

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

Defense Appellate Division, US Army Judiciary
Washington, D.C. 20315

Vol. 1 No. 7

September 1969

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PRETRIAL AND TRIAL DISCOVERY IN THE MILITARY

The Military Justice Act of 1968 and new Article 39(a) of the Uniform Code of Military Justice should bring a renewed interest in the subject of pretrial and trial discovery in the military. Omnibus discovery motions should be routine matters taken up at pretrial conferences and counsel should be aware of new approaches to criminal discovery so as to utilize them most effectively at the trial level. Defense counsel should not rely solely on the good faith of the prosecutor, or the rapport between the parties which often characterizes trial by court-martial, but instead should make diligent efforts to obtain maximum discovery of items which might not be known even to the prosecutor; these efforts should be made a part of each trial record.

Material Exculpatory Evidence

At each pretrial session, there should be an automatic motion made by the defense for the production of all material exculpatory evidence [the trial judge, or the defense counsel, not the prosecutor, should decide what is "exculpatory"] in the possession of the

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trial counsel. Brady v. Maryland, 373 U.S. 83 (1963). The trial counsel should also be asked to disclose the names and current locations of all persons whom he plans to call as witnesses, Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), as well as the names and current locations of "all persons who have a knowledge of the case". United States v. Hardy, F.R.D. (D.D.C. 1968). The defense counsel should not rely on the list of witnesses on the first page of the charge sheet, since it is rarely accurate or complete. Paragraph 44h, Manual for Courts-Martial, United States, 1969.

Statements of the Accused

Generally speaking, statements of the accused are discoverable at the Article 32 investigation. If no statement of the accused is used at the Article 32 investigation, however, a general discovery motion should be made for such statements, if there is any indication that they exist, at the pretrial session. See generally Kaufman, Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts, 57 Colum. L. Rev. 1113 (1957); See Fed. R. Crim.P. 16(a) (1); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964). Discovery of a co-defendant's statement should also be sought here. Fed. R. Crim.P. 16(b); cf. Bruton v. United States, 391 U.S. 123 (1968).

It should not be assumed that since there is a typewritten formal statement of the accused in the file that no further discovery motions are needed. Quite often CID agents retain handwritten statements or notes in addition to formal statements. In the event that even the trial counsel is unaware of the existence of such statements, the CID case investigator should be called as a witness and the method in which he took the statement should be explored in depth.

Statements of Witnesses

Under the Jencks Act, 18 U.S.C. § 3500 (1964), the government must produce, on motion of the defense, any statement [signed or adopted, or a recording or a transcription which is substantially verbatim] of any

witness for the United States, after the witness has testified on direct examination. Oral summaries have so far been deemed non-discoverable. Palermo v. United States, 360 U.S. 343 (1959). The Jencks Act applies to the military, United States v. Walbert, 14 USCMA 34, 33 CMR 246 (1963), but is rarely invoked. There are two possible explanations for the sparse use of the Jencks Act. Either such statements are automatically turned over to the defense before trial without a motion (or are made part of the Article 32 investigation) or counsel are unaware of the applicability of the Jencks Act.

There can be no doubt that in the normal case, statements of witnesses are available to the defense long in advance of trial. However, as in the case of statements of the accused, CID agents or other investigative personnel often retain other formal or informal statements of witnesses which are not submitted even to the trial counsel, and on rare occasions, have tape recordings. See, e.g., United States v. Augenblick, 398 U.S. 348 (1969). Thus, counsel should explore these avenues of discovery at trial. It should be remembered that the Jencks Act applies to any statements including those taken by military intelligence personnel, or command personnel. Finally, if a statement cannot qualify as "substantially verbatim", a motion should still be made under Brady v. Maryland, supra. See Felton v. Rundle, F.2d ____, 5 CrL 2194 (3d Cir. 1969) (en banc) (Biggs, J., dissenting).

Statements of Non-Witnesses

Statements of non-witnesses, not discoverable under the Jencks Act, may be discoverable under Brady v. Maryland, supra, if they can otherwise qualify as material exculpatory evidence.

