

THE ADVOCATE

A JOURNAL FOR
MILITARY DEFENSE COUNSEL

CONTENTS

SENTENCING ALTERNATIVES	1
LITIGATING THE DENIAL OF INDIVIDUALLY REQUESTED MILITARY DEFENSE COUNSEL.	7
CONDITIONS OF PRETRIAL CONFINEMENT AS A BASIS FOR SENTENCE RELIEF	16
THE PRICE IS RIGHT: THE ELEMENT OF VALUE IN COURT-MARTIAL PROCEEDINGS.	21
NOTES	27
RECENT OPINIONS OF INTEREST	28

EDITORIAL BOARD

Editors-in-Chief

John M. Nolan
Robert D. Jones

Articles Editor

Anthony J. Siano

Trial Tactics/New Issues Editor

Sammy S. Knight

Cases Editor

Jay Sacks Cohen

Managing Editors

Stephen D. Halfhill
Richard E. Schmidt

Additional Contributory Authors

Ralph E. Sharpe
Steven J. McAuliffe
Robert H. Herring
Greg English

ALTON H. HARVEY
Colonel, JAGC
Chief, Defense Appellate Division

SENTENCING ALTERNATIVES

I. Introduction: The moment defense counsel receives a new case, he must consider the prospect that, despite his best efforts, his client will be convicted. All too frequently (especially in the cases involving guilty pleas), the most measurable service defense counsel renders his client is minimization of the damage at the time of sentencing. Accordingly, every trial defense counsel should be familiar with alternatives available to the sentencing and reviewing authorities in his jurisdiction. Even more importantly, he should be aware of the ways in which he can bring these alternatives to the attention of those responsible in the manner best calculated to insure the least onerous result for his client. This article is an attempt to catalogue the available sentencing alternatives and suggest ways in which defense counsel can best utilize them.

II. Assessing the Damage: Consider the following in determining the applicable maximum punishment:

A. Jurisdiction of the court (Articles 18-20, Uniform Code of Military Justice).

B. Maximum authorized punishments (Article 56, Uniform Code of Military Justice; Paragraph 127c, Manual for Courts-Martial, United States, 1969 (Revised edition)).

C. Additional punishments authorized (See Footnote 5 to Table of Maximum Punishments).

After you have determined the maximum sentence liability of your client, next consider the sentencing components available to the sentencing authority and the modification components available to the convening authority after trial. The present Manual authorizes a dishonorable or bad conduct discharge (dismissal for officers), reduction to the lowest or any intermediate enlisted grade, forfeiture and detention of pay, fines, confinement at hard labor and hard labor without confinement, restriction, reprimand, and admonition (Paragraph 126, Manual for Courts-Martial, United States, 1969 (Revised edition)), generally). Detention of pay, fines, hard labor without confinement, restriction, reprimand, and admonition are infrequently argued for by trial defense counsel and even less frequently adjudged by the sentencing authority.

After imposition of sentence, the client's next opportunity for sentence relief or modification comes at the time of the review and action by the staff judge advocate and the convening authority. The convening authority's discretion as to sentence is broad. He may approve all or none of the sentence; defer execution of confinement and/or forfeitures; suspend all or part

of the sentence; or commute any part of the sentence as long as he does not thereby increase the severity (See Articles 57, 64, 71, Uniform Code of Military Justice; Paragraph 88, Manual supra). The convening authority may also take action to administratively separate the subject service member pursuant to the provisions of Chapter 10, AR 635-200, up until the date he takes his action. He may also act administratively to mitigate the effects of Article 58(a), Uniform Code of Military Justice (automatic reduction to E-1 when discharge or confinement is approved) by directing that the service member continue to serve in the same or intermediate grade (See Appendix 14d, Manual, supra). In any event, his powers are many, and in the appropriate case, defense counsel should do his utmost to persuade the convening authority to invoke them to ameliorate an adjudged sentence.

III. The Power of the Military Judge: The military judge may impose any of the above-noted sentences where jurisdictionally allowable. Unfortunately, what he does, he may not undo. Unlike his civilian counterpart who may invoke a severe sentence only to "suspend" it in Damoclean fashion over the head of the offender, the military judge has no such powers. United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973). Nor does a court composed of officers have this power. United States v. Wanhainen, 16 USCMA 143, 36 CMR 299 (1966). It should be noted, however, that the question of the military judge's powers in regard to suspension has been recently reopened for consideration by the U.S. Court of Military Appeals. On 2 April 1976, that Court granted review in United States v. Williams (Docket No. 31,795), to consider whether the military judge possesses suspension powers under the Federal Probation Act, 18 U.S.C. §3651. Until the U.S. Court of Military Appeals decides Williams, defense counsel should be aware of the Act's provisions and seek to invoke them where a more conventional sentencing alternative is not available. Hopefully, the Court of Military Appeals will continue to expand the now-limited powers of the military judge in this area. See Chief Judge Fletcher's language in Bouler v. Wood, 23 USCMA 389, 50 CMR 854 (1975). See also Stevenson, "The Inherent Authority of the Military Judge", 17 AFL Rev. 1 (1975). This is not to say that under present conditions the military judge should be ignored or lightly regarded by a defense attorney who knows he can only get a suspension elsewhere. The military judge (assuming he is the sentencing authority) should be actively recruited for the client's cause. His recommendation for suspension frequently carries great weight. So too should the court members be solicited after trial for their endorsement of a recommendation for suspension. Of course, neither the military judge nor the court members will recommend suspension of the adjudged sentence unless you can give them sound reasons why they should. The same holds true for advocating any sentence not conventionally adjudged; e.g., detention of pay, hard labor without confinement, etc.; or any action not conventionally taken by the convening

authority; e.g., commutation, or probationally conditioned suspension based on restitution or specific performance of some act. This brings us to the question of "selling" the sentencing authority and the convening authority on a sentence alternative that benefits your client.

IV. Constructing and Presenting Workable Sentencing Alternatives:

A. Some General Considerations:

1. Your own credibility before the sentencing authority (judge or court-members) and convening authority is vital.

Experienced counsel are aware that, in order to serve the client well, they must be reasonable in the position they take before the court. They know that if, during the course of an argument on sentence, they ask for a suspension of sentence and probation in a case in which invariably heavy penal sentences are imposed, they are doing little to serve the client and will probably be ignored on the question of actual number of years imposed. They are also aware that the judges have human reactions and will come very quickly to discount the vocal efforts of an attorney who they find uses the same approach in arguing for mercy in every case. (Cipes, Criminal Defense Techniques, 1969, §41.01[1]).

2. Furthermore, you should bear in mind that at the sentencing point in the court-martial, you serve not only as an advocate, but as an officer of the court as well. As such it is your job to produce as complete a picture of your client as possible without abandoning his interests. This includes, but is not limited to, family and educational background, physical and mental defects, any and all mitigating circumstances surrounding the offense, and the appellant's prior military service. Take full advantage of the relaxed (almost non-existent) rules of evidence at this stage of the proceedings. Make no recommendations as to sentencing to which your client has not concurred in advance. In this regard, make sure that you have fully explained to your client the consequences of each and every available sentence alternative in a way that he understands them. (See §5.3 and commentary thereto of American Bar Association Standards Relating to Sentencing Alternatives and Procedures, Approved Draft, 1968).

3. You should also be prepared to make specific recommendations to the sentencing and convening authorities as to which sentencing alternatives should be adopted. Once you have decided on well-reasoned specific recommendations, be wary of changing theories between the pre-sentencing phase of trial and the pre-action phase of review.

