 of the Code, supra, is expressly limited to prescribing rules of evidence and procedure and maximum limits upon the punishments which a court-martial may

direct. United States v. McCormick,
12 USCMA 26, 30 CMR 26 (1960). More-
over, it is clear that the changes in
paragraph 158 of the current Manual,
supra, were intended to conform with
the decisions of the United States Court
of Military Appeals. Pages 28-1 and
28-2, Department of the Army Pamphlet
No. 27-2, Analysis of Contents, Manual
for Courts-Martial, United States, 1969
(Revised edition), 28 July 1970."
United States v. Brown, _____ CMR _____
(ACMR 24 May 1971).

The findings of guilty and the sentence were set aside and the
charge dismissed. United States v. Brown, _____ CMR _____ (ACMR
24 May 1971).

CHARGES AND SPECIFICATIONS, SUFFICIENCY OF SPECIFICATION
(WRONGFUL ALTERING OF PUBLIC RECORDS). The decision of the
United States Army Court of Military Review (Panel No. 2)
which had been reversed by the Court of Military Review
(en banc) was reinstated by the Court of Military Appeals
under the rationale of United States v. Chilcote, 20 USCMA
283, 43 CMR 123 (1971). The Panel's decision involved the
sufficiency of nineteen specifications alleging the wrongful
"altering" of public documents (supply records) in violation
of Article 134, Uniform Code of Military Justice. The Court
noted that the offense has its basis in 18 U.S.C. § 2071(a).
This federal statute prohibits the "concealment, removal,
mutilation, obliteration or destruction" of public records
but does not specifically prohibit the "altering" of such
records. The sample specification forms in past and present
Manuals conform to 18 U.S.C. § 2071(a) and do not include
"altering". Thus, in the Court's view, the specifications
fail to allege an offense under the federal statute. Since
Congress seems to have preempted the field of preserving
public records through the enactment of 18 U.S.C. § 2071,
and since this offense closely proximates a form of forgery
proscribed by Article 123, Uniform Code of Military Justice
these specifications could not be upheld as stating a
disorder or service discrediting conduct. United States
v. Maze, CM 420308 (ACMR 6 January 1970). NOTE: The Judge
Advocate General of the Army has certified this case to the
Court of Military Appeals.

PHOTOGRAPHIC IDENTIFICATION -- A robbery conviction was set aside and a new trial authorized in a case where eyewitnesses to a robbery, during the pretrial investigation, were shown photographs of the accused. Subsequently, these witnesses identified the accused at trial. The conviction was set aside for four reasons: (1) the display of pictures of the accused alone was the most suggestive method of pretrial identification, since other photographs of subjects generally fitting the robber's description could have been showed simultaneously to the witnesses; (2) two weeks had elapsed between the robbery and the photographic identification, so there was no question of getting a quick identification while memories are fresh; (3) the accused was a suspect only by reason of a tip from his estranged wife, who had sworn revenge against the accused following her conviction, at his instigation, of cohabitation; and, (4) the display of photographs of the accused alone was made for a second time just minutes before the preliminary hearing, thus not only reinforcing the previous photographic identification by the principal witness, but also needlessly infecting the identification by two other co-workers who admittedly did not observe the robber so thoroughly. Kimbrough v. Cox, ___ F.2d ___, (4th Cir. 1971); 9 Crim. L. Rep. 2264.

SEARCH AND SEIZURE -- LIMITATIONS ON CONSENT SEARCHES -- A case which began in a narcotics arrest ended in a tax evasion conviction. The accused was arrested by federal narcotics agents on a warrant charging him with selling narcotics. When asked whether he had any drugs at his home, he invited the agents to come to the house and look. No narcotics were found, but after some 45 minutes, an agent removed some currency exchange receipts from a drawer, whereupon the accused protested the seizure of these receipts. After the accused again attempted to call off the search, the agents still continued the search for another ten minutes. Seized were such items as currency exchange receipts for the purchase of money orders; insurance policies on defendant's and other persons' lives; insurance policies on cars, dwelling, and furs owned by defendant or members of his family; receipts for a loan; and a certificate of title to certain real estate.

