

T H E A D V O C A T E

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

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GUILTY PLEAS AS WAIVERS

While military courts have on the one hand acknowledged the strict waiver standards of Johnson v. Zerbst, 304 U.S. 458 (1938), indulging every reasonable presumption against waiver of fundamental rights (see, e.g., United States v. Cutting, 14 USCMA 347, 34 CMR 127 (1964) and United States v. Care, 18 USCMA 535, 40 CMR 247 (1969)), there seems to be an increasing trend towards invoking the waiver doctrine where a provident plea of guilty has been entered. In the April 1969 edition of THE ADVOCATE, we discussed the waiver implications of a guilty plea under the guidelines established by United States v. Hamil, 15 USCMA 110, 35 CMR 82 (1964). In Hamil, the Court of Military Appeals held that the denial of a motion to suppress evidence emanating from an illegal search and seizure was not reviewable where the accused providently pleaded guilty to a lesser included offense, thereby judicially admitting possession of the items obtained from the search and seizure. The Court expressly noted that the accused did not contest the providency of the plea and the record of trial affirmatively established that the adverse ruling on the motion to suppress "was not a factor in prompting the plea." THE ADVOCATE therefore suggested that if a plea of guilty is entered after the denial of a motion to suppress, counsel and the accused should clearly record that the plea of guilty is being entered because of the adverse ruling. At that time it was uncertain as to what inroads the decision of Harrison v. United States, 392 U.S. 219 (1968), as adopted by the Court of Military Appeals in United States v. Bearchild, 17 USCMA 598, 38 CMR 396 (1968) would make on the Hamil doctrine. (Harrison-Bearchild essentially held that a judicial confession induced by prosecution's use of unlawfully obtained confession is of no effect.) Since our last article on the subject, it is fair to say that while Army courts have acknowledged the Harrison-Bearchild rationale, they have been extremely reluctant to find a nexus between the adverse ruling on a motion and a subsequent plea of guilty. A quick look at some of the leading cases assures us that Hamil is still very much alive and well.

In the case of United States v. Sullivan, 39 CMR 770 (ABR 1968), the Board of Review first recognized that a guilty plea impelled by an erroneous denial of a motion to suppress would not serve to waive the issue raised by the

motion. However, in Sullivan, the Board found that the guilty plea was impelled primarily by a pretrial agreement and not by the denial of the motion to suppress; this despite trial defense counsel's comment at trial that "in view of the law officer's ruling denying the motion to suppress, the accused would enter a plea of guilty." The strenuous efforts to find a motivation for the guilty plea other than the denial of a motion to suppress has been the hallmark of Army case law in the area. In the case of United States v. Geraghty, 40 CMR 499 (ABR 1969), the Board even seemed to disregard the concept of inducement altogether. This opinion relies on the questionable proposition that a voluntary and provident plea of guilty by itself waived alleged illegalities in obtaining a pretrial confession and in conducting a search and seizure, notwithstanding trial defense counsel's assertion that the plea was entered "subject to and taking exception to the court's prior ruling concerning our two motions to suppress evidence, so this will be a complete record for appeal purposes." The Court of Military Review returned to a discussion of the inducement factor in the case of United States v. Jupiter, CMR (ACMR 30 December 1969), petition denied, 11 May 1970, but found that the guilty plea was based primarily on a pretrial agreement despite the law officer's assurance to trial defense counsel that his position on the denied motion was "well on the record." The issue was entertained by an en banc court in United States v. Cassidy, CMR (ACMR 22 April 1970). Therein, a plea of not guilty was changed to guilty after the denial of a motion to suppress fruits of an alleged illegal search and seizure. The evidence sought to be suppressed constituted the very res of the offense. In entering the guilty plea, trial defense counsel explained that the accused had decided to change his plea after the motion had been denied. The law officer advised the accused that he should not be influenced by his adverse ruling and then incorrectly stated that his ruling would be reviewable on appeal. Trial defense counsel then remarked that the guilty plea was a "tactical decision" and was not tendered because of the ruling on the motion. The Court of Military Appeals found that the accused did not rely on the law officer's erroneous advice and, hence, the plea of guilty was not induced thereby.

Only two cases have been decided by Army courts where a sufficient inducement was found. In United States v. Yasutake, No. 419151 (ABR 27 January 1969), the Court looked to the

following facts finding a taint: no pretrial agreement; no other facts which would explain the guilty plea; and without the evidence which was erroneously admitted the government's case would have "collapsed." In United States v. Williams, CMR (ACMR 27 August 1969), an inducement was found where the law officer expressly advised counsel that his adverse ruling on a search and seizure motion would be reviewable on appeal and this advice was relied upon by trial defense counsel.