4. Timing. It is never too early to begin planning for presentation of an appropriate sentence alternative. If you contemplate the entry of a guilty plea, make the desired alternatives part and parcel of the pretrial agreement. [e.g., "I agree to plead guilty to the offense of larceny provided you suspend any sentence which includes a punitive discharge and all confinement for a period of six months. I agree that any such suspension will be conditioned upon my making complete restitution to the victim of the charged larceny (in the amount of) prior to the completion of the period of suspension."] In contested cases, prepare similar specific proposals to be presented both to the sentencing authority at trial and the convening authority after trial.

Of course, the viability of any specific sentence proposal must be demonstrably supported. Therefore, it is important that matters relating to extenuation and mitigation in general, and adoption of a specific sentence alternative in particular, be explored at the earliest possible date--even in those cases in which an acquittal seems a "sure thing". Put your client to work for you at the earliest possible moment. Have him talk to and compile lists of character witnesses. In drug or alcohol related cases enroll him in an available rehabilitation program. Both the sentencing and reviewing authorities will be inclined to continue a successfully initiated rehabilitation program once shown that the client is making a sincere effort. In any event, don't allow yourself to be placed in a situation where preparation for the pre-sentencing stage of the trial must be done on the day of the trial. A poorly prepared pre-sentencing presentation could cause more damage than none at all.

B. Possible Alternatives:

1. Suspension/Probation. This will be the most common form of sentencing alternative and, probably, the most successful. The convening authority's power to approve all, part, or none of the sentence makes him the most likely repository for sentence relief. Paragraph 88e, Manual for Courts-Martial, United States, 1969 (Revised edition), specifically allows a sentence to be suspended in contemplation of an anticipated future event. Furthermore, the U.S. Court of Military Appeals has specifically noted that the convening authority has the "power to impose at least the same conditions allowable to a judge in a federal civil criminal court." United States v. Lallande,

supra, 46 CMR at 172. Apparently, the only limitation in either the Code or the Manual is that which prohibits the period of suspension from being unreasonably long (Paragraph 33e(1)). United States v. Estill, 9 USCMA 238, 26 CMR 238 (1954); United States v. Holloway, 38 CMR 511 (ABR 1967). The following conditions for probation have been specifically held to be permissible:

(a) That the accused make restitution. See 97 ALR 2d 798 (1964); CAVEAT: Any restitution should be limited to an accused's ability to pay. See United States v. Rogers, 49 CMR 268 (ACMR 1974).

(b) That the accused spend one day of each week in jail. United States v. Murphy, 217 F.2d 247, 251 (7th Cir. 1954). Cf. Franklin v. State, 392 P.2d 552, 555-561 (1961);

(c) That a chronic gambler give up his habit. Barnhill v. United States, 279 F.2d 105, 106 (5th Cir. 1960);

(d) That the accused not use drugs or associate with those who do. Lugo v. United States, 370 F.2d 996 (9th Cir. 1967).

(e) That the accused disclose the source(s) of his drugs to a grand jury. Kaplan v. United States, 234 F.2d 345 (8th Cir. 1956);

(f) That the accused pay a fine as a condition to probation. Mitchum v. United States, 193 F.2d 55 (5th Cir. 1951);

(g) Probation conditioned upon favorable outcome of psychiatric treatment or tests. United States ex rel Vivian, 286 F.Supp 10 (E.D. Pa. 1966).

(h) That the accused agree to stay away from known law-breakers. Arciniega v. Freeman, 404 U.S. 4 (1971); and,

(i) That the accused agree not to drink alcoholic beverages to excess. United States ex rel Sperling v. Fitzpatrick, 426 F.2d 1161, 1166 (2d Cir. 1970).

The possibilities are limited solely by the defense counsel's imagination. However, lest the imagination get carried away, it should be noted that not all conditions have been held to be acceptable. Certainly, the waiver of a constitutional right (e.g., to attack the jurisdiction of the court) may never be an acceptable condition to suspension or probation. United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968). Conditions requiring the accused to give a pint of blood or stop drinking where all volition is gone have been held to be impermissible as well. See Springer v. United States, 353 F.2d 10 (7th Cir. 1965), and Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965), respectively.

Finally, defense counsel should remember that these conditions are permissible in relation to ameliorative actions after trial not as preconditions to pretrial agreements. In each case, counsel will want to explore various possibilities with their clients. For example, a jurisdiction which makes use of a particularly active drug abuse counseling program raises the possibility of placing the first-time drug offender under the probational supervision of trained personnel. Successful completion of a drug abuse program could be the condition on which his suspension/probation is based. It is the defense counsel's responsibility (in the appropriate case) to draft up a specific proposal delineating the conditional elements.

2. Restitution (as a condition to probation). Again, the terms of such a proposal would have to be both reasonable and specific.

3. Work-release. Propose a program whereby the client will agree to work by day in his MOS and return to confinement at night and on the weekends. Generally, where this particular alternative is utilized it is specifically authorized by statute (See, e.g., Wisconsin's Huber Law, W.S.A. 56.08(1), and others noted at §2.4 of ABA Standards, supra.) However, it is worth pursuing if the client has a pressing need to remain in the area for family reasons or to pursue specialized treatment or training.

4. A short period of confinement followed by a pre-determined period of suspension. This might be especially appropriate for the first-time offender who has not been in pretrial confinement. A short term of confinement at a local confinement facility with an immediate probational return to an on-post unit would satisfy those commanders who feel that some amount of confinement is necessary for some classes of offense and would insure that the same commander who suspended the sentence could also vacate the suspension during the specified period of suspension.

5. Fine or Detention of Pay. Like restitution, this may be made a condition to probation or constitute a separate element of the sentence. Most appropriate in property crimes involving loss or damage of property belonging to others.

6. Commutation. Available to the convening authority as a means of substituting one form of sentence for another. Commutation is not perceived as a form of clemency, but it does offer a vehicle for parlaying a bad conduct or dishonorable discharge into some other form of punishment (probably confinement).

See United States v. Johnson, 12 USCMA 640, 31 CMR 226 (1962); United States v. Brown, 13 USCMA 333, 32 CMR 333 (1962); United States v. Darusin, 20 USCMA 354, 43 CMR 194 (1971); and United States v. Owens, 36 CMR 909 (AFBR 1966). See also Vol. 7, No. 2 of "The Advocate", February-August 1975, at 19-20.

V. Conclusion.

It is up to the trial defense counsel, in appropriate cases, to pursue all viable sentencing alternatives available for his client. These should be pursued, once agreed to by the client, before, during and after the trial. At present, most energies are best directed toward the convening authority who possesses unlimited discretion in acting favorably on sentence proposals. (However, the recent indication from the Court of Military Appeals supports an approach to the military judge where there is a federal statutory scheme to which reference can be made.) Where possible, the recommendation of the sentencing authority at trial should also be actively solicited and used to the client's advantage. Defense counsel should familiarize themselves with local programs (e.g. alcohol and drug abuse rehabilitation centers) and incorporate their use into a workable sentencing proposal. Counsel should stress the need to keep the client in the command whenever possible in order to insure the successful completion of the period of probation. Finally, all defense counsel should seek to devise a sentencing alternative program which will be both credible and acceptable with the convening authority in a given case, while recognizing the limitations on both the matters which may be included in pretrial agreements and on the powers of military judges and juries. Innovation should be the defense counsel's by-word in this area. As more and more offenders are successfully rehabilitated, some of the abovementioned sentence alternatives may begin to displace the now "standard sentences" to confinement and/or punitive discharge.