Documentary Evidence, Laboratory and Medical Reports, Official Records

Very often only preliminary reports or summaries are available to the defense counsel at the Article 32 investigation. Thus, as part of the general discovery

motion made at the Article 39(a) session, a motion should be made to produce final laboratory and medical reports, official records or other documentary evidence, photographs and the like which the government plans to use at trial, or which may be helpful to the preparation of the defense case. A similar motion may be made under the federal rules under Fed. R. Crim. P. 16(a)(2), upon a showing of materiality and reasonableness. [This showing is apparently unnecessary for tangible items taken from the accused or from others by seizure or process.] The items need not be specifically described, and the items may be either evidentiary or may lead to evidence.

CID "Reading File"

One of the most valuable documents to effective pretrial preparation by the defense is the CID "reading file." This is usually a handwritten chronology detailing every action taken by the case investigator and is usually physically located in the investigator's case file. Defense counsel can generally anticipate difficulty in gaining access to this file. We suggest several approaches. First, a demand may be made to the Article 32 investigating officer to order production of the file for the purposes of completing his investigation, see Paragraph 34, Manual, supra.

If this is fruitless, a motion should be made to the military judge to produce the file at the Article 39(a) session. The motion may be laid as a general discovery motion for documents and other tangible objects, but may not be successful on this ground. Fed. R. Crim. P. 16 contains a specific exception limiting production of "internal government documents made by government agents in connection with the prosecution of the case." [This is only a pretrial exception, however.] We question whether the CID file so qualifies, but counsel should be aware of this roadblock. The file may nevertheless be discoverable as a Jencks statement if it otherwise qualifies. Another approach is to call the CID agent as a witness during the pretrial session to testify either as to a search or as to an interrogation, and then ask the agent whether he made any informal notes about the warnings administered, the time, items seized and the like. These notes should all be

found in the reading file. Perhaps the best ground is again Brady v. Maryland, supra, for reading files almost invariably contain undeveloped leads, and items which would provide good defense ammunition for cross-examination.

Finally, it should be noted that under the American Bar Association's Minimum Standards for Criminal Justice, the reading file would be discoverable if it "tended to negate the guilt of the accused . . . or would tend to reduce his punishment." The ABA "work product" exception is much narrower than is the federal rule's. See ABA, Standards Relating to Discovery and Procedure Before Trial 14, 16.

Again, the trial counsel should not be permitted to determine what is material to the defense. Jencks v. United States, 353 U.S. 657 (1957).

Identity of Informers

There has always been a great reluctance to permit discovery of the identity of informers, but see Roviaro v. United States, 353 U.S. 53 (1957), because of their great utility in law enforcement. The Supreme Court has ruled that the identity of an informer must be divulged where his information was relied upon to establish probable cause for a search, McCray v. Illinois, 386 U.S. 300 (1967), but the ABA Standards, supra, provide that his identity may be concealed where it is a "prosecution secret", where lack of disclosure will not infringe upon the "constitutional rights" of the accused, and where he will not be called as a government witness.

Military informers most often show up in black-marketing and narcotics-type offenses. In the latter case, they will often form a basis for probable cause to search, and thus their identity would be discoverable under McCray, supra. In any event, where an informer is involved, the trial judge should be asked to conduct a hearing, in camera if necessary, to determine whether the government's failure to identify the informer will infringe upon the "constitutional rights" of the accused.

"Field 201" Files

There seems to be no question in the military as to the right, indeed the duty, of the defense counsel to inspect the "field 201" file of his client. Cf. United States v. Rowe, 18 USCMA 54, 39 CMR 54 (1968). However, the right of the defense to inspect the "201" files of prospective defense or government witnesses, or of court members, is not as clear. There have been cases where the trial judge has ordered such production, see, e.g., United States v. Safford, No. 21,929, USCMA, CMR (granted 12 August 1969). Since discovery of criminal records of government witnesses is now authorized by the new federal rules, and recommended by the American Bar Association, at least this much of the witness's "201" file should also be discoverable in the military.

Omnibus Discovery Motion

At least one federal district authorizes, and the American Bar Association sanctions, the use of an omnibus discovery motion at pretrial conferences held pursuant to Fed. R. Crim. P. 17.1 [similar to Article 39(a), UCMJ.]