Although the Hamil case expressly recognized that not all constitutional rights are waived by guilty pleas, it is anyone's guess as to which rights remain sacrosanct. In United States v. Schalck, 14 USCMA 371, 34 CMR 151 (1964), the Court of Military Appeals opined that a guilty plea waives all defects which are "neither jurisdictional nor a deprivation of due process of law," and held that speedy trial rights being rooted in due process are not so waived. (For a general discussion of military due process rights, see United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).) Recent Court of Military Appeals cases, however, evince a growing judicial disposition to restrict non-waivable defects only to those which affect jurisdiction. For instance, in United States v. Lopez, 20 USCMA 76, 42 CMR 268 (1970), the Court of Military Appeals rejected an accused's claim of a biased Article 32 investigating officer partially on the ground that the accused had voluntarily and providently pleaded guilty even though the issue had been raised at trial. Citing a plethora of federal cases the Court used the following rather unequivocal language: "A voluntary plea of guilty on the advice of counsel waives important constitutional rights, including the ones of confronting accusers and of invoking the privilege against self-incrimination [citations omitted]. Such a plea waives all nonjurisdictional defects in all earlier stages of the proceedings against an accused." (Emphasis added.) In United States v. Stewart, USCMA, CMR (15 January 1971), Judge Darden would have invoked waiver except for the law officer's having erroneously led trial defense counsel to believe that a guilty plea would not waive his claim (raised by motion) that the accused's conscientious objector discharge application had been unlawfully denied by the Secretary of the Army. Again, in United States v. Courtier, USCMA, CMR (15 January 1971), the Court looked to the plea of guilty as a significant factor in finding no prejudice where the accused was unlawfully

denied his right to military counsel of his choice at the Article 32 Investigation. Judge Darden, concurring, would have found that the plea of guilty by itself foreclosed the accused from raising this issue on appeal.

Counsel are therefore advised that the waiver implications of a guilty plea are rather comprehensive and seem to be expanding. We can only repeat our suggestion that if the tactical advantages of a guilty plea are compelling, counsel and the accused should explicitly indicate on the record that the plea is being entered not because of a pretrial agreement but because of the adverse ruling on the motion in question. In view of the trend of the case law, however, this will not guarantee preservation of the question for appeal. When counsel has formulated an issue which he believes to have substantial merit, the choice is a difficult one. The relevant inquiry would involve deciding whether the sentence concession offered in return for the plea is sufficiently substantial to justify the waiver of the client's appellate right. Naturally, counsel must inform the client of the uncertainties of the appellate process among other considerations. The final choice is for the client.

PREPARING THE INSANITY PLEA: THE DEFENSE COUNSEL'S DILEMMA

The absence of a physician-patient privilege in military law [See, Para. 151c(2), MCM, 1969 (Rev.)] may have the effect of putting defense counsel in a wholly untenable position when he is considering insanity as a possible defense to charges against his client. If counsel follows the procedure set forth under Paragraph 121 of the Manual, and requests appointment of a formal sanity board to inquire into the mental status of the accused, he necessarily runs the risk of exposing his client to interrogation by military doctors, and statements made by the accused at such an interview may later be introduced in evidence against him [assuming, of course, proper Miranda-Tempia warnings were given by the sanity board]. This, possibly, to learn that an insanity defense is not viable for his client.

On the other hand, the procedures of Paragraph 121 do not appear to be mandatory, and counsel may desire to arrange a confidential interview and evaluation of his client by means

of personal communication with the military psychiatrist. Where this practice is forbidden by local policy or regulation, however, he may have no recourse other than putting his client to the expense of seeing a civilian physician.

Both of the latter alternatives bear an equally grave amount of risk. Since the physician-patient privilege did not exist at common law, and is only a creature of statute, the absence of statutory authorization in military law would appear to ordain that any physician, be he military or civilian, could be compelled to testify before a court-martial as to the substance of statements made to him by the accused during his course of treatment or evaluation of the accused.

The Manual makes much ado about the absence of the privilege in military law, explaining it in terms of the military physician's "official duty" to examine patients, and thus opines that information thereby acquired is likewise "official." While this extra verbiage may be considered unfortunate [it may have been wiser had the authors of the Manual not attempted to excuse the absence of the privilege in this fashion and said nothing at all], it has been seized upon by the courts when confronted with an invocation of the physician-patient privilege. United States v. Wimberley, 16 USCMA 3, 11, 36 CMR 159, 167 (1966). In Wimberley the Court of Military Appeals also rejected application of the federal statutory privilege, found in 18 U.S.C. § 4244, which excludes statements made by the accused during a government psychiatric interview conducted with or without his consent.

The only other means by which defense counsel can exclude statements made by his client to military psychiatrists would be by an invocation of the accused's privilege against self-incrimination. The Wimberley decision implied the necessity of giving Article 31 warnings to an accused at the psychiatric interview before a sanity board, even when it was conducted at the behest of accused's own counsel. Later decisions of the court, while allowing testimony by the psychiatrists as to their "medical opinions" based upon such an examination, [United States v. Wilson, 18 USCMA 400, 40 CMR 112 (1969); United States v. Schell, 18 USCMA 410, 40 CMR 122 (1969); and United States v. Ross, 19 USCMA 51,

41 CMR 51 (1969), reject testimony of the doctor as to "specific statements" made by the accused during the course of such examination, where Article 31 warnings were not given. United States v. White, 19 USCMA 338, 41 CMR 338 (1970).

