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**THE ADVOCATE**

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*We encourage readers of The Advocate to submit articles pertaining to legal issues which are of particular importance to trial defense counsel and warrant examination in the pages of this journal; your contributions, comments, and suggestions can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.*

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## OPENING STATEMENTS

### Overview

The lead article in this edition thoroughly examines appellate decisions pertaining to Federal Rule of Evidence 403 and its military counterpart, and suggests ways in which that provision can most effectively be applied in the courtroom. The second article, which first appeared in the National Law Journal, presents pragmatic advice on cross-examining expert witnesses. Finally, in part seven of "Search and Seizure: A Primer," the staff analyzes the "stop and frisk" exception to the fourth amendment's warrant requirement.

### Preview

The next issue of The Advocate will contain an article designed to assist trial defense counsel in assessing the lawfulness of military regulations; an analysis of the impact of Federal Rule of Criminal Procedure 26.2 on the Jencks Act; and the final installment of "Search and Seizure: A Primer."

### Staff Personnel Changes

With this issue, CPT Edwin S. Castle completes his tenure as Editor-in-Chief of The Advocate and an action attorney at Defense Appellate Division; he is leaving to assume new duties as Post Judge Advocate, 172d Infantry Brigade (Alaska), Fort Greely, Alaska, APO Seattle 98733, and will be replaced by CPT Richard W. Vitaris. Also departing The Advocate staff is CPT James S. Currie, who will remain at USALSA as a Commissioner for the Army Court of Military Review. The Editorial Board thanks both officers for their contributions to the journal.

APPLYING MILITARY RULE OF EVIDENCE 403:  
A DEFENSE COUNSEL'S GUIDE

*by Captain Edward J. Walinsky\**

The Military Rules of Evidence impose greater responsibilities on the defense counsel than existed under prior practice: they not only broaden his duty to preserve the record by lodging timely objections, but also require that he set forth the specific grounds upon which those objections are premised.<sup>1</sup> At first glance, Rule 403<sup>2</sup> appears to be an exception to this requirement to specifically state the nature and basis of objections. However, because of the extensive judicial discretion vested by Rule 403, counsel should insure that objections under that provision are as specific as possible in order to narrow the military judge's discretion and preserve adverse rulings for meaningful appellate review.

The analysis accompanying Rule 403 stresses the breadth of discretion that provision vests in the military judge. Indeed, in United States v. Long,<sup>3</sup> the Third Circuit noted that the drafters of Federal Rule of Evidence 403 not only intended that the trial judge possess discretion, but also indicated that, in close cases, contested evidence

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1. See generally Lederer, The Military Rules of Evidence: An Overview, 12 The Advocate 113 (1980).

2. Mil. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. 574 F.2d 761 (3rd Cir. 1978).

should be admitted.<sup>4</sup> To apply the Rule, judges must balance the probative value of the subject evidence against the danger of unfair prejudice attending its admission.<sup>5</sup> This highly subjective process requires the judge to evaluate the proponent's need for the evidence as well as any possible prejudice to the other party.<sup>6</sup> While courts may favor admission in close cases because of the importance of the evidence to the prosecution,<sup>7</sup> this is not always true, and the potential for prejudice may be accentuated in hotly contested trials.<sup>8</sup> Finally, the balancing test can only be used as a sword, not as a shield: a party may not object to the evidence on the ground that it prejudices the proponent.<sup>9</sup>

A danger of unfair prejudice<sup>10</sup> exists when there is a strong probability that the jury will consider the evidence for a purpose other than that for which it was introduced.<sup>11</sup> For example, the prosecutor

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4. This conclusion is supported by the Rule's requirement that relevant evidence be excluded only if its probative value is "substantially" outweighed by the countervailing factors enumerated in the provision. See e.g., *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981); *United States v. Woods*, 613 F.2d 629 (6th Cir. 1980); *United States v. Brown*, 547 F.2d 1264, 1266 (5th Cir. 1977); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States v. Robinson*, 530 F.2d 1076 (D.C. Cir. 1976). See also J. Weinstein and M. Berger, *Weinstein's Evidence* [hereinafter *Weinstein*] §403[01] (1975). But see Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 So. Cal. L. Rev. 220 (1976).