The United States Court of Appeals for the 7th Circuit held the seizure of these items to be unlawful. The defendant's consent to the search was limited to a search for narcotics. A consent based on a representation by government agents that

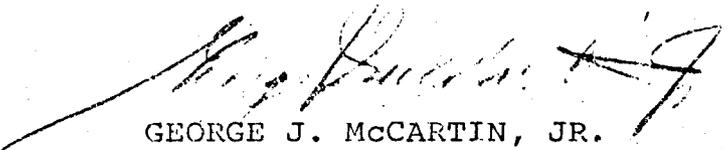
they intend to look only for certain specified items cannot subsequently be turned into "a license to conduct a general exploratory search." The search was unreasonable because it went beyond the scope of the defendant's consent. It appears that at least some of the items seized were not in plain view, but had to be opened and read, and even if these items were evidence of crime seizable under Warden v. Hayden, 387 U.S. 294 (1967), their criminal character was not apparent on a mere surface inspection, and defendant's consent did not authorize the agents' opening and reading them. [Does this mean Warden v. Hayden, supra, is inapplicable to documentary evidence which must be read before its character as evidence of crime can be appreciated, at least in consent searches where consent is given to search only for non-documentary evidence like drugs?]

Lastly, although none of the items seized were introduced at trial, the government on appeal had not argued that its case was not tainted by the illegally seized evidence. A retrial was authorized where the government would have the burden of persuasion to demonstrate its evidence was untainted. Dichiarinte v. United States, ___ F.2d ___ (7th Cir. 1971); 9 Crim. L. Rep. 2238.

SEARCH AND SEIZURE -- COLLEGE DORM vs. GI BARRACKS -- In Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971), the U.S. Court of Appeals held that students occupying college dormitory rooms enjoy the protection of the fourth amendment. Even though a state university may have a valid regulation reserving the right to enter and inspect dormitory rooms; authorizing the search of the room; and requiring the occupant to open his personal baggage, this regulation "cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution." Such would be an unconstitutional condition upon the occupancy of a college dormitory room. Id. at 289. The university had "no authority to consent to or join in a police search for evidence of crime." Id. at 290. The school regulation is valid only insofar as it pertains to "the University's function as an educational institution." Id. at 289. Although there may well have existed probable cause for the searches, they are held invalid because they were not authorized by warrant.

The soldier, of course, is in an even stronger fourth amendment position vis-a-vis his barracks area because he has no election with respect to where he lives, as do many university students. Thus, the doctrine of unconstitutional conditions never enters the analysis of the soldier's fourth amendment status. The real thrust of cases like Piazzola involves future judicial decisions on the use of evidence found during inspections which are validly supported by the university search regulation. If such evidence is suppressed in a criminal trial on the theory that the evidence should not be used for other than the legitimate educational purposes which initially authorized the search, the way is open to suppress on fourth amendment grounds contraband and other criminal evidence found during barracks shakedown inspections on the theory that the operational status of military equipment and personnel is the only valid reason for the inspection, and criminal charges are not necessary to that end.

CONFRONTATION OF WITNESSES -- SPONTANEOUS EXCLAMATIONS -- The constitutional validity Manual rule which renders a spontaneous exclamations admissible "even though it was made by a person who is alive and whether or not he is available as a witness," Para. 142b, MCM, 1969, (Rev.), is brought into question by a recent state case, State v. Lunn, N.M., 484 P.2d 368 (1971). At issue in Lunn was the admissibility of the testimony of several witnesses concerning the res gestae statements of two young boys about the killing of their father and wounding of their mother by the defendant. The defense objected that it was denied the opportunity to cross-examine the boys. The New Mexico Court of Appeals held that admission of the statements denied the accused his sixth amendment right of confrontation by not permitting cross-examination of the youthful spontaneous exclaimers. The Court found that the indicia of reliability laid down in the case of Dutton v. Evans, 400 U.S. 74 (1970), which would allow a statement to be placed before a jury without confrontation of the declarant, were not present in Lunn.



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