The question yet to be raised before the court is whether a psychiatric evaluation performed at the personal and informal request of defense counsel must be preceded by Article 31 warnings. On the one hand, it may be argued that a reading of Article 31 by the psychiatrist to the accused under such circumstances may be unnecessary, and, in fact, spoil counsel's attempt to obtain a frank evaluation of the insanity issue because of the inhibitive effect such a warning might have on his client's cooperation; but that argument may be self-defeating. On the other hand, it may be argued that a psychiatrist in the military performs all examinations, no matter how arranged, in his official capacity, and that his failure to give an Article 31 warning will only work to the misfortune of trial counsel, who later attempts to elicit testimony from the doctor in open court.

Thus, counsel may find himself on the horns of a dilemma. He may be foreclosed by reasons of cost in securing the aid of a civilian psychiatrist [unless he can succeed, under Paragraph 116 of the Manual, in having the government shoulder the expense of the employment of the psychiatrist, a procedure discussed elsewhere in this issue]. This procedure is not entirely without risk, since such a request would certainly wave a red flag for trial counsel as to the fact of a psychiatric interview, and even identify the psychiatrist for him. Similarly, the defense counsel may be reluctant to repose his client's confidences in a military psychiatrist who is on post and readily available for interrogation by an alert trial counsel.

We hesitate to recommend any particular course of action to trial defense counsel in obtaining an evaluation of a possible insanity defense, since, in most cases, the method chosen will perforce depend on a number of varying local factors. In cases in which counsel determines not to assail the operative fact issues[e.g., what would otherwise be a guilty plea case] he may be wise to request a formal sanity board via the procedure contained in Paragraph 121 of the

Manual, and let the chips fall where they may. If a contest of the facts is anticipated, however, this route may be somewhat less desirable, unless counsel is reasonably certain his client can be thoroughly prepared prior to interrogation by the board not to discuss incriminating matters.

If local practice and experience permits, defense counsel may desire to arrange a personal interview of his client by the military psychiatrist, but only if he can assure himself that such a meeting can be conducted discreetly and confidentially. In no case should the attorney leave the physician with the impression that his testimony cannot later be compelled by the government, nor should he, by any device or suggestion, lead the doctor into an abridgement of any local medical policy or regulation. If counsel should select this alternative, the following suggestions are offered to assist him both in realizing the maximum benefit from psychiatric evaluation of his client, while preserving at least a modicum of protection for his client.

1. In the first instance, counsel should make every effort to get to know the psychiatrist. Psychiatrists, as well as other physicians, share an innate mistrust of lawyers and their work, which can only be overcome by counsel's candor and congeniality. Help him to understand the nature of your work and the sincerity of your efforts, and allow him the insight of your personal opinions. Learn how he thinks, and how well-disposed he may be to add affirmatively to your case.

2. Explain to the psychiatrist the law and facts of your case, and his role in the matter. Mental responsibility and competency, as legal words of art, are, in a sense, rather irrelevant to medical practice. Explain the nature of any defenses you may desire to raise, and give him the benefit of your theory of the case before he actually sees your client. Counsel should, to a degree, be as much an advocate before the psychiatrist as he is before the court.

3. Encourage the psychiatrist to avail himself of the services of other para-medical personnel, such as a psychologist. Maximize for him the importance of tests and other data that generally will be more reliable than information gleaned from your client's service or medical records.

4. Prepare your client thoroughly for the psychiatric interview. Let him know that the psychiatric evaluation is in his best interests, and detail for him how it will assist in the preparation of his defense. Reassure him that your actions are not intended to be demeaning; and explain the possible vitality of the physician's testimony on his behalf. Let him know, with as much specificity as possible, the time and place of the interview. Don't let him be pulled from the stockade without notice, and find himself seated in a Mental Hygiene Clinic with a slip in his hand. If possible, strengthen his trust by meeting him at the clinic before his interview, and introduce him personally to the psychiatrist, taking time to review the nature of the evaluation desired. Encourage candor on the part of the client, and advise him of the risk of exposure to trial counsel, cautioning discretion on his part.

5. Discuss the case thoroughly with the psychiatrist as soon as possible after the interview, preferably before he has made any formal report. Encourage economy on his part in preparing any clinical records, to guard against any written inconsistencies that may haunt him on later cross-examination. Help him overcome his distaste for courtroom testimony, and insure that he does not allow the prospect of what may be time-consuming trial appearances to impair his judgment. Advise him of the effect of mentioning uncharged misconduct in the clinical history, and encourage him to forego any gratuitous comments of that nature in his written report. Don't give the impression you are telling him how to practice his medicine, but urge upon him the necessity for legal sufficiency in what he does.

By following these simple suggestions, counsel should enhance his ability to get clear, and frank, medical evaluations of possible insanity defenses. But above all, counsel should not be discouraged with a psychiatrist who cannot agree that his client's characterological or behavioral disorders rise to a sufficient defense. He should always keep in mind the possibly salutary effect of the psychiatrist's offerings in extenuation and mitigation, particularly before a full court.

