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# THE ADVOCATE

A Journal For  
Military Defense Counsel

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Vol. 9 No. 3

May-Jun 1977

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EDITOR'S NOTE: RAISING THE ADEQUACY OF TRIAL DEFENSE COUNSEL

As many trial defense counsel are all too painfully aware, it is not unusual for a former client to later allege inadequacy of representation no matter how well-tried the case. It is an easy allegation to make whenever the result (i.e., conviction) is less than that hoped for. Naturally, the most likely recipient of such an allegation will be the appellate defense counsel, who learns of the charge via comments recorded during the post-trial interview, or a letter written to the convening authority, Congressman, or the President, or frequently by direct communication with the client after conviction. Contrary to the views of some trial defense counsel, such communications are never acted upon precipitously. Current procedures employed in the Defense Appellate Division require that the following steps be taken before raising the adequacy of trial defense counsel as a matter of law before the appellate courts:

1. Appellate defense counsel first proceed to elicit specifics from the client as to the manner and extent of any alleged inadequacy. Normally, this is done by requiring the client to submit a sworn statement containing a "bill of particulars". It is standard procedure to advise such clients that allegations of inadequate representation may ultimately result in a waiver of attorney-client privilege; that the trial defense counsel will be contacted and allowed to respond prior to any decision to raise the matter as an error of law; and that inadequacy as a matter of law is seldom a "winning" error.

2. After the client provides the "bill of particulars" the action attorney evaluates the allegations with his branch chief and if it is determined that the client has raised any matters which might constitute a valid claim, a copy of the allegations are forwarded to the trial defense counsel for comment. If the client's allegations are clearly frivolous, the action attorney will so advise the client and take no further action. See Section 8.6 of the ABA Standards Relating to the Prosecution Function and the Defense Function.

3. In all other cases, trial defense counsel are asked to respond in writing to the allegations being leveled by the client. After the response is received, the action attorney and his branch chief consult once again. If all allegations of inadequacy are satisfactorily rebutted, the client is advised of this and informed that counsel will not proceed further. If, on the other hand, a valid

claim is made out, further consultation will be had with the branch chief as well as the Chief of the Defense Appellate Division prior to final decision. A decision to pursue the error is not made without the express permission of the Chief of the Defense Appellate Division.

Appellate defense counsel may not and do not solicit allegations of inadequate representation. Client satisfaction being what it is, charges of inadequacy are already abundant enough. Quite apart from that fact is the very real difficulty of perfecting even the most valid allegations. The standards applicable to the military criminal defense do not require a perfect defense. Trial defense counsel's performance will be tested to determine whether it comported with "the customary skill and knowledge which normally prevails" in other cases which come before the reviewing court. See United States v. Schroder, 47 CMR 430, at 433 (ACMR 1973), and cases cited and discussed therein. As that Court noted:

The majority of jurisdictions take the position that mere inexperience, or unskillfulness, lack of preparation or of interest, mistakes or errors of judgement, improper advise or trial strategy, are ordinarily insufficient to justify setting aside an otherwise valid conviction.

This, coupled with the reality that a claim of inadequacy will waive the attorney-client relationship, thereby raising the possibility that in his efforts to defend his performance at trial, the trial defense attorney may reveal formerly privileged matters which do little to aid the client's cause, makes reliance on the inadequacy of trial defense counsel a losing proposition for most appellate counsel in their quest to gain relief for their clients.

The investigative procedures currently being used by attorneys assigned to the Defense Appellate Division are aimed at eliminating all frivolous claims of inadequacy of trial defense counsel through a careful screening process. Trial defense counsel can assist in this process by active contact with the appellate defense attorney. While not always true, frequently the trial defense counsel is fully aware that a given client will "turn on him" as soon as they are out of the court-room. He should not be too surprised when he is later informed of this fact by the appellate defense counsel; nor should he be too alarmed--if the allegations are groundless. In all cases, he should cooperate fully in the appellate defense counsel's

investigation of the matter.

It is an unfortunate fact of life for criminal defense attorneys that allegations of inadequacy of representation are easily and frequently made. Realizing this, the Defense Appellate Division has established procedures to screen out the frivolous and unfounded claims. The perception held in the field by some practicing defense counsel that attorneys in this Division solicit and/or pursue claims of inadequacy regardless of their merit is simply unfounded. Nevertheless, all such claims must be investigated and evaluated, just as any other error of law. To do less is to abrogate the ethical responsibilities of the appellate defense attorney. See United States v. Palenius, 25 USCMA 222, 54 CMR 549, \_\_\_ MJ \_\_\_ (CMA 1977); United States v. Larnear, 3 MJ 76 (CMA 1977).