* * *

LITIGATING THE DENIAL OF INDIVIDUALLY REQUESTED MILITARY DEFENSE COUNSEL UNDER ARTICLE 38(b)

Article 38(b) of the Code and Paragraph 48a of the Manual, pertain to an accused serviceman's statutory right to representation by "military counsel of his own selection if reasonably available." Although this aspect of the right to counsel constitutes a "fundamental principle of military due process," and COMA has held it to be the Government's duty and obligation wherever possible to shoulder the financial, logistical, and administrative burdens associated with

guaranteeing that right, it appears that reasons of "administrative inconvenience" are being invoked by supervisory personnel, and going unchallenged, as a basis for routinely denying requests for selected individual counsel. See generally United States v. Eason, 21 USCMA 335, 45 CMR 109 (1972); United States v. Murray, 20 USCMA 61, 42 CMR 253 (1970).

This article discusses the practical aspects of litigating an accused's statutory right to individually selected military counsel. Successful litigation of the denial of a request for representation by chosen military counsel provides an accused with the full rights Congress intended to bestow, while even unsuccessful litigation often preserves a viable appellate issue.

While an accused may initially express an interest in being represented by a lawyer who he knows from a previous relationship, or by reputation, it is certainly permissible for appointed counsel to suggest the name of an attorney who he might, for whatever reason, feel more suited to handling the case. ^{1/} See e.g. EC 2-8, ABA Code of Professional Responsibility. Once a request is made by the client, appointed defense counsel assumes full responsibility for either effecting that request or preserving the record with respect to that issue.

Among the first duties in such a situation is that of advising the accused of the possible delay which may be encountered in fulfilling his desire; a fact of some importance to an accused languishing in pretrial confinement. If the client decides to invoke his right, regardless of the poten-

^{1/} In view of the decisions of the Court of Military Appeals in United States v. Johnson, 23 USCMA 148, 48 CMR 764 (1974) (holding that a convening authority must inquire into the availability of a counsel requested from another armed service), and United States v. Copes, 23 USCMA 578, 50 CMR 843 (1975) (holding it prejudicial error for a trial judge to misadvise an accused that his right to individual military counsel was limited to those attorneys assigned to the local SJA office), it should now be beyond question that the right to individual military counsel extends to attorneys in every service, no matter where they may be stationed. However, the Army Court of Military Review recently held, as a matter of law, that attorneys assigned to the Defense Appellate Division are not available for selection as individual counsel pursuant to Article 38(b), presumably even if they are "reasonably available". United States v. Herndon, CM 430760, CMR (ACMR 12 May 1976). An appeal of that decision is expected.

tial delay, 2/ several preliminary matters ought to be given immediate attention by appointed counsel. Some initial groundwork will provide a rough idea of the type of activity in which requested counsel is engaged, the distance he would have to travel, the time he would have to invest in the case, the budgetary pressure on the requesting command (who will be paying the bill), and the willingness of the requested counsel to undertake the defense. Therefore, appointed counsel should always call the desired attorney well in advance of the formal request. The basic goals during this phase are enlisting the desired attorney's support and obtaining absolutely as much information about him and his job situation as possible; with the ultimate aim of anticipating and rebutting future excuses for denying his services.

Preparation and anticipation are essential prerequisites to success in any litigation, but they are especially important factors when the burden is the very heavy one of proving abuse of discretion. Overcoming a denial of requested counsel will require demonstration of just such an abuse by the convening authority. United States v. Gatewood, 15 USCMA 433, 35 CMR 405 (1965).

The Request, the Denial, and the Administrative Appeal

The mechanics of initiating a client's request for individual counsel are not particularly complex, and are set out in Paragraph 48b, Manual for Courts-Martial, United States, 1969 (Revised edition). Basically, once armed with full knowledge of the target and his circumstances, appointed counsel need only ask the convening authority to provide that attorney to the defense. While the Manual does not require that the initial request be in writing, it should always be written in order to preserve the record for trial litigation.

2/ Trial defense counsel should resist any subsequent efforts by the Government to charge the defense with delay for speedy trial purposes based upon the time ordinarily associated with processing a request for individual counsel. It can be forcefully argued that such delay was contemplated by COMA when it fashioned the Burton-90-day rule. United States v. Marshall, 22 USCMA 431, 47 CMR 409 (1973). ACMR has indicated, however, that delay caused by a tardy request for individual counsel, and the necessity to ascertain the availability of requested counsel at distant locations, could be deducted from the 90-day limit. United States v. Rivera, 49 CMR 261 (ACMR 1974), reversed on other grounds, 23 USCMA 430, 50 CMR 389 (1975).

If the requested attorney is a member of the convening authority's command, he "will make the detail and order any necessary travel," or he will deny the request on the only basis allowed by the statute: "not reasonably available". If the requested counsel is a member of another service, or some other command within the Army, the convening authority will forward the request to that counsel's commanding officer, who will, in turn, perform the same function: either make the counsel available or deny the request on the only permissible ground of unavailability.

Assuming the appropriate commander determines the requested counsel to be unavailable and denies the request, an administrative appeal to the next higher command may lie. Appeals may be taken where the initial commander was not serving at departmental level, or immediately below departmental level. Stated another way, no administrative appeal lies if it would have to be acted on by an officer serving at departmental level. Paragraph 48b, Manual. For example, attorneys serving with the Office of The Judge Advocate General are under the command of an officer serving at Department of Army level, thus a denial by that officer cannot be appealed administratively. As with any other defense-related matter, however, when in doubt, always appeal.

When the convening authority denies the request he must give "sound reasons" for that action to the accused. United States v. Quinones, 23 USCMA 457, 458, 50 CMR 476, 477 (1975). The convening authority, personally, must make the decision; the staff judge advocate may not exercise that function in his stead. United States v. Hartfield, 17 USCMA 269, 38 CMR 67 (1967). Therefore, when the convening authority's initial denial is received, appointed counsel should immediately examine the stated reasons for "soundness". (Remember that the staff judge advocate is also a lawyer adept at using language; he undoubtedly will advise the convening authority regarding a properly phrased response.) Often the convening authority's justification will consist of no more than a description of the normal duties assigned to the requested counsel, packaged in an impressive sounding vocabulary and accompanied by a conclusory pronouncement that due to that counsel's overworked state and the importance of his mission, he simply could not be made available to conduct the defense. Appointed counsel should be alert to this approach, and be prepared to point out the insufficiency of such a response.

What is a sound reason for denial? Article 38(b), provides that the requested counsel must be appointed to the defense "if reasonably available", but neither the Code nor Manual provide more specific guidance as to what reasons are sound.

There are few obvious situations; hence the need and opportunity for applied advocacy. The Court of Military Appeals has always approached this issue with circumspection and has been quick to point out that each case must be decided in light of its own particular facts. In determining whether a given commander has abused his discretion in denying a request for individual counsel, COMA will consider "the duties assigned the requested officer, military exigencies, and similar considerations -- in short, 'a balance between the conflicting demands upon the service'. . . ." United States v. Cutting, 14 USCMA 347, 351, 34 CMR 127, 131 (1964). The Court has also indicated that the request need not be granted if to do so would "obstruct either other important operations of the service concerned or the orderly administration of military justice." United States v. Vanderpool, 4 USCMA 561, 566, 16 CMR 135, 140 (1954). Balancing these general pronouncements against the intent of Congress in enacting Article 38(b), and the Court's own admonition to the Government in Cutting to avoid giving only "grudging application" to this substantial right, the dividing line between discretion and abuse remains unclear.