EXPERT WITNESSES--FOR THE DEFENSE

Article 46 of the Uniform Code of Military Justice provides that trial counsel, defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with applicable regulations. May then the defense procure its own expert in a proper case at government expense? And if so, what procedural steps must trial defense counsel take to secure such expert assistance?

Paragraph 116 of the Manual for Courts-Martial, United States, 1969 (Revised edition), provides that when the employment of an expert is necessary during a trial by court-martial, the trial counsel, on order or permission of the military judge, will request the convening authority to authorize the employment and to fix the limit of compensation to be paid the expert. The Manual provision also sets out procedure to be followed when employment of an expert is sought prior to trial.

"When, in advance of trial, the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the convening authority for permission to employ the expert, stating the necessity therefore and the probable cost. In the absence of a previous authorization, only ordinary witness fees may be paid for the employment of a person as an expert witness." Id.

From the foregoing Manual provision it seems clear that defense counsel has some right to obtain a defense expert witness at government expense. However, it also appears that the convening authority exercises great discretion over whether a defense request will be granted. Presumably, if a pretrial request for employment of an expert is denied by the convening authority, it may be renewed before the military judge at trial. However, the military judge's authority to order employment of an expert is unclear. The Manual provision states that when employment of an expert is deemed necessary, trial counsel will, on "order or permission" of the military judge, request the convening authority's authorization. The logical interpretation of this language is that a military judge may order trial

counsel to make a request, but he may not order the convening authority to grant that request. If a convening authority, presumably on the advice of his staff judge advocate, has previously denied a defense request for an expert witness prior to trial, it would seem that chances of having that same request granted during trial even with the recommendation of the military judge are only slightly improved. If a judge-ordered request is denied, what then may defense counsel do?

The probable next step is a motion to dismiss charges and specifications for a denial of military due process. Should this motion be denied, the military judge's ruling is subject to appellate review.

It would also seem that the military judge's refusal to order a request for employment of an expert or the convening authority's refusal to grant such a request is reviewable on appeal. Certainly, denial of a request for personal appearance of a non-expert witness can be reviewed for abuse of discretion. See United States v. Davis, 19 USCMA 217, 41 CMR 217 (1970); United States v. Thornton, 8 USCMA 446, 24 CMR 256 (1957).

The Army Regulation implementing Paragraph 116 of the Manual is AR 37-106 (C.42, 21 April 1970). Paragraph 13-38a of that regulation is a restatement of the Manual provision with respect to an expert witness necessary during trial and adds some additional information regarding preparation of invitational travel orders and authorization of normal travel allowances. However, paragraph 13-38b of the AR places a restriction upon the use of an expert. That paragraph reads as follows:

"b. Additional Aid. Except as provided by this paragraph, a Government employee or a member of the uniform services who solicits the aid of a professional person or an expert to aid him in the performance of his duties in connection with a military court proceeding may not obligate the Government for any expenses or charge related to the professional or expert aid."

Just how great a restriction the above section of the regulation imposes is open to speculation. The provision clearly precludes

employment of someone in the nature of an associate or consulting attorney or legal expert at government expense. Whether it would justify denial of a defense request for any expert who will not actually testify in court is unclear.

Although there is a lack of judicial guidance on the subject, trial defense counsel should be aware that the machinery for employment of their own expert witness exists in the Code, the Manual, and applicable Army Regulations. Since the government has a variety of expert witnesses available within the military, e.g. doctors, criminal investigators, chemists, etc., a more extensive use of civilian experts by defense counsel would help make a court-martial a truly adversary proceeding.

GRANTS OF IMMUNITY

Military law with respect to grants of immunity has now reached a state of unprecedented confusion. Where heretofore there have been rather stable and workable judicial rules governing the nature and effect of immunity grants, there now exist not doubtful rules so much as an absence of rules. Conspiring to create this situation have been a recent statute followed by an even more recent judicial nullification of it. A look at a case from the District Court for the Southern District of New York will serve to outline the problem. Upon application of the government for an order directing Joanne Kinoy to answer questions before a federal grand jury under a grant of immunity conferred by Title II of the recently enacted Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001 - 6003, United States District Judge Constance Baker Motley denied the application. At the outset, Judge Motley's opinion makes it clear that the witness was subject to a valid subpoena (even though the issuing grand jury had been excused sine die, its ordinary life is eighteen months).

The heart of the case is the issue whether the immunity provided by the new law is coextensive with the fifth amendment privilege against self-incrimination. The witness argued that it was not enough that she would be protected against the "future use of the compelled testimony, and its fruits," but that the constitutional protection required "absolute immunity from future prosecution for the offense to which the questioning

relates." In an extensive opinion, Judge Motley traced the development of constitutional doctrine on the subject of immunity statutes. The principal case is Counselman v. Hitchcock, 142 U.S. 547 (1892) which requires that an immunity statute "must afford absolute immunity against future prosecution for the offense to which the question relates." That is, an immunity statute must provide for "transactional immunity" as opposed merely to "use-restriction immunity," as provided in the statute under attack. The opinion rejected the positions advanced by the government that the language of Counselman was dictum and that Counselman has been overruled sub silentio. On the latter issue, distinguishing Murphy v. Waterfront Comm., 378 U.S. 52 (1964), the decision relied on such cases as Brown v. Walker, 161 U.S. 591 (1896); Ullman v. United States, 350 U.S. 422 (1956); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965); and Stevens v. Marks, 383 U.S. 234 (1966), which clearly adopted the Counselman rule, dictum or not.