EDITOR'S NOTE: RULES CHANGE IN PROCEDURE FOR PETITIONING FOR EXTRAORDINARY RELIEF AT THE U.S. COURT OF MILITARY APPEALS.

Changes to the U.S. Court of Military Appeals Rules of Practice and Procedure, which become effective 1 July 1977, prescribe a specific form for Petitions for Extraordinary Relief (Rules 25, 26). While the substantive law concerning extraordinary relief has not changed (see "Extraordinary Relief," Vol 8, No. 1, Jan-Feb 1976, and "Update--Extraordinary Relief," Vol. 8, No. 6, Nov-Dec 1976, The Advocate), the Court of Military Appeals will now require that petitions be prepared in accordance with the following rules:

Rule 25. Petition for Extraordinary Relief, Appeal, Answer, and Reply.

(a) Petition for Extraordinary Relief or Appeal.

A petition for relief or an appeal from a denial thereof will be accompanied by proof of service on the party respondent and will contain:

- (1) A previous history of the case including whether prior actions have been filed or are pending for the same relief in this or any other court and the disposition or status of such actions;
- (2) A concise statement of the facts necessary to understand the issue presented;
- (3) A statement of the issue;

- (4) The specific relief sought;
- (5) Reasons for granting the writ;
- (6) The jurisdictional basis for the relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate review.

(b) Immediately on receipt of any such petition, the Clerk shall forward a copy of the petition to The Judge Advocate General for the service of which the petitioner is or was a member.

(c) Briefs. Each petition for extraordinary relief shall be accompanied by a brief in support of the petition, unless it is filed in propria persona. The Court may issue a show cause order in which event the Government shall file an answer. The petitioner may file a Reply to the Answer.

(d) Initial Action by the Court. The Court may, as the circumstances require, dismiss or deny the petition, order the respondent to show cause and file an answer within the time specified, or take whatever action is deemed appropriate. The Court may also direct The Judge Advocate General of the petitioner's service to furnish counsel to represent him and the respondent.

(e) Oral Argument and Final Action. The Court may set down the matter for oral argument. However, on the basis of the pleadings alone, the Court may grant or deny the relief sought or make such other order in the case as the circumstances may require.

Rule 26. Form of Petition for Extraordinary Relief, Answer, and Reply.

(a) Petition. A Petition for Extraordinary Relief will be substantially in the following form:

IN THE UNITED STATES  
COURT OF MILITARY APPEALS

_____, Petitioner )	PETITION FOR EXTRAORDINARY
v.	) RELIEF IN THE NATURE OF
_____, Respondent )	) <u>(Type of writ sought)</u>
	) Miscellaneous Docket No _____
	) (For Court use)

PREAMBLE

The Petitioner hereby prays for an order directing the Respondent to: (Specify in this preamble a very brief indication of the nature of the relief sought sufficient to alert the Court to the problem).

I

HISTORY OF THE CASE

II

STATEMENT OF FACTS

III

STATEMENT OF ISSUE

(Do not include citations of authority or discussion of principles. Set forth no more than the full question of law involved.)

IV

THE RELIEF SOUGHT

(State with particularity the relief which the petitioner seeks to have the Court order.)

V

REASONS FOR GRANTING THE WRIT

VI

JURISDICTIONAL STATEMENT

\_\_\_\_\_  
Petitioner

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Address & Phone Number

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed or delivered to the Court and the Respondent on \_\_\_\_\_.  
(date)

\_\_\_\_\_  
name

\_\_\_\_\_  
address & phone number

(b) Answer. The respondent's answer to the order to show cause, if ordered by the Court, shall be in substantially the same form as that of the petition, except that the Answer may incorporate the petitioner's statement of facts, add supplementary facts, or contest the statement. So far as the petitioner's statement of facts is not contested by the respondent, it shall be taken by the Court as representing an accurate declaration of the basis on which relief is sought. The Answer will be filed by the respondent within 10 days after service on him of the order requiring such answer, unless a different time for filing the answer is specified in the Court's order.

(c) Reply. A reply may be filed by the Petitioner within 5 days after the filing of the Answer.