The most commonly invoked excuse for avoiding the mandate of Article 38(b) is the oft-heard: "His regularly assigned workload is too burdensome and his absence even for a few days (certainly not weeks!) would doom the entire activity's military mission to utter and complete failure." The Court of Military Appeals does not particularly care for this "mere workload" excuse, as indicated in the recent opinion in United States v. Quinones, supra. Appointed counsel should be at least equally skeptical when it is proffered to him. 3/ In Quinones a Navy commander (as well as his superior on appeal) determined that a particular counsel was not reasonably available because his regularly assigned duties were much too burdensome. Appointed counsel contested that determination by demonstrating, on the record, that the requested attorney's backlog consisted of only six (6) cases, three of which were inactive. Id. at 459, 50 CMR at 478.

3/ Contrast Quinones with United States v. Barton, 48 CMR 358 (NCMR 1973). In that case, inordinate expense, the fact that the requested counsel was a military judge engaged in pending courts, provided primary legal assistance for the area, was on orders to the Phillipines, would have had to travel to England and would be away for some 30 days, were held to be sufficient reasons for denial. These extreme factors, it should be argued, represent the minimum conflict that must exist to justify the denial of requested counsel on the basis of unavailability.

The staff judge advocate countered by asserting that the requested attorney was engaged in a "special project" and was working "an excess of 40 hours per week." The Court of Military Appeals, finding an abuse of discretion, held that the availability of requested counsel does not depend solely on the number of cases he is assigned, or the number of hours he works. The point of Quinones is that no magic incantation exists, and no form can be printed, which will justify a denial of requested counsel in every case. Each case stands on its own merit. While "workload" might be a factor, it is only a factor, and not an automatic excuse.

Trial advocates should also be aware that reasons which would justify denying a request for individual counsel under ordinary circumstances, may not suffice where the accused has already entered into an attorney-client relationship with the requested attorney. See United States v. Eason, 21 USCMA 335, 337, 47 CMR 109, 111 (1972); but see United States v. Herndon, supra.

Appointed defense counsel should continue to argue the Eason theory where a client requests the services of his former counsel at a rehearing or limited hearing, and counsel should also inquire into the possible existence of a previously established attorney-client relationship whenever an accused requests a specific military attorney. These matters must, of course, be made part of the record in the event the issue is litigated at trial.

An administrative appeal from an adverse decision, if available, should be made immediately, and the grounds should be specifically set out. The appeal should be no less than a full advocacy brief written with a view toward convincing the higher authority that not only has the subordinate commander failed to give adequate consideration and weight to the pertinent circumstances surrounding the issue, but that the actual circumstances require that the requested counsel be made available if appellate reversal is to be avoided. If no administrative appeal is available, the convening authority should be asked to reconsider his initial decision based upon the facts as you, the appointed defense counsel, develop and substantiate them.

Building the Record

Personal contact with the requested attorney will probably have resulted in a good deal of useful information, including an affidavit fully describing his duties and availability. Since the most frequently employed excuse for denial concerns the requested attorney's "crucial duties and general workload", this area should have been fully explored. Appointed counsel should endeavor to learn not only what the requested counsel's

duties and caseload actually are, but what they are compared to those of other attorneys in the same office, and what they are currently compared to what they were one, six, and twelve months ago. Ask him to include in his affidavit all factors he personally would consider to weigh in favor of his availability and, later, after the request has been denied, ask him to relate all factors he believes the commander should have, but did not consider, or did not adequately consider, in reaching the decision. Flexibility is the key: if some reason genuinely would preclude the requested attorney from serving as defense counsel, find out when that reason would no longer be applicable and inform the convening authority of your client's willingness to wait until that condition is abated. Judge Cook's language in Quinones is suggestive of the basic approach appointed counsel should adopt in contesting adverse determinations:

[many duties of a requested counsel] ... can, conveniently and readily be postponed for a reasonable time, with no discernable adverse affects. Such postponement may be particularly feasible when, as here, requested counsel remains at his regular office and is immediately available for consultation if an emergency should arise in regard to a postponed matter. Id., at 461, 50 CMR 480.

Trial Procedure

Generally speaking, in order to preserve the denial of requested counsel as an appellate issue the request must be renewed at trial and the pertinent facts bearing on the request must be spread on the record. See United States v. Mitchell, 15 USCMA 516, 36 CMR 14 (1965). The "pertinent facts" appointed counsel must develop are those tending to prove that: 1) no important military operations would be obstructed by the assignment of requested counsel; 2) the orderly administration of military justice would remain substantially unaffected; and 3) no serious exigencies or practicalities exist which would warrant denial. All three factors must be supported.

The requested counsel's affidavit will bear heavily on all of these issues, but so will the commander's express reasons for denying the request. The principal task then, becomes one of looking behind the commander's express reasons -- discerning why he concluded that the attorney's workload was too heavy. (Did he consider the fact that the requested attorney has only X cases while every other attorney in the office has X cases?); why this particular counsel could not be spared? (Could not the requested counsel bring crucial work with him to occupy time not expended on the defense, or postpone it, or transfer

it to a willing colleague?); why this counsel would not be available in the immediate future? (Has he been assigned other collateral duties? If he can be spared for other reasons, why not to defend an accused serviceman?).

Besides direct questioning regarding the decision at hand, policy considerations should also be explored: Has the commander ever made a member of his command available? Has he ever made this attorney available? Is there a policy, expressed or implied, directing routine denial of requests for individual counsel, and if not, who were the last attorneys made available upon request to defend a case, and when?

The possibilities are great, and the experienced trial practitioner can no doubt think of many other fruitful lines of inquiry. As the questions themselves suggest, appointed counsel ought to submit thorough and detailed interrogatories directly to the commander whose discretion has been exercised, as well as his superior if an appeal has been taken. When engaging in this search for useful information, do not overlook the commander's subordinates, especially records clerks and administrative personnel. Often, they can provide very helpful data such as comparative statistics indicating that the workload of the office, as well as the particular counsel's, has actually decreased over the last few months.

Article 49 of the Code (depositions) is the primary source of authority for submitting interrogatories, and Paragraph 117 of the Manual clearly sets out the specific options and procedures available. Most trial practitioners who routinely submit such interrogatories do so prior to trial, through the designated trial counsel. If necessary, however, there is no reason why the military judge cannot order answers, on motion, at an Article 39a session. The Army Court of Review has ordered such interrogatories answered on motion by defense counsel during litigation on appeal. United States v. Brisbon, SPCM 11234 CMR (ACMR 14 May 1976). Additionally, the Court of Military Appeals has held the Court of Review in error in an analogous case where interrogatories submitted on appeal by the defense, which were designed to inquire as to the correctness of information upon which a contested promulgating order was based were refused. United States v. Gladden, 23 USCMA 381, 50 CMR 158 (1975).

Should the answers to interrogatories, or information obtained through informal investigation, prove to be incomplete, evasive, or in any way unacceptable, appointed counsel needn't hesitate to ask for the production of the commander, his superior, and all other persons who have information supportive of the client's position. The Army Court of Military Review most recently recognized in United States v. Brisbon, supra,

that the requested attorney would be a proper witness on this issue because of his first-hand knowledge of the circumstances. The Brisbon opinion also suggests that the convening authority would be a proper witness if the materiality and relevancy of his expected testimony could be shown. An example might be a situation where counsel is attempting to demonstrate an abuse of discretion founded in the existence of a policy in the command which dictates routine denial of all counsel requests.