Under its terms, the immunity provisions of the Organized Crime Control Act of 1970 apply to the military departments. The Judge Advocate General of the Army has required that grants of immunity must be coordinated with the Military Justice Division, Office of the Judge Advocate General, pending further study and implementation of this statute. His message of 15 December 1970, subject: Grants of Immunity, specifically notes that "no provision is made by the Act for the granting of complete transactional immunity." Military defense counsel faced with cases involving grants of immunity will be well advised to become acquainted with the new law and with such cases as In re Kinoy, 39 U.S.L.W. 2427 (29 January 1971), arising under it.

THE STATUTE OF LIMITATIONS: TIME OF WAR

The Court of Military Appeals has declared that the normal two-year statute of limitations applicable to most offenses under the Code was suspended as of 10 August 1964, the date of the Gulf of Tonkin Resolution, United States v. Anderson, 17 USCMA 588, 38 CMR 386 (1968). In accordance with Article 43, Uniform Code of Military Justice, the Court stated that the status of war would continue until peace and security were assured as declared by the President or by joint resolution of Congress. Id. at 388.

Since Anderson, it has widely been assumed that the Court's interpretation of "in time of war" was valid. However, a recent decision has cast serious question upon the validity of Anderson. United States v. Averette, 19 USCMA 363, 41 CMR 368 (1970). In Averette the Court of Military Appeals construed the phrase "in time of war" in Article 2(10) of the Code as having a totally different meaning than determined in Anderson. The question presented was whether military courts-martial had jurisdiction to try civilian offenders. In reversing for lack of jurisdiction the Court held that the United States was not "in time of war". Specifically refusing to overturn Anderson the Court distinguished the two cases by announcing that, while Averette was a civilian, Anderson was a soldier, and, that the statute in Averette concerned the constitutionally delicate question of military jurisdiction over civilians while in Anderson the issue concerned only a statute of limitations problem.

Recently, several cases have arrived at the Defense Appellate Division in which an accused was convicted of an AWOL in excess of a two year period and the procedural steps for telling the statute had not been taken (See Article 43(c) Uniform Code of Military Justice.) In briefs to the Army Court of Military Review we have attacked the distinctions enunciated by the higher court in Averette. It is argued that identical words within a single statute should be interpreted identically, that criminal statutes should be interpreted strictly, and, that to base any such distinction upon the fact that one accused is a civilian and one a soldier, denies the soldier due process of law and equal protection through an arbitrary and unreasonable classification. We urged that the strict interpretation of the phrase "in time of war" as announced in Averette should also be applied to statute of limitations situations. Of particular significance is the fact that the Gulf of Tonkin Resolution has now been repealed. Foreign Military Sales Act, Pub. L. No. 91-672, 91st Cong. 2d Sess. (12 January 1971).

Defense counsel in the field should be aware of this appellate attack and should now consider raising on the record, the statute of limitations as a bar to trial.

THE MISCELLANEOUS DOCKET

In Petty v. Moriarty, COMA Misc. Docket No. 71-3, petitioner, a marine, invoked the court's extraordinary writ powers in a petition complaining of the withdrawal of the charges against him from the Court to which they had been referred. Petitioner was charged with disobeying and threatening a superior noncommissioned officer. The charges had been referred to a special court-martial empowered to adjudge a bad conduct discharge. At trial, the defense counsel moved for a continuance to obtain witnesses. The motion was granted. Thereupon, defense counsel requested the presence of four defense witnesses, none of whom were present at that installation. The request to trial counsel was accompanied by a summarization of their expected testimony. Trial counsel brought the matter up with the staff judge advocate of the general court-martial convening authority whose representative was then alleged to have told defense counsel that if he wanted to try a case by the "big league rules," he could do so in a different forum. At this point, the charges were withdrawn from the special court-martial and forwarded to an Article 32 investigating officer. Based upon these allegations, the Court, on 1 February 1971, ordered the convening authority to show cause. This action is significant and indicates that the Court views the allegations seriously enough to demand justification. This case bears further watching and will be followed up in future issues of THE ADVOCATE.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

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* The decision in United States v. Robinson, No. 23,734 F2d (C.A.D.C. 3 December 1970) digested in the recent cases portion of the January 1971 edition of THE ADVOCATE has been vacated and the case referred for rehearing en banc by order dated 26 January 1971.