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REQUESTING DEFENSE WITNESSES

Background

The Sixth Amendment to the U.S. Constitution provides, in part, that an accused in all criminal prosecutions ". . . shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor. . .". The term "all criminal prosecutions" includes courts-martial. The United States Court of Military Appeals has declared the military accused's right to compulsory process constitutionally (United States v. Manos, 17 USCMA 10, 37 CMR 274 (1967)), as well as statutorily (Article 46, Uniform Code of Military Justice, 10 USC Sec. 846) inviolate.

### The Procedure

Per Paragraph 115 of the Manual for Courts-Martial, United States, 1969 (Revised edition), the defense actually has three opportunities to secure the presence of a particular witness deemed to be "essential". As a first course of action counsel should submit to the trial counsel, in writing, the formal request for the witness and a statement containing (1) a synopsis of the expected testimony, (2) the reasons for the personal appearance of the witness, and (3) "any other matter showing that the expected testimony is necessary to the ends of justice." Second, if the trial counsel disagrees that the witness is necessary, the convening authority must determine whether the witness is required to appear at trial. Third, if the convening authority renders an adverse decision, the request may be renewed at trial. Counsel must be aware that unless the ruling of the convening authority is "plainly erroneous" (Manos, supra), failure to raise the witness request at trial normally constitutes waiver.

#### Who is an Essential Witness?

The only test sanctioned by the Court of Military Appeals to determine whether the Government must produce a defense-requested witness seems to involve two issues. It must be determined first whether the witness "may offer proof to negate the Government's evidence or to support the defense" (United States v. Sweeney, 14 USCMA 599, 34 CMR 379 (1964)); and, second, whether that proof is relevant and material. United States v. Carpenter, 24 USCMA 210, 51 CMR 507 (1976). Thus, arguments posed by the Government which deal with issues other than materiality and relevancy have been rejected by the Court. For example, in United States v. Carpenter, supra, the accused requested as a character witness the officer who had served as his company commander during the period of time when he allegedly committed the charged offenses. At the time of the request, the former commander was attending a military school at another post. At trial, when the defense counsel raised the issue before the military judge, the prosecutor stated that the request had been sent to the school, but the witness was "not available". The military judge denied the request because of "military necessity" in that the witness' schooling should not be interrupted.

Before the Court of Military Appeals, the Government argued that the trial judge's ruling was correct, and, alternatively, even if he did err, the accused was not prejudiced because two other character witnesses had testified for the defense and the parties had entered into a stipulation of expected testimony of the requested witness. The Court rejected these arguments and ruled that the military judge had applied the wrong standard in determining whether

the witness should have been ordered to appear. "Although 'military necessity' or various personal circumstances relating to a requested witness may be proper criteria to determine when his testimony can be presented", the Court held, "the sole factor for consideration in determining whether he will testify at all is the materiality of his testimony." Stressing that character testimony is relevant to questions of both guilt and an appropriate sentence, and that an accused's commanding officer "occupies a unique and favored position in military proceedings," the Court decided that the "compelled stipulation of testimony. . . (was) not an adequate substitute for the personal appearance of the witness."

In the Manos case, the Court also refused to apply a different standard when the defense witness was requested for extenuation and mitigation only, and held that an accused's right to compulsory process does indeed extend to such a witness. See also United States v. Ledbetter, 25 USCMA 51, 54 CMR 51 (1976), and United States v. Chestnut, 25 USCMA 182, 54 CMR 290 (1976), applying a similar rationale to witnesses requested at Article 32 hearings.

#### The Compulsory Question

When the trial is held in the United States and the requested witness (either a citizen or a foreign national) is physically present in the United States, Article 46, Code, provides for securing his presence at the proceedings. Regardless of where the trial is held, when a requested witness is a member of the military, world-wide process power exists to secure his presence. Difficult problems arise, however, when the trial is overseas and the requested witness is an American civilian who is present in the United States, or conversely, trial is held in the United States and the American civilian witness is overseas, or both the trial and such witnesses are overseas. United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974); and United States v. Boone, 49 CMR 709 (ACMR 1975) are generally cited for the proposition that the military does not have the power to compel attendance of these witnesses in a court-martial.