Article 46 of the Code gives every accused equal opportunity to obtain witnesses necessary to his defense, and establishing abuse of discretion without live witnesses will be more than difficult. Naturally, the prosecution will enthusiastically resist any attempt to call the commander or distant clerks as witnesses on a motion for appropriate relief. Therefore, counsel should be prepared to summarize the expected testimony of these witnesses, to show how it will relate to the pending issue, and to demonstrate that the answers to interrogatories are entirely inadequate substitutes for live witnesses subject to follow-up questioning. Although the appellate courts have been somewhat reluctant to strictly enforce the provisions of Paragraph 115a of the Manual (See e.g. United States v. Corley, 50 CMR 161 (ACMR 1975)), it should be automatic practice to comply with that paragraph's procedural requirements by putting witness requests and supporting summaries in writing, especially when dealing with important prospective witnesses.

Lastly, if the trial judge is not receptive to your cause, do not fail to make an offer of proof -- in writing, if necessary. Make certain that the offer is presented in an affirmative, positive way, resolving all doubt and speculation in favor of the client's position. This final effort will cement the issue in the record, and will insure complete review on appeal by leaving the appellate court with few facts open to speculation.

In summary, the Court of Military Appals has recognized that the appropriate commander's determination as to whether or not a particular attorney is "reasonably available" is a matter of discretion. However, like all matters involving the exercise of discretion, that determination is subject to review for abuse. Appointed counsel bears full responsibility for thoroughly investigating and litigating each denial to the fullest extent his imagination and professional ability allow. Not only should the particular facts of each case be carefully analyzed, but patterns or routines which suggest automatic denial rather than individual consideration of each request should be investigated by appointed counsel.

Unless appointed counsel aggressively litigate these issues on a regular basis, the substantial right to individually requested military counsel will become no more than an empty promise,

routinely denied as a matter of administrative convenience. Congress intended this right to be afforded every accused serviceman. Unless and until that statute is changed, the Government must be discouraged from giving it only "grudging application".

* * *

THE CONDITIONS OF PRETRIAL CONFINEMENT
AS A BASIS FOR SENTENCE RELIEF

The Advocate recently (Vol. 7, No. 3, at 2) considered the subject of unlawful pretrial confinement and the methods available to trial defense counsel in dealing with it. As noted there, counsel may obtain relief for his client prior to trial by Article 138 complaint to the appropriate commander, application to a local magistrate, or Petition for Extraordinary Relief to either the United States Court of Military Appeals or Courts of Military Review (model forms for filing extraordinary writ petitions can be found in The Advocate, Vol. 8, No. 1 at 27 et seq). See generally Courtney v. Williams et. al., 24 USCMA 87, 51 CMR 260 (1976); Porter v. Richardson, Misc. Docket No. 75-38, 8 September 1975, USCMA, 51 CMR (1975); Bouler v. Wood, 23 USCMA 589, 50 CMR 854 (1975); Kelly v. United States, 23 USCMA 567, 50 CMR 786 (1975).

In addition to those options, or if they do not prove entirely adequate ^{1/}, the issue may be raised at trial by means of a Motion for Appropriate Relief at an Article 39a Session, and, if unlawful confinement is established, "meaningful" sentence relief must be granted. United States v. Jennings, 19 USCMA 88, 41 CMR 88 (1969). Specifically, when instructing court members, the trial judge is required to forthrightly advise them of 1) the nature of the illegal pretrial confinement, 2) the seriousness of the Government's violation of the individual's fundamental rights, and 3) the necessity that they give meaningful sentence relief for that governmental violation of Article 13. United States v. Kimball, 50 CMR 337, 340 (ACMR 1975).

This note assumes that an accused is properly in confinement prior to trial, that is, that he not only "could" be confined, but that he also "should" be confined. See Courtney v. Williams,

^{1/} Say, for example, the accused is released from illegal pretrial confinement, or illegal conditions are alleviated only after he has endured same for a lengthy period of time.

supra. From that assumption, the following discussion considers the conditions of incarceration which may render otherwise lawful pretrial confinement unlawful, thereby justifying meaningful relief at least as to the sentence ultimately imposed.

Apart from the traditionally enunciated prohibition against the commingling of sentenced and unsentenced prisoners, and treating them identically 2/, there is little military case law pertaining strictly to the conditions under which a pretrial confinee is forced to live. Nevertheless, those military decisions which are reported provide insight into the types of conditions for which trial defense counsel should be vigilant. Also, federal and state prison cases supply some other guidelines by which to judge the legality of restrictions associated with pretrial confinement.

A military accused can not be subjected to confinement that is more rigorous than necessary to insure his presence at trial. Article 13, Uniform Code of Military Justice, 10 U.S.C. §813. Thus, in general, the conditions of an accused's confinement must always be reasonably related to insuring his presence; or stated another way, an accused may not be deprived of any right or privilege to which he would otherwise be entitled, unless that deprivation is reasonably related to insuring his presence at trial. See e.g. United States v. Jennings, supra; United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969). As will be seen, some local confinement facility rules and regulations violate this dictum.

In United States v. Snowden, 43 CMR 569 (ACMR 1970) an Army First Lieutenant's pretrial confinement at Fort Hood, Texas, was held to be illegal because of the harsh conditions imposed upon him: He was confined alone in a cell containing only an Army bunk, a sink with cold water, and a commode. The cell door was always locked, he was accompanied by a guard wherever he went, he was never saluted by anyone in the facility, and, because authorities had directed that he be considered the same

2/ See United States v. Bayhand, 6 USCMA 762, 21 CMR 84 (1956), for COMA's specific touchstones of illegality in this regard (also The Advocate, Vol. 7, No. 3, at 4 n.2); See also United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969).

as "any other damn prisoner", he was called "Hey, prisoner", and "Luey" by the guards. He was required to wear a white armband with an "O" inscription e.g. (presumably for "officer"), ate all meals alone in his cell, and was allowed only an hour-long daily exercise period. Additionally, he was required to use a communal razor shared by five to fifteen other prisoners, and was subjected to rectal inspections. The Army Court of Military Review had little difficulty finding such conditions to be "more rigorous than necessary to insure his presence" and reduced the confinement portion of the approved sentence. Approximately five years later, another accused's case became the subject of appellate sentence relief because of virtually identical conditions of pretrial confinement in this same facility. United States v. Fitzgerald, CM 433547 (ACMR 5 March 1976) (unpublished opinion).

In view of the fact that few administrators personally seek to treat pretrial confinees more severely than necessary, these two cases suggest that an initial review of local confinement facility rules and regulations may well reveal not only prescribed conditions that are per se illegal, but also prescribed conditions that may be illegal as applied to a particular accused. Since two cases originating at Fort Hood have been decided in this field, and the Fort Hood Area Confinement Facility Inmate Rulebook is readily available, having been introduced into evidence in Fitzgerald, an examination of some of the rules, regulations and policies contained therein will be helpful as an illustration of the approach that counsel should take in other jurisdictions. Other local rulebooks may disclose similar suspect conditions of pretrial confinement:

1. Severe restrictions on the speaking of native tongues while confined. See United States ex rel Gabor v. Myers, 237 F.Supp. 852 (E.D. Pa. 1965), wherein the refusal of prison authorities to allow a federal inmate access to letters from his sister because they were written in Hungarian, thus denying him a privilege accorded to other English-speaking prisoners, was held to constitute unconstitutional discrimination based upon the "accident of language".