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SENTENCE -- UNSWORN STATEMENT BY ACCUSED -- Trial defense counsel, after findings, read the unsworn statement of the accused in which accused requested a discharge in order to care for his mother. After argument, the military judge, with appellant's acquiescence, questioned appellant, concluding with: "Oh, I see, you don't feel any obligation to serve your country, huh?" The Army Court of Military Review noted it was error for the military judge or trial counsel to question an accused who makes an unsworn statement in extenuation and mitigation regardless of the interrogator's motives. Paragraph 75c(2), Manual for Courts-Martial, United States, 1969 (Revised edition); United States v. Wells, 12 USCMA 627, 33 CMR 159 (1963); United States v. Royster, No. 424149 (ACMR 6 November 1970). The court noted one exception to this prohibition -- the military judge can determine the previously unexpressed desires of an accused if the defense counsel argues for a punitive discharge. In this case the Court found no prejudice but added the caveat "Of course, if trial judges continue to invade the accused's testimonial rights, ad hoc reviews of this nature may prove inadequate to the task. In that event other remedies may be necessary. See United States v. Donohew, 18 USCMA 149, 39 CMR 149 (1969); United States v. Bowman, USCMA , CMR (6 November 1970)." United States v. Hayworth, CMR (ACMR 24 November 1970).

SEARCH AND SEIZURE -- DISCLOSURE OF IDENTITY OF INFORMERS; ROLE OF COMMANDING OFFICER AS BOTH "MAGISTRATE" AND "POLICEMAN" NOT INCONSISTENT -- The United States Army Court of Military Review refused to reverse a military judge's ruling that the identity of informants would not be disclosed. The commander who authorized the search resulting in discovery of the criminal goods did so on the basis of the informants' tip. The commander testified that one of the informants was of proven past reliability. The Court of Military Review noted that military law concerning identity of informers was in accord with the holding of the United States Supreme Court in McCray v. Illinois, 386 U.S. 300 (1967) that the disclosure of the identity of a confidential informer was not required unless the identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. Citing Paragraph 15lb (1), Manual for Courts-Martial, United States, 1969 (Revised edition); United States v. Hawkins, 6 USCMA 135, 19 CMR 261

(1955); United States v. Ness, 13 USCMA 18, 32 CMR 19 (1962). In the Court's view, if the informant's identity is relevant only to a determination of probable cause, disclosure is ordinarily not required; if identity is relevant to guilt or innocence, disclosure is required.

The Court of Military Review was further of the opinion that a commanding officer may be both a "policeman" and an impartial magistrate and noted that most commanders approach these dual tasks in a fair and objective manner. The Court rejected the defense theory that since a civilian magistrate must reveal the name of the police officer who gave his information, though not the name of the informer, when, as in a military accused's case, the magistrate also acts as a policeman he must reveal the names of informers. United States v. Miller, ___ CMR ___ (ACMR 21 January 1971).

DISCOVERY -- INVESTIGATIVE AGENCIES -- The Court of Appeals for the District of Columbia Circuit considered the question of the legal consequences of intentional non-preservation of relevant evidence by investigative officials under Brady v. Maryland, Rule 16 of the Federal Rules and the Jencks Act and remanded the case for further inquiry into the degree of negligence and possibly bad faith involved in the loss of a tape recording in the Bureau of Narcotics and Dangerous Drugs. The tape recording was of a conversation between the appellants and an undercover agent. The undercover agent testified at trial a year after the alleged conversation and his credibility was crucial to appellants' conviction. The defense made repeated pretrial efforts to obtain the tape recording but were unsuccessful as the tape recording was lost somewhere in the Bureau of Dangerous Drugs. The Court of Appeals found the tape to be crucial on the issue of the appellants' guilt or innocence and noted that pretrial suppression of evidence by investigative officials, no less than by the prosecution corrupts the truth-seeking function of the trial. The Court distinguished United States v. Augenblick, 393 U.S. 348 (1969) (involving loss of tapes of the interrogation of a government witness in a military court-martial) as involving a good faith loss where there was no evidence of negligence in the Navy's routine in handling and using such recordings. The Court stated that in the future it would invoke sanctions for non-disclosure based on loss of evidence unless the government (to include investigative agencies) can show that it has

promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation. United States v. Bryant, ___ F.2d ___ (D.C. Cir. 29 January 1971).

INSTRUCTIONS ON CREDIBILITY OF WITNESSES; CONSCIENTIOUS OBJECTOR BELIEFS VIS-A-VIS ORDER TO PARTICIPATE IN RIOT TRAINING -- The Army Court of Military Review recently considered an attack on the absence of instructions on credibility of witnesses and noted that except in cases of "plain error" an instruction on credibility of witnesses is waived unless specifically requested. "Plain error" exists only if the conflicting evidence is of "vital importance" and is "virtually in equipoise."

In the same case the Court considered the accused's refusal to participate in civil riot control training. The accused claimed to be a conscientious objector and refused an order to participate in the role of a "dissident" in riot control training. He had not applied for conscientious objector discharge. The Court of Military Review found that the order to participate in such training in an unarmed role was not inconsistent with conscientious objector beliefs opposing war in any form even if an application for discharge as a conscientious objector were pending, or the status of non-combatant had been offered. United States v. Chase, No. 422919 (ACMR 5 February 1971).