5. *United States v. Sangrey*, 586 F.2d 1312 (9th Cir. 1978). However, the judge cannot exclude evidence merely because he finds it incredible. *United States v. Thompson*, 615 F.2d 329 (5th Cir. 1980).

6. *United States v. Dolliole*, 597 F.2d 102 (7th Cir. 1979); *United States v. Cook*, 538 F.2d 1000 (3d Cir. 1976).

7. *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978). For a good discussion of demonstrable need, see *United States v. Foster*, 568 F.2d 207 (1st Cir. 1978).

8. *United States v. Frick*, 588 F.2d 531 (5th Cir. 1979).

9. *Government of Virgin Islands v. Carino*, 631 F.2d 226 (3d Cir. 1980).

10. Rule 403 is concerned only with unfair prejudice. A party is always prejudiced by relevant, damaging evidence admitted by the opponent, and the law will not exclude evidence on that basis; references to "prejudice" throughout this article therefore pertain to "unfair prejudice."

11. Weinstein, *supra* note 4, at §403[03].

may introduce explicit color photographs of the deceased in order to prove that the victim is dead. Although the photographs might inflame the jury, that danger, standing alone, will not render them inadmissible: the defense must show that the risk of unfair prejudice substantially outweighs the probative value of the evidence. If the photographs are the only evidence of death, such a showing could never be met since death is an essential element of the charged offense. If, on the other hand, there is other evidence, or if the defense counsel so stipulates, the balance may shift toward exclusion.

Judicial discretion may be bridled by requesting the military judge to state, on the record, his reasons for admitting or excluding the evidence.<sup>12</sup> The defense counsel may also request limiting instructions, which insure that the court members consider evidence only for proper purposes, although they may cure appealable error by eliminating unfair prejudice.<sup>13</sup> Severance of trials may be required if limiting instructions would be too confusing.<sup>14</sup> As a practical matter, of course, limiting instructions may focus attention on the subject evidence.<sup>15</sup> The converse may also be true, however, and the lack of an instruction may indicate prejudice.<sup>16</sup> A request for instructions should be made only after the military judge has denied a motion to exclude the evidence.

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12. United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976); United States v. Dolliole, supra note 6; United States v. Robinson, supra note 4; Weinstein, supra note 4, at §403[02]. Counsel must identify Rule 403 as the specific reason to make such special findings. See United States v. Milhollan, 599 F.2d 518 (3d Cir. 1979), United States v. Long, supra note 3. See also United States v. Medico, 577 F.2d 309 (2d Cir. 1977).

13. United States v. Chew Kam Tom, 640 F.2d 1037 (9th Cir. 1981); United States v. Wyatt, 611 F.2d 568 (5th Cir. 1980); United States v. Moore, 522 F.2d 1068 (9th Cir. 1975). But see United States v. Figueroa, 613 F.2d 47 (2d Cir. 1980); United States v. Turquitt, 557 F.2d 464 (5th Cir. 1977).

14. United States v. Praetorious, 462 F. Supp. 924 (E.D. N.Y. 1978).

15. United States v. Aims Back, 588 F.2d 1283 (9th Cir. 1979).

16. United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980); United States v. Ailstock, 546 F.2d 1285 (6th Cir. 1976).

Judicial discretion may also be narrowed by stipulating to the relevant portion of the objectionable evidence. Thus, when the government seeks to introduce evidence of a prior conviction, defense counsel should consider stipulating to the fact of conviction. In one case, a reviewing court held that the trial judge abused his discretion by admitting a record of a conviction after such an offer.<sup>17</sup> Likewise, when a defendant charged with armed robbery fled the jurisdiction and was picked up while armed, a stipulation as to his flight would have avoided the prejudice arising from revelation of the circumstances of his arrest.<sup>18</sup>

#### Specific Examples of Unfair Prejudice

Despite the breadth of judicial discretion under Rule 403 and the availability of curative instructions, appellate courts have recognized prejudice in a wide variety of cases. In United States v. Williams,<sup>19</sup> for example, the defense in a bank robbery case objected when the prosecution attempted to introduce evidence that stolen money was found in the apartment of the defendant's sister. Because the cotenant of that apartment had already pled guilty to the robbery, the court found that the evidence, while slightly relevant, was extremely prejudicial. In United States v. Green,<sup>20</sup> the government sought to introduce expert testimony comparing the illegal drug the defendant allegedly manufactured with LSD. The court found that the evidence was irrelevant and unfairly prejudicial, and excluded it. The Fifth Circuit reviewed a similar situation in United States v. Hall,<sup>21</sup> a conspiracy trial of an alleged drug distributor. A drug agent testified that, due to the difficulties in arranging controlled purchases from large-scale dealers, no physical evidence existed. The court reversed because the inference was unfairly prejudicial. In United States v. Koger,<sup>22</sup> the court held that evidence

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17. United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976).