In Daniels, the appellant argued that certain provisions of 28 U.S.C. Section 1783(a), and Rule 17(e)(2) of the Federal Rules of Criminal Procedure would permit a court-martial abroad to compel American citizens abroad to testify before it. Writing for the Court, Senior Judge Ferguson concluded that to so hold would be to infringe upon an area of responsibility reserved to the legislative branch of Government. In Boone, the Army Court of Military Review held that a court-martial likewise lacked the power to summon an American citizen residing in the United States to a court-martial abroad. The Court of Review, relying on Daniels, also opined that

legislative, rather than judicial, change was necessary to confer that power.

Daniels and Boone continue to be the law, but their continued validity need not be forever accepted. Concurring in the result in Daniels, Judge Quinn makes a persuasive argument that language contained in 28 USC 1783(a) would, in fact, authorize a court-martial to compel the attendance of American civilians in such cases. Trial defense counsel can make the same argument in an appropriate case. Finally, it should be noted that the membership of the Court of Military Appeals has changed completely since Daniels was decided. Judge Quinn's argument might very well be accepted if renewed before the new membership of the Court.

Despite the holdings in Daniels and Boone refusing to apply compulsory process to requested civilian witnesses, those same cases can nevertheless be cited for the proposition that if such a witness voluntarily desires to appear in behalf of the accused and the defense counsel can meet the burden of demonstrating that the witness is essential, the Government must produce him. It is suggested that if this situation arises, counsel should obtain an affidavit from the requested witness which indicates his voluntary consent to attend the trial, and present it to the trial counsel, convening authority, or military judge, depending on the stage of the proceedings. If the witness is not subject to process and refuses to voluntarily appear, trial defense counsel should consider requesting a change of venue, where the witness would be subject to process. United States v. Daniels, supra; United States v. Nivens, 20 USCMA 420, 45 CMR 194 (1972). Finally, if the witness is found to be essential, but remains outside the realm of compulsory process, the proceedings must be abated. United States v. Daniels, supra.

#### Litigating the Issue at Trial

If neither the trial counsel nor the convening authority agree to produce the requested witness, the issue must be litigated at trial in order to preserve same for appeal. It is imperative that the following be made a matter of record:

1. After making the motion for appropriate relief, introduce the written request and statement, showing compliance with Paragraph 115, Manual, supra.
2. If the trial counsel has determined that the requested witness is essential, but his decision is overruled by the convening authority, litigate this point. Frame your argument around the point that the Manual does not provide for such

intervention. See fn. 8, United States v. Carpenter, supra, at 509.

3. Demonstrate prejudice to the accused on the record. For example, if the accused is charged with a crime of violence, explain to the trial judge that the accused's recently PCS'd roommate would testify that the accused's reputation was that of a peaceful, law-abiding citizen. If the accused is going to take the stand on the merits, stress that his recently ETS'd squad leader would testify favorably as to the accused's truth and veracity.

4. After making your point, require the Government to justify its actions. Do not be satisfied with a statement by the convening authority that he simply considered the expected testimony "irrelevant". Call the convening authority as a witness to explain why he considered that testimony irrelevant.

5. Ask for special findings. Be sure to phrase questions in a factual context. If you believe that the military judge has denied your request because the expected testimony is cumulative, ask the judge to say that on the record. He may apply the wrong standard or simply err in his concept of materiality and/or relevancy.

6. If the military judge denies the request to produce the witness, but allows a stipulation, do so, but only under protest. Make it clear that you are so stipulating only to get important evidence before the court. Explain that you consider it your only alternative and stress that it is a poor substitute for oral testimony. This should preserve the issue for appeal.

### Conclusion

An accused's Sixth Amendment right to the attendance of requested witnesses at his trial is a valuable right. It can and should be used to its full potential in a contested case and should never be lightly bargained away in a guilty plea case. Finally, it is apparent that the United States Court of Military Appeals envisions a system which (in day-to-day practice, as opposed to theory) allows for equal access to witnesses by both sides. See United States v. Carpenter, supra. The present system, interposing as it does, the partisan advocate for the Government in any defense request for witnesses (see paragraph 115, Manual, supra) frequently results in unequal access. By vigorously litigating a client's right to compel attendance of defense witnesses, trial defense counsel can hasten the day when the system works to the equal benefit of all.