CHARGES AND SPECIFICATIONS -- FINDINGS OF GUILTY BY EXCEPTIONS AND SUBSTITUTIONS -- Appellant was tried by military judge alone upon a not guilty plea to the offense of leaving his post as a sentinel before he was regularly relieved in violation of Article 113, Uniform Code of Military Justice. Appellant was convicted of wrongfully lying down on his post, in violation of Article 134, Uniform Code of Military Justice. The United States Army Court of Military Review did not reach the question of whether the offense of wrongfully lying down on post, as a violation of Article 134 of the Code, is lesser included in a charge of misbehavior of a sentinel by sleeping on post laid under Article 113. Rather, it set aside the appellant's conviction because appellant defended against leaving his post not sleeping on post. The Court noted that "We appreciate the

dilemma an accuser sometimes faces in cases of this kind where the precise nature of a sentinel's misconduct may be clouded until all the evidence is adduced at trial. In such instances, the dilemma may be resolved by resort to the Manual's provision that permits making one transaction the basis for charging two or more offenses, when sufficient doubt as to the facts or the law exists, to meet the exigencies of proof (Para. 26b, MCM, 1969 (Rev))." United States v. Jones, ___ CMR ___ (ACMR 15 January 1971).

POST-TRIAL REVIEW -- FATAL OMISSIONS -- The Army Court of Military Review found a post-trial review deficient in the following particulars. (1) The review did not inform the convening authority that the military judge recommended suspension of a bad conduct discharge which he adjudged. (2) The testimony of extenuation and mitigation witnesses was not summarized. (3) The convening authority was not advised that he has an independent responsibility to approve only that portion of the sentence which he finds correct in law and fact. The Court of Military Review held that deficiencies (1) and (2) required reassessment of the sentence. Specifically recognizing that the third deficiency had been held to be nonprejudicial in United States v. Engel, 40 CMR 608 (ABR 1969), the Court held that when coupled with other deficiencies, such as those present in the case, the deficiency was prejudicial. United States v. Brown, SPCM 6233 (ACMR 27 January 1971).

SPECIAL FINDINGS -- The appellant below was tried by military judge sitting alone. Trial defense counsel defended on jurisdictional grounds. His oral and written request for special findings relative to his motion to dismiss for lack of jurisdiction was denied by the military judge who was of the opinion that special findings need only be made as to matters pertaining to guilt or innocence. The United States Army Court of Military Review disagreed that a military judge's responsibility is limited to rendering special findings pertaining to guilt or innocence. The Court concluded upon a review of various military and federal authorities that (1) Upon request the military judge must make special findings (Article 51(d), Uniform Code of Military Justice; Paragraph 74i, Manual for Courts-Martial, United States, 1969 (Revised edition)). (2) The rule contemplates a single set of special findings entered at or near the time general findings are

entered without regard to multiple or earlier requests. Citing: Benchwick v. United States, 297 F.2d 330 (9th Cir. 1961). (3) When trial is by the court such findings must reflect determinations as to jurisdiction and defenses whether raised on the general issue or by motion. Citing: 4 Barron and Holtoff, Federal Practice and Procedure, § 2124; 3 Orfield, Criminal Procedure under the Federal Rules, § 23.49 et seq. (1966); 8 Moore, Federal Practice, Paragraph 23.05 (1969). To determine the issue of prejudice the record was ordered returned to the military judge for entry of appropriate special findings, to be followed by a new review and action. United States v. Falin, SPCM 6506 (ACMR 26 January 1971).

COUNSEL-ACTING IN ADVERSE CAPACITIES, APPOINTMENT ON ORDERS AS AMOUNTING TO A PRESUMPTION OF ACTION -- Captain X, JAGC represented appellant at the Article 32. The case was then referred to trial by a court appointed by Convening Order #1. Captain X was named as trial counsel on this order. Eight days later the case was re-referred to a new court appointed by order #2 as amended by order #3. These orders didn't name Captain X as a member of either the prosecution or the defense and he was not present at trial. At trial the trial counsel and defense counsel made "boilerplate disclaimers" of activity of any members of the prosecution and defense in adverse capacities.

A panel of the United States Army Court of Military Review in an exhaustive treatment of the often conflicting authorities in the field:

1. Refused to accept stereotyped or "boilerplate" disclaimers from other than the declarant counsel or other members of the prosecution or defense present in court (now and in the future).

2. Placed the burden on the military judge and trial counsel to examine the allied papers before trial for any irregularities. If some appear, the matter must be clarified on the record. A statement by counsel that he has personally investigated the matter and that there is no adverse action in fact, absent an objection by the accused, will suffice.

3. Refused to accept an affidavit offered by appellate government counsel that Captain X didn't act in an adverse capacity indicating that the place to establish his nonparticipation is at trial.

A DuBay type limited rehearing on the issue of Captain X's participation was ordered. United States v. Paroz, No. 422363 (ACMR 26 January 1971).

RECORD OF TRIAL -- NON-VERBATIM RECORD -- Appellant was convicted by a court composed of members of premeditated murder and certain lesser offenses and sentenced to dishonorable discharge and life imprisonment. Due to a recording machine malfunction the entire proceedings through a substantial portion of the prosecutions case on the merits were not recorded. Rather than declare a mistrial, the parties simply commenced again from the beginning. There was no objection to this procedure lodged at the trial forum.