In this motion, the defense may ask the prosecution:

1. to state whether an informer was involved, and whether the privilege of non-disclosure is claimed;
2. to disclose evidence favorable to the defendant on the issue of guilt or sentence;
3. to disclose whether it will rely on prior acts or convictions for proof of knowledge or intent;
4. whether any expert witnesses will be called, and to disclose their identity, qualifications, subject and report;
5. to supply any reports or tests of physical or mental examination in the control of the prosecution or obtainable through due diligence;

6. to supply any reports of scientific tests, experiments, comparisons and the like;
7. to permit inspection and/or copying of books, papers, documents, or photographs which were obtained from the defendant or which will be used at trial;
8. to supply information concerning prior convictions of government witnesses;
9. to supply any information the government has concerning entrapment;
10. to inform the defendant whether there has been any electronic surveillance or leads obtained by electronic surveillance.

See generally ABA, Standards Relating to Discovery and Procedure Before Trial, 138; National Defender Project, Defender Newsletter, Vol. IV, No. 4, p. 45.

It has been anticipated, and is in fact the practice in many federal jurisdictions, that Jencks statements will be delivered to the defense before trial, often at the pretrial conference under F.R.Crim.P. 17.1.; See Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L.J. 1276, 1294 (1966); Ogden v. United States, 303 F.2d 734 (9th Cir. 1962).

Finally it should be noted that both under the federal rules and the ABA Minimum Standards, there is a continuing duty on the prosecution to disclose material to the defense which either qualifies as material exculpatory evidence, Giles v. Maryland, 386 U.S. 66 (1967), or which comes within the terms of a prior discovery order or production request.

THE NEW MILITARY GUILTY PLEA PROCEDURE -- A PROBLEM

On 29 August 1969, the Court of Military Appeals revised the military guilty plea procedure to incorporate recent Supreme Court mandates. In United States v. Care, No. 21,983, USCMA, CMR (decided 29 August 1969), the Court held that before a guilty plea could

be accepted, the trial judge must (1) explain each element of the offense charged to the accused in order to determine that the plea is knowing and intelligent, and (2) "question the accused about what he did or did not do, and what he intended".

The Court purported to follow McCarthy v. United States, 394 U.S. 459 (1969) and Boykin v. Alabama, 395 U.S. (1969). There is, however, one essential difference between McCarthy, Boykin and Care, a difference which may have been overlooked by the Court of Military Appeals.

It is quite clear that under Fed.R.Crim. P. 11, the trial judge must personally address the accused to ascertain "that the plea is made voluntarily and with understanding of the nature of the charge and the consequences of the plea." This, the Supreme Court held, was a mandatory rule in the federal courts, and since it was of constitutional dimensions, applied equally to the states. The federal rule goes on, however, to provide that a plea may not be accepted unless the court is "satisfied that there is a factual basis for the plea." This half of the rule apparently does not apply to the states. Boykin, supra.

The essential difference between McCarthy and Care is that in the military courts, the trial judge must ask the defendant personally "what he did or did not do" in order to establish the factual basis for the plea, while in federal courts, the factual basis for the plea may be determined from sources other than from the accused. The Advisory Committee for the Federal Rules made it clear that the "factual basis" could be determined either by inquiry of the defendant, inquiry of the prosecutor, or through examination of the presentence report. Advisory Committee's Note to Fed.R.Crim.P. 11. See McCoy v. United States, 363 F.2d 306 (1966). Neither McCarthy nor Boykin requires anything different.

What are the consequences of the Care approach? Generally speaking, the difference will be immaterial, for there will be no reason why the accused should have any reluctance to tell the judge "what he did or did not do" in order to plead guilty. One can imagine a case, however, where an accused may be unwilling to discuss

hitherto unknown details of the crime, to expose a co-actor, or necessarily to incriminate himself in an uncharged crime. In this situation, federal practice contemplates that he would still be able to plead guilty, provided that there is available to the judge enough independent evidence for him to determine that "the conduct which the defendant admits constitutes the offense charged." McCarthy, supra.

Permitting the trial judge to ask the accused "what he did or did not do" may open an unintended Pandora's box, and may in some cases seriously prejudice the accused. Military guilty plea practice will continue to bear close scrutiny.