18. United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975). See also United States v. Lewis, 560 F.2d 901 (8th Cir. 1977); United States v. Coades, 549 F.2d 1303 (9th Cir. 1976).

19. 561 F.2d 859 (D.C. Cir. 1977).

20. 548 F.2d 1261 (6th Cir. 1977). See also United States v. McMaraman, 606 F.2d 919 (10th Cir. 1979); United States v. Anderson, 584 F.2d 849 (6th Cir. 1978).

21. 653 F.2d 1002 (5th Cir. 1981).

22. 646 F.2d 1194 (7th Cir. 1981).

of a coaccused's conviction was unfairly prejudicial. The court reviewed a bizzare factual scenario in United States v. Richardson,<sup>23</sup> where jurors learned that a key government witness had been threatened and shot just before the trial. The appellate court found unfair prejudice and reversed on the grounds that a mistrial should have been declared when the witness testified from a wheelchair.

Evidence of "bad acts"<sup>24</sup> occurring subsequent to the charged offense may often be excluded as unfairly prejudicial. Although the admission of evidence of prior "bad acts" is governed by Rule 404(b),<sup>25</sup> an objection under Rule 403 can often be successful even if the evidence is relevant.<sup>26</sup> Some illustrative examples include United States v. Foskey,<sup>27</sup> a prosecution for drug possession, where there was evidence of the defendant's prior arrest for an identical offense while in the company of his present codefendant. Both Rules 404(b) and 403 barred this evidence.<sup>28</sup> Similarly, the prosecution may not introduce evidence of a defendant's possession of marked bills from an earlier robbery during the trial of an unrelated robbery.<sup>29</sup> In United States v. Shavers,<sup>30</sup> the Fifth Cir-

23. 651 F.2d 1251 (8th Cir. 1981).

24. United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979); United States v. Daniels, 572 F.2d 535 (5th Cir. 1978).

25. This Rule provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

26. United States v. Jones, 570 F.2d 765 (8th Cir. 1978); United States v. Beechum, supra note 7. See generally, United States v. Cook, 557 F.2d 1148 (5th Cir. 1977). See also United States v. Czarnecki, 552 F.2d 698 (6th Cir. 1977); United States v. Myers, 550 F.2d 1036 (5th Cir. 1977). Careful voir dire may cure this. United States v. Hall, 588 F.2d 613 (8th Cir. 1978).

27. 636 F.2d 517 (D.C. Cir. 1980).

28. See also United States v. Mann, 590 F.2d 361 (1st Cir. 1978).

29. United States v. Calhoun, 604 F.2d 1216 (9th Cir. 1979).

30. 615 F.2d 266 (5th Cir. 1980).

cuit held that it was error to introduce evidence of a prior threat with a knife in a prosecution for assault on a different victim with a different weapon.<sup>31</sup> In United States v. Vaughn,<sup>32</sup> the Second Circuit disallowed evidence of possession of heroin cut with quinine within three days of the charged incident. While the evidence was relevant because the defendant was charged with exchanging heroin for quinine, his offer to stipulate that he received the quinine reduced its probative value.<sup>33</sup> The Eighth Circuit has reversed an armed robbery conviction where the government introduced evidence that the defendant threatened a witness and a FBI agent.<sup>34</sup>

In United States v. Webster,<sup>35</sup> a case involving Federal Rule of Evidence 404(a),<sup>36</sup> a drug enforcement agent presented hearsay testimony that the accused had previously sold cocaine. The Fifth Circuit deemed this testimony inadmissible because it was unrelated to a character trait, constituted blatant hearsay, and was extremely prejudicial. A recent decision held that a mistrial may be the only feasible remedy for certain prejudicial evidence; an instruction to disregard may not be

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31. Other cases have been reversed due to the introduction of marginally relevant bad acts. United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981); United States v. McCann, 589 F.2d 1191 (3d Cir. 1978); United States v. Frick, supra note 8; United States v. Turquitt, supra note 13.