2. The right of free speech and to petition for redress of grievances is denied confinees. In Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971) the United States Court of Appeals for the First Circuit recognized that, while prison authorities may read and inspect outgoing letters, prisoners have a right to send letters to the press concerning prison management, treatment of offenders, or personal grievances, except those which, a) contain or concern contraband, or b) contain or concern any plan of escape or device for evading prison regulations.

3. Confinees are prohibited from possessing or receiving books or newspapers from sources other than book or newspaper publishers. In Van Ermen v. Schmidt, 343 F.Supp. 377, 379 (W.D. Wis. 1972), a similar restriction applied to a prisoner's receipt of law books was held to be a proper basis for a civil rights action as it represented an "unreasonable interference. . . with plaintiff's freedom to use the mails." See also Fortune Society v. McGinnis, 219 F.Supp. 901, 904 (S.D. N.Y. 1970); and Cruz v. Betts, 405 U.S. 319, 323 (1972), (wherein Chief Justice Burger, concurring, stated ". . . materials cannot be denied to prisoners if someone offers to supply them."). In Sostre v. Otis, 330 F.Supp. 941 (S.D. N.Y. 1971), the issue of a prisoner's constitutional right to possess and read literature is explored and, while the Court recognized that a brochure informing the reader how to saw through prison bars with a kitchen spoon or how to provoke a prison riot might properly be screened and withheld as posing a clear and present danger to security, it nevertheless decided that an inmate's right to read any literature he chooses (absent substantial danger of disruption) is not expressly or impliedly lost upon his incarceration. Moreover, the court required that a prisoner, as a matter of constitutional right, be afforded a due process hearing, including notice to the inmate and an opportunity to object, before any literary materials could be withheld from him.

4. Married confinees are prohibited from corresponding with adult women outside their immediate family until such time as "final proof of divorce" is offered, and single confinees are prohibited from corresponding with more than one girlfriend. All confinees are prohibited from corresponding with "former inmates, families of former inmates, strangers, or penpals." See Jones v. Wittenberg, 330 F.Supp. 707 (D.C. Ohio 1971), aff'd 456 F.2d 854 (6th Cir. 1972). In that case the court found it "obvious" that prisoners awaiting trial are not to be punished at all, except to the extent necessary to preserve order, and, therefore, readily concluded that pretrial confinees could not be limited in their communications with outside persons, absent compelling justification. The Court then directed that, within thirty (30) days, authorities comply with expressed minimum standards regarding treatment of pretrial confinees, to include: a) no censorship, or limitation on addresses of outgoing mail, b) insurance that pretrial prisoners have full opportunity to obtain writing materials and postage, and, c) provisions for pretrial inmates to make unmonitored local telephone calls during stated hours.

5. Confinees are not permitted to have United States postage stamps or envelopes in their possession, and are further prohibited from having more than five (5) letters in their possession. (See Jones v. Wittenberg, supra; Van Ermen v. Schmidt, supra.)

Many other questionable restrictions which are included in the above sample generally fall within the prohibitions against punishing pretrial confinees. (e.g. severe limitations on the right to have visitors; suspension of postal privileges if deemed necessary for the "prevention of unreasonable excesses"; requiring each inmate to receive and pay for one haircut per week whether needed under applicable regulations or not; refusing to allow confinees to salute the American flag at reveille or retreat in the customary military manner, or to salute and receive a military salute in the normal course of the duty day; and withholding of normal "privileges", such as watching television, until they are "earned").

Admittedly, many of these conditions in local regulations, which the Court of Review designated "mickey mouse" in Fitzgerald, may not be enforced with regularity. However, the fact that those rules exist is reason enough to expect that they, or similar infringements, eventually will be invoked against an accused in pretrial confinement. A trial defense counsel ought to make every effort to familiarize himself with the rules and regulations governing the pretrial confinement of his clients, and he should carefully examine those rules to insure that similar oppressive restrictions are not being imposed in his jurisdiction.

A pretrial confinee enjoys a different status than a sentenced prisoner -- he is presumed innocent, and he is in jail only as a means of insuring his presence at trial. "[A]ny limitation on the fundamental rights of unconvicted persons must find justification in the legitimate advancement of that interest," [Seal v. Manson, 326 F.Supp. 1375, 1379 (D. Conn. 1971)], because, "a prisoner retains all rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

In a military setting, counsel should determine, soon after appointment, to what extent his clients in pretrial confinement are deprived of rights and privileges they ordinarily would be free to exercise. He should then insure that such deprivations are both reasonably and necessarily ^{3/} related to insuring his clients' presence at trials. If they are not, appropriate remedial action should be taken, to include, but certainly not limited to, presenting the matter at trial accompanied by a demand for meaningful sentence relief. (See Kimball, supra). No doubt, trial defense counsel will discover many conditions of pretrial confinement which fall short of these standards of

^{3/} See Sostre v. Otis, supra, at 944.

legality, and, though in the abstract some might seem trivial, their importance to a confined accused will be magnified many times. Virtually no deprivation should be overlooked in the effort to both alleviate the infringement (thus making pretrial incarceration slightly more bearable), and to obtain sentence relief. As in most situations involving a client's rights, the most effective guide to illegal confinement conditions is counsel asking himself the rhetorical question: "Would I object to the imposition of this restriction if I were confined awaiting trial?"

Seal v. Manson, supra, will provide interested counsel with a beginning checklist of possible violations, and it persuasively suggests the potential value of raising such matters in terms of administratively improving confinement conditions through agreement and stipulation with the authorities who administer the facility. Such a course will inure to the betterment of all confinees. Finally, when litigating these issues counsel should be certain to introduce copies of the regulations which prescribe the conditions complained of, and to make every effort to obtain live witness testimony in support of the motion for appropriate relief. Confinement facility administrators, guards, cadre, counselors, and other inmates can usually provide useful testimony regarding the conditions applicable to pretrial confinees.

* * *

THE PRICE IS RIGHT:
THE ELEMENT OF VALUE IN COURT-MARTIAL PROCEEDINGS

The element of value is of prime importance in court-martial proceedings involving prosecutions under Articles 108, 109, 121, 126, 132, and certain charges brought under Article 134, Uniform Code of Military Justice, 10 USC §908 et seq. Depending upon the value proved at trial, confinement at hard labor may vary from six months to ten years, and may be potentially coupled with either a bad conduct or dishonorable discharge. See Paragraph 127(c), Manual for Courts-Martial, United States, 1969 (Revised edition). Forfeitures of pay and allowances are similarly affected. Since clemency opportunities in appellate or administrative review proceedings are speculative, it is incumbent on defense counsel to insure that his client will suffer only so much punishment as the government's evidence will warrant. It has not been the case

The Prosecution's Case

The most common prosecution in this area is brought under Article 121, generally as larceny. In a great many situations the property will have been removed from a barracks bay or

room and many court members will view such an offense as particularly repugnant since it involves a "dwelling". These cases may be relatively easy to prove and the defense attorney should be careful not to "give up" his case even if his client can be readily identified with the offense. He should make every effort to see that the property is regarded with as little value as possible as a matter of findings so that the sentence may be minimized.

The primary prosecution witness is very often the owner of the property. He may testify, for example, that he bought the missing stereo in July 1975 for \$450.00, and that it had two speakers with "wood" cabinets, an AM-FM receiver, and a Garrard turntable. The stereo will work "perfectly", and he will play records at least every day and all day on weekends, usually at top volume. He will no doubt value the stereo at the purchase price, with each component (speakers, receiver) at some proportionate fraction of that price. He may also have "priced" similar equipment before buying. Finally, he may have examined replacement items and their prices.