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## DEFENDING THE VACATION OF A SUSPENDED SENTENCE

On 23 May 1977, the Court of Military Appeals decided what could be termed landmark decisions for the military in United States v. Bingham 3 M.J. 119 (CMA 1977), and United States v. Rozycki 3 M.J. 127 (CMA 1977). By holding the due process requirements of Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972), applicable to the military, the two decisions will significantly alter the manner in which the traditional vacation proceeding has been conducted. It is now clear that the convening authority making the final revocation decision must make a written statement as to the evidence relied on and the reasons for vacating the suspended sentence, thus giving defense counsel a solid basis on which to effectuate an appeal. The Court also seems to hold that, unless the probationer is confined pending the vacation proceeding, only one hearing, conducted by the special court-martial convening authority himself, is required. Only the special court-martial convening authority is statutorily empowered to act as the revocation hearing officer and a proceeding conducted by his appointee is improper. In Rozycki, the Court held that vacation proceedings toll the running of the suspension period, thereby substantially modifying the requirements of paragraph 97b, Manual for Courts-Martial, United States, 1969 (Revised edition).

The Court of Military Appeals did not have occasion to consider two of the Morrissey-Gagnon procedural safeguards in either Bingham or Rozycki. These due process mandates, the right to have a "neutral and detached" hearing body hear the evidence and if supportive of a probation violation, determine whether the suspended sentence should be vacated, are of vital importance to counsel defending the probationer. This latter requirement of a neutral and detached hearing body is especially important in light of Judge Perry's majority opinion in Bingham where he stated:

Thus, fact-finding and discretionary powers of a quasi-judicial nature are lodged in the revocation hearing officer, and, as such, we believe they must be exercised by the statutorily empowered official, unless that person is otherwise constitutionally disqualified. (emphasis added) (footnote omitted). Bingham, at 124.

### Neutral and Detached Hearing Body

As one of the minimum due process requirements to be afforded the probationer at his final hearing, the Supreme Court directed that the case be heard by "a 'neutral and detached'

hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers." Morrissey, supra, at 489. The Court expressed no opinion as to what qualities made a hearing body "neutral and detached" other than to analogize it to a parole board.

In Gagnon, the Court elaborated on those qualities of a parole officer.

"While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety."1/

After restating the purposes of the revocation hearing, to determine whether a condition of parole was violated and, if so, whether the probationer should be incarcerated, the Court noted that "the parole officer's attitude toward these decisions reflects the rehabilitative rather than punitive focus of the probation/parole system:

' . . . While presumably it would be inappropriate for a field agent never to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.' (emphasis original).2/

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1/ 411 US at 783-84, quoting F. Remington, D. Newman, E. Kimball, M. Melli, and H. Goldstein, Criminal Justice Administration, Materials and Cases 910-911 (1969).

2/ Id. at 785.

The military revocation hearing is conducted by the special court-martial convening authority. While the typical special court-martial convening authority no doubt recognizes his dual duty, that to the welfare of a member of his command and his concomitant obligation to insure a safe and disciplined military command, it can hardly be said that the typical commander's concern for the probationer-soldier, already convicted and sentenced for breaking military law on one occasion, overrides his concern for the welfare of his military community. Unless the Army probationer is a member of a command specializing in the retraining or rehabilitation of prisoners, he is likely to face a hearing officer with no training in criminal corrections and rehabilitation. In short, few military hearing officers will have those attributes ascribed by the Gagnon Court to parole agents.

The issue of whether a commander can act as a neutral and detached magistrate when deciding whether to grant the authority to search a member of his command pursuant to probable cause is presently pending before the Court of Military Appeals. Defense counsel should insure that convening authorities conducting vacation hearings are neutral and detached, or challenge them on the record.

Should the hearing officer, or the special court-martial convening authority be precluded from conducting the revocation hearing because he does not meet the constitutional requirements of a neutral and detached hearing officer, the problem is readily apparent. Someone, presumably the ultimate decision maker, the general court-martial convening authority, must then act as the revocation hearing officer. The language of Article 72 of the Code does not provide for any delegation of responsibility for holding vacation of suspended sentence hearings. Of course, the general court-martial convening authority could be found to be constitutionally disqualified for the same reasons as the special court-martial convening authority in some instances. He can also be disqualified from acting as the ultimate decision-maker in cases where immunity, for instance, has been granted a government witness. Indeed, it is possible that without legislative intervention, there will be no statutorily or constitutionally qualified official to conduct vacation of suspended sentence hearings. See, Bingham at 124, fn 13.

While the convening authority will be able to make objective findings of fact in most instances, the question of whether the soldier has violated probation is but one side of the coin.