32. 601 F.2d 42 (2d Cir. 1979).

33. See also United States v. Coades, supra note 18.

34. United States v. Weir, 575 F.2d 668 (8th Cir. 1978). A death threat was held unfairly prejudicial in United States v. Check, 582 F.2d 668 (2d Cir. 1978).

35. 649 F.2d 346 (5th Cir. 1981).

36. The military version of this Rule provides, in part:

(a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same[.] Mil. R. Evid. 404(a).

enough. In United States v. Escamilla,<sup>37</sup> a case involving conspiracy to sell heroin, the prosecutor asked a DEA agent if he knew that appellant's parents lived where the alleged exchange was made. His prejudicial answer was that one of appellant's brothers was arrested for heroin possession at that house. Cumulative or confusing evidence may also be unfairly prejudicial.<sup>38</sup> For example, in United States v. Civella,<sup>39</sup> complex statistical evidence introduced by the government was deemed unfairly prejudicial because it was beyond the jury's expertise. Rule 403 must be used equitably: if government evidence is admitted over objection, the provision cannot be used to reject similar evidence offered by the defense.<sup>40</sup>

#### Rule 403 and Other Rules

The relationship between Rules 403 and 404(b) has already been discussed. The former provision constitutes a "second line of defense" to objectionable evidence of prior bad acts. Rule 609 prescribes three different standards for admitting records of prior convictions.<sup>41</sup> To admit such a document under Rule 609(a)(1), the military judge must determine that the probative value of the evidence exceeds its prejudicial

37. \_\_\_ F.2d \_\_\_ (5th Cir. 1982).

38. See United States v. Butcher, 557 F.2d 666 (9th Cir. 1977); United States v. King, 560 F.2d 122 (2d Cir. 1977); United States v. Krezdorn, supra note 31. But see United States v. Moreno, 649 F.2d 309 (5th Cir. 1981), where the cumulative nature of the testimony rendered it nonprejudicial.

39. 493 F. Supp. 786 (W.D. Mo. 1981).

40. United States v. Sellers, 566 F.2d 884 (4th Cir. 1977).

41. This Rule provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or (2) involved dishonesty or false statement, regardless of the punishment. In determining whether (Cont'd)

impact. In contrast, Rule 403 enables the admission of evidence unless the danger of unfair prejudice exceeds its probative value. Records of convictions described in Rule 609(a)(2), however, are per se admissible, and no balancing test, not even that prescribed by Rule 403, is applicable.<sup>42</sup> Finally, evidence of a conviction over ten years old is admissible if the military judge determines that its probative value substantially outweighs any prejudicial effect. Rule 608,<sup>43</sup> which pertains

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41. (Cont'd)

a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

42. United States v. Toney, 615 F.2d 277 (5th Cir. 1980); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976), S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 115, 116 (2d Ed. 1977). In a Rule 609(a)(2) case, counsel should nevertheless argue that a prejudice analysis is necessary. At the very least, limiting instructions should be requested.

43. This Rule provides:

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (Cont'd)

to character evidence, also interacts with Rule 403.<sup>44</sup> In United States v. Davis,<sup>45</sup> the court held that it was error to exclude two defense witnesses who would have impeached the chief prosecution witness. They had been excluded since they were not included on a pretrial witness list. The court's decision was based on Rule 403 and the sixth amendment. It is especially important to examine character evidence carefully, because limiting instructions may not suffice.

#### Rule 403 on Appeal

A finding or sentence may not be held incorrect due to an error of law unless the error materially prejudices the accused's substantial rights.<sup>46</sup> Similarly, Rule 103(a)<sup>47</sup> states that error may not be predi-

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43. (Cont'd)

(b) Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

44. United States v. Leake, 642 F.2d 715 (4th Cir. 1981); United States v. Medical Therapy Sciences, Inc., 583 F.2d 36 (2d Cir. 1978); United States v. Bocra, 623 F.2d 281 (3d Cir. 1980).

45. 639 F.2d 239 (5th Cir. 1981). See also United States v. Wasman, 641 F.2d 326 (5th Cir. 1981).