The Defense Case

Value is a question of fact to be determined on the basis of all the competent evidence presented. As a general rule, the value of stolen property is to be determined by its legitimate market value at the time and place of theft. Paragraph 200a(7), Manual for Courts-Martial, United States, 1969 (Revised edition); United States v. Robinson, 15 CMR 784 (AFBR 1954). The purchase date is the linchpin of any valuation problem. Although the purchase price of an item may be persuasive, such purchase must be recent to be valid evidence of value. Value must be determined as of the time of the taking, and the burden is on the prosecution to prove said value. United States v. Tucker, 29 CMR 790 (AFBR 1960).

Three areas of significance to defense counsel are: a) the time interval from purchase to theft, b) the nature of the property, and c) the demand for like property at the time of theft. The value of a stereo or any other item of personal property is seldom what the owner deems it to be, especially after the passage of a substantial period of time. In United States v. Barker, 35 CMR 779 (AFBR 1965), it was held that an interval of one year from the date of purchase was too great to permit a determination of the present value of skis, purchased new for \$85.00 with a "lifetime guarantee", even though the skis were before the court. Only "some value" was attributable to the skis, resulting in significant sentence reassessment. Other intervals from one month to one year have been deemed too long to permit valuation by purchase price. See United States v. Skinner, 11 CMR 807 (AFBR 1953). In a recent unpublished opinion, the United States

Army Court of Military Review held that the alleged value of a stereo and tape system had not been established by evidence of purchase price when the system had been purchased almost two years prior to the theft, and the tapes had been acquired over the previous six months. United States v. Fobbs, SPCM 11394 (ACMR 12 December 1975). In the same case, a ten month span between purchase and theft was found to be too great to permit the purchase price to be valid evidence of present value for two stereo speakers. Only "some value" was found for all the equipment, which was not before the trial court.

As is readily apparent, the problem of the purchase-theft interval is merely one of depreciation. The mark-up on most consumer items is enormous and depreciation begins as soon as the article leaves the shelf. Successful trial tactics in this area have involved asking the witness if he knows what depreciation is, or if he thinks the article was really worth the same when stolen as it was when he bought it weeks, months, or years before. Other questions might be framed in terms of repairs, maintenance schedules, the physical condition of the cabinetry ("Have you ever dropped it? Does it have any scratches? Did you ever loan it to anyone? Does anyone have permission to use it in your absence? Did anyone ever use it in your absence? Have you ever moved it or shipped it?") The questions should be tailored to the particular situation, but it is a rare witness who will state in open court that his radio is still worth what it was when he bought it. Even if he does refuse to budge, careful questioning will cause the trier of fact, be it judge or members, to draw on his own common knowledge and experience and will underscore the irrational nature of the witness's testimony. The same effect may be obtained by calling rebuttal witnesses.

The Nature of the Property

The nature of the property will govern its value at the time of theft. Any mechanical or athletic equipment, for example, will depreciate with use. Legitimate anti-ques or art objects may indeed increase in value, but cases involving such property are rare in the military. Remember that relief may be obtained only when the value is reduced below \$100.00, with additional relief obtainable if valuation is lowered below \$50.00. The difference between a stolen \$101.00 radio and a stolen \$99.00 radio is a dishonorable discharge, four years confinement at hard labor, and \$2.00! See Paragraph 127c, Manual, supra. Clothing is another prime subject for the barracks larceny. With the possible exception of "jeans" and other "used" items, nothing depreciates faster than last month's fad. If such a case arises, the number of times an article has been worn can effectively "impeach" a witness's testimony. Ask again about loans, cleaning, tears, snags, tailoring, and other changes from its original condition.

Government Property

When the property allegedly stolen is issued or obtained from Government sources, the official price list for that property at the time of the theft is admissible as evidence of its value. Paragraph 200(a)(7), Manual, supra. However, the property must be shown to have been in "price-list" condition at the time of theft. The same factors, age, use, and damage, are pertinent evidence of its condition, and the list price is not conclusive. The fact-finder, especially a court with members, must be reminded that the fact that a typewriter was issued by the Government does not prevent it from depreciating just like the one purchased from Sears. The more complex the equipment, the greater the likelihood of some mechanical failure. The questions should fit the equipment, but the general principles outlined above are applicable.

Market Value

The demand for like property at the time of theft is simply the market price at the time and place of theft. If that price cannot be determined, then the legitimate market value in the United States or its replacement cost, both determined as of the time of theft may be used. Again, a recent purchase price paid for an item of like quality is the key source for establishing a market price. If the recent purchase price is not discernible, market value may be established by anyone familiar through "training or experience" with the market value in question. Paragraph 200(a)(7), Manual, supra. The owner may testify as to its market value if he is familiar with its quality and condition. As noted above, even an owner's testimony may be discredited through careful cross-examination. This point raises the question of who is an "owner". In many cases the true owner may be the witness's parents, another relative, or just a good friend, who allows the witness to use the equipment. Only that true owner is competent to give opinion testimony of market value. Paragraph 200(a)(7), Manual, supra.

When one not the owner is testifying he cannot relate a price given to him by the owner, as such information is clearly hearsay. United States v. Bills, 13 CMR 407 (ABR 1953); Paragraph 139a, Manual, supra; see 5 Wigmore, Evidence Section 1361 et seq. (Chadbourn Rev. 1974). He must be qualified as an expert witness. When a witness, not the owner, has merely "priced" similar equipment once or twice in the past he will not be deemed to have formed a sufficient basis for an independent conclusion of value. Again, such testimony will be inadmissible as hearsay. United States v. Thornton, 11 CMR 667 (AFBR 1953); see United States v. Gray, 40 CMR 504 (ABR 1969). Only an individual qualified through training and experience with the market value of such property may offer such testimony. United States v. Boone, 36 CMR 586 (ABR 1965);

United States v. Bills, supra. This testimony may be attacked like that of any other expert witness's testimony through questions relating to training, experience, with the particular type or model of property, course of dealing, and by your own expert witness. Even an owner's testimony can be impeached through that of roommates, friends, the personal property file in the company, or any other witness who can demonstrate a familiarity with the property and its pre-loss condition.

When the Property is Before the Court

When the missing item has been recovered and is before the court, the fact-finder has the right to make its own judgment of value, without regard to testimonial or other evidence. United States v. Barker, supra; Paragraph 200(a)(7), Manual, supra. When the property is a radio, for example, proper questioning may elicit information that it was returned intact and that its general condition is the same as before the alleged theft. If, through pretrial investigation or witnesses' testimony, it is revealed that the radio was defective before the theft, play the radio for the court. No "\$85.00" radio will be worth that much if it fails to function properly as a radio. With articles of clothing, look for stains, rips, cleaning tags which may still be affixed, and other indicators of wear, and bring these matters to the court's attention. In other words, any defect or signs of wear which may be shown to have existed prior to the time of the alleged theft should be called to the court's attention.

When the Property is not Before the Court

Often the missing item cannot be recovered. In these cases the sole evidence of value will of necessity come from the victim's testimony. Sales slips, property receipts, cancelled checks, and other documents may be submitted by the prosecutor, but unless these items can positively be linked to the missing goods, they are inadmissible as evidence. Even if some record is admitted, as past recollection recorded, for example, it would not necessarily reflect a date-of-loss value. Just as when the property is before the court the owner's opinion may be attacked. Again, purchase date is of prime importance. Careful examination of witnesses is crucial in that the court will not have the opportunity to make its own independent judgment of the property's worth. As noted earlier, rebuttal witnesses also may be called to dispute the condition before loss.