The Court of Military Review noted that when recording devices fail, the military judge may employ one of two proceedings. He may declare a mistrial, or he may in accordance with Paragraph 82i, Manual for Courts-Martial, United States, 1969 (Revised edition) reconstruct the record out of the presence of the court, and thereafter the record will be tested for substantial compliance with Article 54. The Court refused to place its stamp of approval upon the procedure utilized in this case because no effort was made to determine what had occurred during the unrecorded portion of the trial. The record was deemed to be non-verbatim so as to deny the appellant his right to appellate review. Because a capital offense was involved the majority refused to apply the doctrine of waiver and set aside the findings of guilty and the sentence and remanded the case for rehearing.

In concurrence in the result, the Senior Judge of the Panel dissociated himself from the implication in the majority opinion, that were the sentence less severe the record deficiency would be deemed waived by appellant's failure to object in the trial forum. United States v. Benoit, ___ CMR ___ (ACMR, 20 January 1971).

SEARCH AND SEIZURE -- MOTOR VEHICLES -- The majority of the Court of Appeals for the District of Columbia Circuit finds a heroin producing search of an armed robbery suspect's automobile

passenger unlawful even though it took place during the arrest of the robbery suspect.

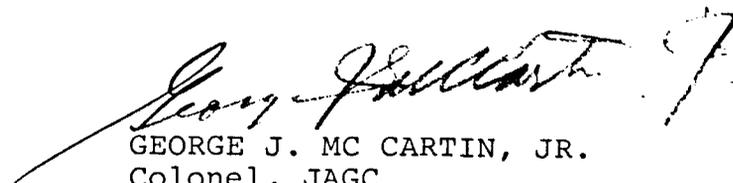
A lone gunman robbed a telephone company employee of a coin box. The employee gave an accurate description of the culprit and his car as well as the license number. Six days later a telephone company investigator told the police where the car was, and two detectives staked out the site. Some minutes later appellant and two others entered the car and were arrested. As one of the officers approached the car, he observed appellant attempt to conceal a small brown object on the floor of the car which turned out to be a small change purse containing heroin. The appellant was first arrested for robbery while in the car. The arresting officer ordered appellant out of the car, and then picked up the change purse, examined its content and arrested appellant for a narcotics violation. The author and concurring judges agreed that there was no probable cause to arrest the passenger for robbery because the passenger did not match the description of the robbery suspect whereas the individual in the driver's seat did, and there was no independent information connecting appellant with the holdup. The change purse having been seized in the course of the arrest for robbery was therefore illegally seized.

The author judge went further than the concurring judge and suggested that even if it be assumed that the police officers had probable cause to search the vehicle for fruits or instrumentalities of the robbery or reasonable grounds to frisk the passenger for weapons for police security, the search of the hand-sized change purse was illegal because it was too small to contain fruits or instrumentalities of the robbery or to contain a weapon. United States v. Collins, ___ F.2d ___ (D.C. Cir. 20 January 1971); 8 Crim. L. Rep. 2338.

SEARCH AND SEIZURE -- The New Mexico Court of Appeals recently considered a marihuana producing search for weapons conducted at a police station. The defendants were stopped in a road-block set up by the state police for the purpose of checking drivers' licenses and registrations. The defendant's were asked if they were in military service and defendant Washington admitted being in the service but could produce no leave papers. The defendants were taken to the police station to verify Washington's leave status. At the police station the defendants were told to empty their pockets on a table. One officer

testified this was done to search for weapons. Included among the items placed on the table were several small cigarette wrapping papers and some 2" x 3" folded manilla envelopes. The envelopes were opened and marihuana was found. The police then searched the defendants' car with their consent and discovered two plastic canisters of marihuana. The New Mexico Court assumed without deciding that the search for weapons as conducted was legal but held that once the defendants' placed their belongings on the table it was evident that they were not armed. The search, then, was at an end and since defendants were not under arrest a search and seizure incident to arrest was not involved. The Court rejected the argument that the cigarette wrapping papers gave rise to cause to suspect the defendants might be marihuana smokers. The Court also held that the canisters of marihuana found in the car were inadmissible by reason of their relationship to the unlawfully discovered marihuana in the envelopes. State v. Washington, (N.M. Ct. App., 22 January 1971); 8 Crim. L. Rep. 2339.

AWOL -- PROOF; OFFICIAL RECORDS; HEARSAY -- To prove an AWOL charge the government introduced a morning report. The military judge ruled it inadmissible because the attesting signature was illegible. The military judge admitted, however, a next-of-kin letter from the appellant's personnel file, to the appellant's brother informing the brother that appellant had been in an AWOL status since a particular date. The next-of-kin letter was prepared by a commander of a unit other than the appellant's. The United States Army Court of Military Review ruled the letter was inadmissible to show the inception of the AWOL, because it was not prepared by one having a duty to record officially an AWOL status, since the commander of a unit to which the appellant did not belong had no legally imposed duty to record the fact of appellant's absence, its date, or official status (i.e., authorized or unauthorized). The letter was not an exception to the official record exception to the hearsay rule. United States v. Schalk, No. 423199 (ACMR 10 February 1971).


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