46. Article 59(a), Uniform Code of Military Justice, 10 U.S.C. §859(a) (1976).

47. This Rule provides:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and (Cont'd)

cated upon a ruling which admits or excludes evidence but does not prejudice a party's substantial right. The term "prejudice" in Article 59(a) and Rule 104(a) differs from the manner in which that word is used in Rule 403. The former provisions deal with the concept of harmless error. For example, if a military judge erroneously overrules a defense objection to exclude evidence because the danger of unfair prejudice substantially outweighs probative value, the error may well be considered harmless in light of all the circumstances.<sup>48</sup> Thus, when a defense counsel lodges an objection under Rule 403, he should emphasize the "unfair prejudice" necessary to exclude the evidence, and preserve the record by indicating the manner and extent to which this prejudice adversely affects the accused.

### Rule 403 in the Military

Few reported military appellate decisions deal with Rule 403: United States v. Woolery<sup>49</sup> discusses unfair prejudice without citing the

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47. (Cont'd)

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.

The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

48. See, e.g., United States v. Tapio, 634 F.2d 1092 (8th Cir. 1980); United States v. Fortes, 619 F.2d 108 (7th Cir. 1980); United States v. Bettencourt, 614 F.2d 214 (9th Cir. 1980); United States v. Ives, 609 F.2d 930 (9th Cir. 1979); United States v. Kizer, 569 F.2d 502 (9th Cir. 1978); United States v. Harvey, 547 F.2d 720 (2d Cir. 1976); United States v. Banks, 520 F.2d 627 (7th Cir. 1975); United States v. Butcher, supra note 38.

49. 5 M.J. 31 (CMA 1978). See United States v. Teeter, 12 M.J. 716 (ACMR 1981).

Rule, and in United States v. Pjecha,<sup>50</sup> the court specifically mentioned Rule 403 and found unfair prejudice stemming from an in-court drug analysis which was only marginally relevant.<sup>51</sup>

### Conclusion

Rule 403 may be asserted to overcome the prejudicial effect of prosecution evidence or, if the evidence is not excluded altogether, the Rule may be invoked to secure limiting instructions or a stipulation as to the central facts. However, counsel should be aware that the government can invoke the Rule to exclude marginally relevant defense evidence on the grounds that its admission would be confusing and time-consuming.<sup>52</sup> Rule 403 therefore provides a valuable tool to attack otherwise relevant but highly damaging prosecution or defense evidence; the key to its successful implementation lies in the extent to which the parties limit judicial discretion.

50. 7 M.J. 455 (CMA 1979). Judge Cook, dissenting, felt that any error was harmless. For an earlier discussion of prejudicial evidence in the military, see United States v. Massey, 50 CMR 346 (ACMR 1975); United States v. Salisbury, 50 CMR 175 (ACMR 1975).

51. Three recently reported decisions have mentioned the Rule while forsaking in-depth analysis. United States v. Thomas, 11 M.J. 388, 393 (CMA 1981); United States v. Boles, 11 M.J. 195, 201 (CMA 1981); United States v. Helton, 10 M.J. 820, 824 (AFCMR 1981).

52. See, e.g., United States v. Steffan, 641 F.2d 591 (8th Cir. 1981) (defense evidence too confusing); United States v. Clifford, 640 F.2d 150 (8th Cir. 1981) (defense evidence irrelevant and confusing); United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1981) (defense impeachment evidence as to drug use too tenuous and possibly inflammatory); United States v. Williams, 626 F.2d 697 (9th Cir. 1980) (defense evidence held cumulative).

HANDLING THE EXPERT LIKE AN EXPERT: BACK TO BASICS\*

*\*\*by Michael E. Tigar*

The Courtroom doors are open for expert testimony.

. Federal Rule of Evidence 702 sets the tone: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

. Rule 703 permits the expert to rely on any facts or data "of a type" relied on by those in the field. These facts or data need not themselves be admissible.

. Rule 704 abolishes the silly rule that an expert could not state an opinion or inference embracing the "ultimate issue."

. Rule 705 permits the proponent freedom of choice as to the way he presents the expert's testimony.

In most cases, there will be no serious question whether the expert can testify if properly qualified by an intelligent direct examination. The real questions are those of tactics and strategy. How can an expert help you? How can you prevent the other side's expert from doing lethal damage to your case? I make these decisions by talking to myself, or more precisely by conducting an imaginary interrogation of an imagined expert. These basic questions help me decide whether to use an expert at all, and what sort of expert I should be looking for. The same questions help to prepare the attack on the other side's expert, through research and cross-examination.