Other Considerations

When value will be an element in a client's court-martial, the defense has an appraisal right when the goods are reasonably

available. In United States v. Cooper, (No. 31,452) USCMA
CMR (29 January 1976), the appellant's conviction
for two specifications of larceny was reversed and remanded to
the Army Court of Military Review. The military judge had
denied a defense motion, made during the Article 39(a) hearing,
to have the goods appraised at the accused's expense. The
equipment was no longer on post because it had been returned
to its owners, neither of whom were then in the service. The
witnesses returned to testify against the accused, but did
not bring the equipment. The military judge ruled that since
the property was not on post, it was not available for appraisal.
On remand, the Army Court of Military Review dismissed both
specifications. United States v. Cooper, decision on further
review, (ACMR 4 February 1976). See United States v. Potter,
14 USCMA 118, 34 CMR 330 (1963); United States v. Daniels, 11
USCMA 52, 28 CMR 276 (1959). This motion should be made at
trial or, undoubtedly, it will be lost as an appellate issue.

When the property has not been recovered or is otherwise
not before the court, a motion to dismiss after the close of
the government's case is proper. However, the situations in
which this motion may be made are rather limited. Some suggestions
on appropriate cases are: 1) when the owner does not testify; or
2) when the value cited by the owner is obviously erroneous, such
as a purchase of clothing several years removed and a refusal by
the witness to back away from a purchase-price valuation.

Often the prosecution will demand stipulations of fact,
particularly when guilty pleas will be entered. Several cases
have also been noted where stipulations have been entered in con-
tested cases. In many instances, a value will be stipulated
for the stolen goods. Counsel should be aware that this
valuation will have a substantial impact on sentence, just as
if it were a matter of proof. If stipulations are to be used
try to limit the agreed valuation to "some value", or the lowest
value possible. Without a doubt, the prosecution's valuation
will be based on the victim's statement alone. These opinions
are no more valid in a stipulation than they are from the
witness stand. Rarely will the judge make an in-depth inquiry
into the value as alleged, especially one contained in a
stipulation. Counsel should note the significance of this
seemingly innocent concession.

Conclusion

Even in those situations where the evidence of guilt is
overwhelming, defense counsel may give valuable assistance to
their clients by attacking the element of value in larceny
and related cases. Even if unsuccessful at trial, the appellate
record may be strengthened by aggressive action in this area.
If successful at trial, the client may be subjected to minimum

punishment, even in a general court-martial proceeding with a strong prosecution case. Each trial has two distinct parts. Success in the pre-sentencing stage may depend to a great extent on the factual findings of value made in the pre-findings stage. Lastly, the chances for clemency or appellate relief are significantly greater with a bad conduct discharge rather than a dishonorable discharge. These considerations should be remembered at all stages of a trial where value is a concern.

* * *

Note

In July 1975, The Judge Advocate General directed that all staff judge advocates ensure that judge advocate officers not be detailed as defense counsel until completion of an "apprenticeship" period as assistant trial counsel and trial counsel. The Judge Advocate General recommended that the apprenticeship period be long enough to ensure that counsel are equipped with the tools necessary to function effectively as defense counsel. Periods of two or three months service as an assistant trial counsel and six months service as a trial counsel were mentioned. Of course, these time frames were general guidelines and each officer should be judged independently. All senior defense counsel should ensure that all officers assigned criminal defense functions within their jurisdiction have served the necessary "apprenticeship". If they have not, the staff judge advocate should be informed and steps should be taken to rectify the situation.

* * *

Note

Counsel who may be encountering difficulty in staying current with recent decisions may want to consider individually subscribing to the advance opinions for the Court of Military Appeals and the Courts of Military Review. The price is \$20.00 a year, Address: The Lawyers Co-operative Publishing Company, Rochester, New York 14603. Specify that this is an individual request so that a separate account can be established.

Court of Military Appeals Opinions

United States v. Moore, 30,802, 9 April 1976

Before court members, the trial judge elicited testimony that the accused requested a lawyer after being advised of his rights. This is clear error. The government conceded such, but argued that specific prejudice must be found. The Court disagreed, citing the standard set forth in United States v. Ward, 23 USCMA 572, 50 CMR 837 (1975). Now, no specific evidence of prejudice need be found to compel reversal; "the error is not harmless unless the reviewing court can affirmatively find beyond a reasonable doubt that the error might not have contributed to the conviction." Judge Cook dissents.

United States v. Thomas, 29,934, 23 April 1976

Marijuana Dogs.

The fruits of a marijuana dog inspection were held inadmissible. Three concurring and widely divergent opinions are here presented for trial defense counsel analysis.

Judge Ferguson flatly holds that the use of marijuana dogs is a search under the Fourth Amendment and unreasonable here because not based upon probable cause.

Chief Judge Fletcher believes that the use of marijuana dogs during reasonable administrative inspections must be allowed because of military necessity. But the fruits from such an inspection should not be used in a criminal or quasi-criminal proceeding or as a basis to establish probable cause under the Fourth Amendment.

Judge Cook disagreed with the Chief Judge because his position would encourage commanders to abuse the inspection tactic and flatly disagrees with Judge Ferguson's position. Judge Cook bases his decision here on the narrow ground that the officer issuing the search warrant was misled about the dog's actions.

United States v. Uhlman, 30,635, 14 May 1976.

Jurisdiction - Forgery.

A serviceman's signature was forged onto a stolen check. The appellant was off duty, off base, and out of uniform when the offense was committed. The court overrules United States v. Morisseau, 19 USCMA 17, 41 CMR 17 (1969) because that case fails to draw the required analytical distinction between forgery and uttering a forged instrument. The victim was not the serviceman whose signature was forged and, hence, there was not a military victim. Applying the Relford factors, the court finds no service connection. Judge Cook dissents.

United States v. Henderson, 30,512, 21 May 1976.

Speedy Trial - Murder.

After defense delay, a total of 113 days passed in pre-trial confinement before trial. The Court dismisses (reluctantly because of the crime) under Burton. The government did not show extraordinary circumstances, though the crime occurred in a foreign country.

"[T] he facts in the record must support a determination that because of the serious or complex nature of the charges, due care required more than a normal time to gather the evidence." Chief Judge Fletcher dissents.

Court of Military Review Opinions

United States v. Simpson, SPCM 11744, 14 April 1976

Post-Trial Interview.

Trial defense counsel was never advised of his client's post-trial interview. The Court relies on United States v. McOmber, USCMA, CMR (2 April 1976), while recognizing the factual and legal distinctions, and holds the failure to deal with trial defense counsel at this stage to be error. A less stringent prejudice test is applied than in McOmber and no prejudice is found here. Issue was raised in the Goode rebuttal.

United States v. Powell, CM 433902, 29 April 1976

Speedy Trial - Burton.

One pretrial delay was partially attributed to the government because of delay in processing the accused's request for individual military counsel. In another delay, charged to the government, the detailed defense counsel went TDY for some schooling. Since this did not benefit the accused, the government is responsible, since it made no attempt to recall the defense counsel. A similar holding applied to some regular leave taken by the detailed defense counsel. Dismissal ordered.

United States v. Hawkins, SPCM 11648, 14 May 1976

Military Due Process.

The accused was denied the opportunity, after repeated requests, to consult with counsel for 62 days, most of which time was spent in pretrial confinement without charges being preferred. The government conceded error. Charges dismissed.