IMPEACHING YOUR OWN WITNESS: HOW TO SHOW SURPRISE

1. Private Smith, I direct your attention to June 5, 1969. Did you have occasion to discuss this case with Agent Black of the CID?
2. That was at 1300 hours, wasn't it?
3. And Agent White was also present, wasn't he?
4. During that interview you had occasion to sign a statement with respect to this case, didn't you?
5. And that statement was under oath, wasn't it?
6. Since that date you and I have discussed this case several times, have we not?
7. In fact, you saw me this morning in court, did you not?
8. On none of these occasions did you indicate that you were going to vary your testimony from this statement, did you?
9. Private Smith, I show you Defense Exhibit A for identification and ask you if you recognize it.
10. This document purports to be a narrative of the events on 30 May 1969, does it not?

11. Is that your signature on the document?

12. And on that occasion did you not state [the contradictory statement]?

Your honor, I submit that a sufficient showing of surprise has been made.

See generally Maryland, District of Columbia, Virginia, Criminal Practice Institute, Trial Manual.

WRITTEN INSTRUCTIONS ON SENTENCE VOTING PROCEDURE

Several military judges have adopted the practice of submitting written instructions to the court on the mechanics of voting and other required sentence instructions.

Both federal law and military law permit this practice if first the court is given identical oral instructions. United States v. Noble, 155 F.2d 315 (1946); CM 404841, Sanders, 30 CMR 521 (1961); ACM S-12489, Hillman, 21 CMR 834 (1956). Some military cases indicate, however, that to invoke this rule, objection must be made to the practice at the trial level. Defense counsel who perceive prejudice to the rights of their clients by this truncated instruction procedure should note an objection for the record before the written instructions are handed to the court, preferably at the time they are marked as appellate exhibits.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

SEARCH AND SEIZURE---SPECIFICITY: The New Mexico Court of Appeals has interpreted Chimel v. California, 395 U.S. ___ (1969) as requiring that all evidence seized must be specifically named in a search warrant, thus overruling Harris v. United States, 331 U.S. 145 (1947). See generally, Note, Searches of the Person Incidental to Lawful Arrest, 69 Colum. L. Rev. 867 (1969). State v. Paul, ___ P.2d ___, (N.M.Ct. App. 8 August 1969).

CONFESSIONS--VOLUNTARINESS--PSYCHOLOGICAL COERCION:

Psychological coercion can be every bit as debilitating to a confession as physical coercion. Where the accused tried to speak, and the CID agent "overruled" him with his voice, and also conducted a fifteen minute tirade against the accused, the Court looked to the totality of the circumstances and found them inherently coercive, despite a good warning and the absence of physical coercion. See generally Driver, Confessions and the Social Psychology of Coercion, 82 Harv. L. Rev. 42 (1968). United States v. Planter, No. 21,901, 18 USCMA _____, 40 CMR _____ (Decided 8 August 1969).

JURISDICTION--SERVICE-CONNECTION: In the first military case holding lack of service connection, the Court of Military Appeals decided that an officer who committed off-post sex offenses in 1962-63 could not be tried by court-martial. This case may be cited for the following propositions of law: (1) O'Callahan v. Parker, 395 U.S. 258 (1969) is retro-active; (2) it is jurisdictional; (3) it applies to officers as well as enlisted men; and (4) it applies even "in time of war". Moreover, the records of that case indicate that some of the civilian female victims of the appellant's crimes were military dependents, and the government stressed this factor in its brief to the Court. Thus this relationship without more, is not a sufficient service-connection. United States v. Borys, No. 21,501, 18 USCMA _____, 40 CMR _____ (decided 5 September 1969); see also United States v. Prather, No. 21,603, 18 USCMA _____, 40 CMR _____ (decided 5 September 1969).

LAWFUL GENERAL REGULATION: MACV Directive 65-50, entitled "Postal Service, Money Order Service" purported to regulate excessive purchase of treasury checks. The Court of Military Appeals ruled that the regulation was not punitive since its avowed purpose was to "regulate the postal service and postal money order transactions within it." United States v. Baker, No. 21,910, 18 USCMA _____, 40 CMR _____

(decided 15 August 1969). See also CM 420561, Underwood, (decided 21 August 1969) (successor regulation to MACV Directive 65-50 also found to be non-punitive in character). (QUERY: What is the application of these cases to Paragraph 18.1 (Change 2) Army Regs. 600-50, proscribing certain drugs?).



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