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## Doing Without Experts

"To begin, Mr. Expert, what makes you think this testimony will 'assist the trier of fact?'" If it won't help, but may confuse, don't bother with expert testimony. Make some charts and summaries for the fact witnesses, or use them in summation. If you can put the case together with ordinary people, and with your advocacy skills, leave the experts alone. If the other side is using an expert who is doing nothing more than summing up exhibits and testimony in evidence, point out by your cross-examination that the jurors could probably do that just as well for themselves.

"What makes you call yourself an expert in this field?" Academic degrees are fine. Publications are impressive -- make sure you've read them all, for your experts and theirs. Testimony in other cases is a good indicator and a fertile source of cross-examination material. "Do you have any practical experience? I mean, after listing all your degrees and publications, did you find time to get a real job and see how to put this expertise into practice?"

"Are you an expert in something real, that the courts permit expert testimony about?" This sort of inquiry comes up whenever lie--detector, eyewitness identification, and other controversial expert testimony is tendered. Check the law to make sure your expert's specialty is recognized in your jurisdiction as a proper subject of expert testimony.

## Inflicting Early Damage

The questions suggested so far go to qualifying the expert and to attacking qualifications. The attack can be made on the voir dire to oppose permitting the expert to testify as such. Or you can defer that cross-examination until the conclusion of the direct. If you can inflict some early damage, do it on the voir dire.

"Now that you are qualified, Mr. Expert, tell us whether your approach to your subject is respectable. Is it controversial? Is it subject to responsible criticism from other experts who have written in the field, or who might appear here and testify?"

Every psychiatrist and psychologist has an orientation acquired by training and experience. That orientation is regarded as wrong by other equally respectable mental health professionals. Economists, engineers, accountants, chemists - they all have an approach, too. Evaluate your own expert to see if she or he is so controversial as to be subject to ridicule. Size up the opposing expert and make her or him admit that there can be other points of view, and indeed that recognized schools, treatises, articles and other experts are responsible advocates of those points of view. An expert who admits there can be a difference of opinion is made ready for your rebuttal. An expert who will not admit there can be a difference of opinion looks arrogant and foolish.

#### 'Battle of the Experts'

In the course of this cross-examination, try to get your opponent's expert to concede that your expert is a respected member of the profession.

This problem of professional disagreement can be vexing, for it can make "the battle of the experts" an inconclusive waste of time. Consider how you can cut through the problem and tie your expert's opinion to objective facts or at least noncontroversial, incontrovertible scientific conclusions.

In one recent case, the defendant's mental condition was in issue, as to whether he could have had the specific intent required to commit the offense. The defense psychiatrist relied not only upon a standard psychiatric diagnostic procedure, but also upon evidence that the defendant had been drinking heavily just before the incident, had a fever over 100 degrees, had been taking double the recommended dose of a powerful antihistamine/decongestant, and had just spent 12 hours in an airplane in which the cabin was pressurized to about 7,000 feet above sea level.

The plaintiff used an eminent phamacologist to describe to the jury the effect of the toxins and drugs on the defendant's condition, and then put on its psychiatrist to integrate the pharmacological evidence with his own findings.

In a recent murder case, the defendant called, not just a psychiatrist but an expert on the battered wife syndrome to help explain how she came to kill her husband.<sup>1</sup> Focus your search for an expert.

### Looking for Pitfalls

Now, make sure you know how the expert came to a conclusion. The proponent should personally examine the background data, notes and calculations, to test for reasonableness and make sure there are no pitfalls for cross-examination. The cross-examiner should embark on a rigorous hunt for prior statements, notes and background material, looking for the same pitfalls. "Were there other tests done? Were they inconclusive, positive or negative?" Demand and receive every scrap of discovery you can get under the applicable civil or criminal rules.

In a criminal case, any information casting doubt on a government expert's conclusion is producible under Brady v. Maryland.<sup>2</sup> If you can't get the background material through discovery, cross-examining to uncover its existence is probably worth the risk.