The other is should the soldier "be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" Morrissey, supra, at 480. The military, like the state, has an interest in making certain that it does not unnecessarily interrupt the probationer's rehabilitative efforts. Gagnon, supra, at 755. An objective view by someone not constantly concerned with the good order and discipline of his command, as is a commanding officer, is dictated by the requirement of a "neutral and detached" hearing body.

### The Right to Confrontation

The Department of the Army message expanding the probationer's rights in light of Morrissey stated the "[probationer] will be given the opportunity to confront and cross-examine adverse witnesses (unless good cause is shown)"<sup>3/</sup>. No mention is made of what good cause will deny the probationer the right to confrontation. Morrissey and Gagnon held the probationer's due process rights at the final hearing included "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)". Morrissey and Gagnon, both supra, at 489, 786. No definition of good cause was given.

To glean some insight into what conditions may preclude the probationer from confronting and cross-examining his accusers, reference should be made to the requirements necessary to insure the probationer due process at his preliminary revocation hearing. In addressing this issue, the Morrissey Court held that "on request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination." Morrissey, supra, at 487.

Thus it appears the right to have adverse witnesses present is contingent only on the request of the accused and such position should be advocated. Only when a determination has been made that

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<sup>3/</sup> DA Message 1972/12992, reprinted in The Army Lawyer, Vol. 3, No. 1 (January, 1973), at 13.

the government's witness risks harm can the probationer's fundamental constitutional right be abridged. Defense counsel should be prepared to combat the argument that disclosure of an informant, especially in drug cases, always opens the informant up to potential harm. Without clear and convincing evidence, noted on the record, that immediate harm to the informant is a reality, not a potentiality, the request to confront the informant should not be denied.<sup>4/</sup>

As the Manual compares vacation proceedings to Article 32, Uniform Code of Military Justice investigations, recent Court of Military Appeals pronouncements on the availability of Article 32 witnesses should be examined. In Leadbetter, United States v. Leadbetter, 25 USCMA 51, 54 CMR 51, (1976), the court held the availability of witnesses at Article 32 investigations "requires a balancing of two competing interests. The significance of the witnesses testimony must be weighed against the relative difficulty and expense of obtaining the witness' presence at the investigation." Id. at 61. See also, United States v. Leadbetter, 25 USCMA 51, 54 CMR 51, \_\_\_\_\_ M.J. \_\_\_\_\_ (1976) at 61. See also, United States v. Chestnut, 25 USCMA 182, 54 CMR 51, 290, \_\_\_\_\_ M.J. \_\_\_\_\_ (1976).

However, unlike the Article 32 investigation which is followed by a constitutionally protected court-martial proceeding before the accused is deprived of liberty and property, the probationer has only one chance to retain his fundamental rights in the vacation of a suspended sentence process. Therefore, a higher standard than that of determining the availability of Article 32 witnesses should be employed. Counsel should urge that materiality is the sole criterion for producing the requested witness. United States v. Willis, 3 M.J. 94 (CMA 1977); United States v. Carpenter, 24 USCMA 210, 51 CMR 507, \_\_\_\_\_ M.J. \_\_\_\_\_ (1976). Absent a showing by the government with clear and convincing evidence, that risk of harm to this witness is a reality, "the Government must either produce the witness or abate the proceedings." Carpenter at 509.

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<sup>4/</sup> For cases dealing with disclosure of informants, see Roviaro v. United States, 353 US 53 (1957); United States v. Ness, 13 USCMA 18, 32 CMR 19 (1962); United States v. Miller, 43 CMR 671 (ACMR 1971)

## Conclusion

While our Court went far in addressing the constitutionality of the Code's vacation of suspended sentence procedure, several areas remain ripe for litigation. In addition to the two areas this Note has addressed, the matter of how much advance notice of the hearing is due the probationer and his counsel remains unsettled. The Rozycki decision however has removed the convening authority's time requirements of paragraph 97b, Manual from the defense counsel's arsenal. Consequently, counsel should have an easier time getting sufficient time to fully prepare for the vacation proceeding than has been true in the past with the convening authority facing the time strictures of paragraph 97b, Manual. Problems may remain as to the number of hearings required when the probationer is not confined as a result of the alleged commission of a new offense or conviction of another offense, but is arrested and placed on a tight administrative restriction, tantamount to confinement, with his freedom substantially impaired. The Court of Military Appeals has construed some provisions of the Code and Manual strictly and others liberally in the vacation of a suspended sentence area. The procedures set forth in the Code and Manual should be read closely in light of Morrissey and Gagnon, and now Bingham and Rozycki, in order to afford your client, the probationer, all the process to which he is due.