"Now, Mr. Expert, are you aware of the literature in your field that deals generally with the subject you are telling us about?" The advocate had better read up. "Are you aware of specific references that support, (or, if you are cross-examining, that contradict) the conclusions you are relating to the jury?"

1. Hawthorne v. State, 30 Crim.L.Rep. (BNA) 2338 (Fla. Ct. App. 18 Jan. 1982).

2. 373 U.S. 83 (1963). See Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).

It is proper to bring out on direct the scholarly as well as the factual basis for an expert's opinion. It is essential on cross-examination to discuss contrary literature. First, ask the expert if she or he knows a particular treatise or article, or its author? Then, ask if she or he is aware of the reference you have in mind.

#### Using Witness Publications

In a complex bank fraud case several years ago, the government put on a PhD from the Federal Reserve Bank in Kansas City, Mo., to testify, in effect, that a defendant's bank had improvidently and imprudently used some \$5 million of the bank's money, amounting to 5 percent of the assets.

Using the witness's own publications, the defense showed that the unqualified opinion expressed on direct examination contradicted a method of analysis he had earlier identified as sound. The defense did not know this witness would testify, nor did the government provide his prior publications. The defense knew only that experts would be called, and spent months collecting, sifting and cataloguing the literature in the field, with the help of its own expert.

The defense then took the witness through a list of publications written by others. Whenever we found one that he agreed with, he was asked about parts of it that were helpful to the defense. Before the witness left the stand, he had conceded that the transaction for which the defendant was indicted might well have been beneficial to the bank's depositors and shareholders.

In fact, the defense's use of the literature in cross-examining the government's experts let it put on so much of its own case that it rested without putting on a defense. The jury acquitted.

"Let us now look at the facts. Mr. Expert, you were not there when the events we are talking about took place, were you?" Of course not. "You got the facts from one of the parties, right?" Or, "Are the facts really in issue even relevant to your testimony?"

For example, the ballistics expert says that a given bullet was fired from a given gun; the fingerprint expert tells you that X touched a certain object at some past time unknown (to him). The ballistics expert doesn't know if the defendant was holding the gun when it went off, or whether the victim was charging him armed with a knife. The fingerprint expert does not know when X touched the object on which the print was found; some objects retain developable fingerprint impressions for years. The tire-tread expert (yes, the FBI has them) can usually tell you only that the tire-tread pattern is "consistent with" a certain vehicle. Get your discovery to make sure you are not being sandbagged, then go in and establish that it is also "consistent with" 10,000 or so other vehicles.

Pointing out this sort of fact is "so what?" cross-examination, designed to bring the jury back to the real issues in the case. If you're doing a "so what?," get up, do it, and sit down; be quick about it.

Most experts cannot, however, be dismissed with a "so what?" cross-examination. You need to find out just how the expert's factual assumptions may have biased the result. You can use facts in evidence that the expert has overlooked, or ask the expert to assume facts you expect to prove. In a bank fraud case, a government expert made much of the defendant's bank having bought quantities of federal funds to bolster required reserves. The jury was impressed to learn that the expert did not analyze federal fund sales for the period to see how much the bank earned from those transactions. The point was drilled home more forcefully when it turned out that the prosecutor hadn't bothered to show the witness the sales records.

"Well, Mr. Expert, if the facts were shown to be such and such, wouldn't you say that . . . ?" Fill in the ellipsis in your own words. "If . . . , would you change your conclusion?"

Let's take an example from a pathologist's cross-examination. "If the jury should find that the defendant was lying on the ground when he fired the gun, with the victim standing over him holding a knife, wouldn't that account for the trajectory of this bullet you have been telling the jury about?"

Take a look at the question in the previous paragraph. The question is designed to take the issue right back to the jurors, to bring them into the picture, and to emphasize that their resolution of disputed fact issues will determine the value of the expert's testimony. Keep that in mind, on direct and cross, or else risk losing the jury's attention as you and the expert show what geniuses you are.

Almost every expert has to make some assumptions. The expert must make an assumption to fill in gaps in information about the past, and to make predictions about the future. The expert would prefer to call these "inferences." Make sure the assumptions are spelled out. On cross-examination, identify them and run some changes on them:

"Now, Doctor, you have told us that the defendant was unable to control his conduct due to alcohol, his flu attack, the medication he was taking and his general psychiatric condition, is that right? Well, if in fact he only consumed half the amount of alcohol you have assumed, that would make a difference in your diagnosis, wouldn't it? And the person who told you about the alcohol was none other than the defendant, isn't that right? He told you about this when you examined him after he was indicted in this case, isn't that right?"