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## RECENT OPINIONS OF INTEREST

### COMA OPINIONS

#### PRETRIAL AGREEMENTS

United States v. Lanzer, 3 M.J. 60 (CMR 1977).

Appellant entered into a pretrial agreement in which the convening authority agreed to suspend an adjudged punitive discharge. At a post-trial interview, appellant made statements inconsistent

with his plea of guilty. Based on this interview, the plea was held to be improvident and a second trial was ordered. At that trial, appellant entered a plea of not guilty, was acquitted of one charge, but was sentenced to a bad conduct discharge on the remaining charge. That sentence was affirmed. The Court reversed. The agreement was written in terms of pretrial and trial actions and the post-trial action of the convening authority did not relieve him of his obligation to suspend the bad conduct discharge.

#### ILLEGAL RESTRICTION

United States v. Robinson, 3 M.J. 65 (CMA 1977)

Appellant was placed in a Retraining Squadron to complete a sentence to confinement. Breach of administrative restriction was cause of the charges. The violations occurred after appellant had completed service of his sentence. As applied to appellant, the restriction regulation was an unlawful extension of his court-martial sentence, for he was comingled with sentenced prisoners and was not merely subject to retraining. Appellant's stated desire for a favorable discharge did not constitute implicit consent to enter the retraining program. The Government must prove a waiver of appellant's right to be released after serving his term of confinement.

#### APPEAL TO COURT OF MILITARY APPEALS

United States v. Larnear, 3 M.J. 76 (CMR 1977).

Constructive service of the decision of the Courts of Military Review, while not itself unconstitutional, is a matter of statutory concern and Article 67(c), UCMJ calls for actual notice on the accused before the 30 day period to petition the Court of Military Appeals begins to run.

The problem of service most often arises, as in this case, when the appellant is on excess leave. To meet this problem, the Court sanctioned actual notice through counsel as well as the accused so long as the accused has designated counsel as his agent for this purpose. Advice to the accused in exercising such a power of attorney is the function of the trial defense counsel. See United States v. Palenius, 25 USCMA 222, 54 CMR 549, \_\_\_ M.J. \_\_\_ (1977).

Before and after a decision by a Court of Military Review, the trial defense counsel and his successors have the obligation to advise the client of his right to further appeal and to ascertain the client's desires. If the client is unavailable following the CMR decision, the attorney can act in accordance with the previous grant of authority and file what is necessary. Counsel has an ethical obligation to urge upon the client "what he perceives to be the best course under all the circumstances." Included within this principle, is the obligation to proceed with an appeal which the client desires, though it may not be meritorious in the attorney's mind. The procedure to be followed in such a case should conform to that delineated in Anders v. California, 386 U.S. 739, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967).

#### ATTENDANCE OF WITNESSES

United States v. Willis, 3 M.J. 94 (CMA 1977)

Even at a sentence rehearing, when the witnesses had personally testified at the original trial, the defendant had a right to the personal attendance of the same four relevant and material character witnesses. Military convenience cannot deny this right guaranteed the accused through the Sixth Amendment and Article 46, UCMJ.

#### CHARGING UNDER ARTICLES 134 AND 92, UCMJ

United States v. Jackson, 3 M.J. 101 (CMR 1977)

The Court held that the rule of United States v. Courtney, 24 USCMA 280, 51 CMR 796, \_\_\_ M.J. \_\_\_ (1976) is to be applied prospectively (only to cases tried or retried after 2 July 1976). The Court attempted to clarify any confusion by stating that Courtney held that charging under Article 134 is unconstitutional when virtually identical conduct is also punishable under Article 92. The Court also stressed that regulatory amendment does not necessarily cure the equal protection infirmities in drug charging. In dissent, Judge Cook called for retroactive application of Courtney.

#### RULE 34, UNIFORM RULES OF PRACTICE

United States v. Kelson, 3 M.J. 139 (CMR 1977)

This rule, which requires that all motions be disposed of at one preliminary hearing and called for waiver for failure to supply proper notice, is inconsistent with Paragraph 67a, Manual and also is not promulgated by proper authority. As such, the Manual must control.

### THIRD PARTY CONFESSION - FAIR TRIAL

United States v. Johnson, 3 M.J. 143 (CMA 1977)

The appellant was denied due process when a third party confession was ruled to be inadmissible, after that third party pleaded the Fifth Amendment at appellant's trial. The Court held that the trial was not fair where this trustworthy confession was excluded and where the evidence supporting the conviction was circumstantial. In the future, the Court said such a question can be decided on grounds short of constitutional dimensions - as a statement - against-penal-interest.

### CHARGE UNDER ARTICLE 92(1) - PROOF OF REGULATION

United States v. Williams, 3 M.J. 155 (CMA 1977)

The failure of the trial counsel to either introduce a copy of AR 600-50 or request the trial judge to judicially notice same and the military judge's failure to indicate that he took judicial notice amounted to a failure of proof of the charge of violation of the regulation. Such an essential fact cannot be assumed.

### FEDERAL OPINIONS

#### DOUBLE JEOPARDY

Commonwealth v. Bolden, 21 Cr L 2159 (Pa. Supr.Ct. 1977)

The basic purposes of the Double Jeopardy Clause can only be fulfilled if an immediate appeal of denial of a motion to dismiss on the jeopardy claim is permitted, before the second trial begins. Also, actions by judge or prosecutor which are intentionally or grossly negligent should bar retrial.

### RECENT GRANTS OF REVIEW OF INTEREST

#### TAMPERING WITH DEFENSE WITNESS - DENIAL OF MISTRIAL

United States v. Thompson, Docket Number 34,117,  
Petition granted, June 3, 1977.

While waiting to testify, a defense witness was taken by the CID at the instigation of the trial counsel, and questioned in an allegedly threatening, coercive manner as a result of which the witness fled the courthouse. Upon his return, ten days later, he

was a more reluctant witness and his actions caused at least one court member to consider him to be unreliable. Was the defense motion for mistrial improperly denied?

#### SEVERANCE

United States v. Wright, Docket Number 33,614,  
Petition granted May 6, 1977

Was it prejudicial error when the trial judge failed to grant appellant's motion to sever, where the motion was supported by good cause, and the military judge sitting alone received into evidence a pretrial statement of the co-accused without deleting incriminatory hearsay references to appellant?

#### ASSIMILATIVE CRIMES

United States v. Wright, Docket Number 33,614,  
Petition granted May 6, 1977

The offense of unlawful entry under the Code does not encompass automobiles. Automobile thefts can be charged under Articles 121 or 109. Is the assimilative Crimes Act inoperable (Section 30.04 of the Texas Penal Code) because Congress preempted the area?

#### DENIAL OF TRIAL BY COURT MEMBERS

United States v. Wright, Docket Number 33,614  
Petition granted May 6, 1977

Did the military judge abuse his discretion by refusing to permit appellant to withdraw his request for trial by military judge alone where granting the request would not have delayed the proceedings or prejudiced the Government's case.

#### RECUSAL

United States v. Wright, Docket Number 33,614  
Petition granted May 6, 1977

Was it prejudicial error when the trial judge failed to recuse himself after a challenge for cause when he had been the staff judge advocate during a substantial portion of the processing of appellant's case?

ADMISSIONS - DENIAL OF COUNSEL

United States v. Hill, Docket No. 33,980  
Petition granted May 8, 1977

At the initial interrogation, appellant refused to answer questions and asserted his right to counsel. Nine hours later the same investigator procured an admission, without inquiring whether an attorney was representing the appellant at the time and without having given any assistance to the appellant in obtaining one. Was counsel effectively waived?

CONFESSIONS

United States v. Kelley, Docket No. 34,013,  
Petition granted May 16, 1977

The sergeant in charge of MILPERCEN Records Review Unit suspected Captain Kelley of removing an Article 15 from his file and questioned him without giving Article 31 warnings. Was the sergeant in a "position of authority" within the meaning of United States v. Dohle, 240 USCMA 34, 51 CMR 84, \_\_\_ M.J. \_\_\_ (1975) which required administration of rights warnings?

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FDS SEMINARS APPROVED FOR CLE CREDIT BY  
WISCONSIN AND MINNESOTA

The Boards of Continuing Legal Education for the State Bars of Wisconsin and Minnesota have approved the Field Defense Services counsel seminars for use towards mandatory continuing legal education credits. Wisconsin has granted up to 8.0 hours and Minnesota has approved up to 6.5 hours. Actual attendance by the individual lawyer is the determinative factor.

Application for CLE credit is currently pending before the State Bar of Iowa.

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