The expert who will not admit to obvious gaps that are filled by assumptions, or who will not show any willingness to change his mind no matter how much the underlying facts are altered, looks a fool.

Two types of assumptions are fodder for cross-examination: those the jury may reasonably find unwarranted, based on your evidence and argument; and those your expert is going to disagree with or has disagreed with. Cross-examination in this field is, in part, for the purpose of summing up a little ahead of time, and contrasting the testimony of the other side's expert with yours.

Now to questions of style. Most experts are rather boring. They lack effect. Their testimony tends to be confusing. So get graphic. The expert's testimony, if it at all lends itself to summarization in charts, graphs, slides or pictures, or with objects in evidence or replicas of objects, should be so illustrated.

The pictorial material must be large enough to be seen by the court and jury, in which case the expert can step down and explain it. Or it must be small enough to be examined while seated, in which case each juror can have a copy to follow along.

This point about visual evidence seems obvious, but all too many lawyers forget about it. This sort of demonstrative evidence need not be expensive. For the cost of some art board, stick-on letters and marker pens, you can create a dramatic visual aid to the expert's testimony. And whether the chart is "evidence" or simply shown to the jurors to help them is a legal distinction without a tactical difference.

In sum, an expert can play a constructive participant role in shaping a case and presenting it persuasively to a jury. Persuasion, and not ego gratification, is the goal. If the expert is yours, warn her or him against the tragic flaw of hubris and the fatal error of windy obfuscation. If the expert is your opponent's, pull the discussion back to the basic facts the jury will be deciding. And if the expert seems willing to take refuge in pridefulness, opacity or wordiness, chase him along that path. It will lead to his own undoing.

## SEARCH AND SEIZURE: A PRIMER

### Part Eight - Stop and Frisk

Prior to Terry v. Ohio,<sup>1</sup> courts were reluctant to apply fourth amendment analysis to "stop and frisk" situations. Subsequent decisions, implicitly approved by the Supreme Court, have developed a bifurcated test requiring a separate examination of whether the detaining officers' belief that criminal activity was afoot is sufficiently reasonable to warrant the initial stop, and whether the subsequent frisk is justified by a reasonable belief that the suspect was armed and dangerous.<sup>2</sup>

#### Reasonableness of Stop

In its initial application of the fourth amendment to a stop and frisk, the Supreme Court focused on two aspects of the government's conduct: (1) whether the intrusion was reasonable and made in furtherance of legitimate government interests; and (2) whether it was limited in scope and intensity to the extent necessary to effectuate its purpose.<sup>3</sup> In Terry, the Court held only that a suspect can be physically seized, for the purpose of a frisk, if the police officer reasonably suspects criminal activity and reasonably believes that the suspect is armed and dangerous.<sup>4</sup> Decisions by lower courts have expanded the original scope of Terry by using the first aspect of the standard in that case as a basis for evaluating the reasonableness of an investigative stop, even if the defendant was suspected only of a minor offense.<sup>5</sup>

1. 392 U.S. 1 (1968).

2. United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972).

3. Terry v. Ohio, supra note 1.

4. Id

5. United States v. Smith, 574 F.2d 882 (6th Cir. 1978) (no requirement that stop be made only for dangerous offense since reasonable belief that suspect is armed and dangerous applies only to frisk); United States v. Magda, 547 F.2d 756 (2d Cir. 1976), cert. denied, 434 U.S. 878 (1977).

### Sources of Information

The standard employed by most courts and adopted by the Court of Military Appeals is that an investigative stop and frisk must be predicated on a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."<sup>6</sup> The investigative stop may be justified by the same sources of information supporting a finding of probable cause to arrest: the officer's personal observations;<sup>7</sup> information relayed from police sources such as radio bulletins;<sup>8</sup> an eyewitness's or victim's description of the perpetrators;<sup>9</sup> or information from other, less inherently reliable informants.<sup>10</sup> Some courts assess reliability in a manner similar to the evaluation of probable cause underlying the issuance of search warrants,<sup>11</sup> while others do not require the scrutiny to be as strict,<sup>12</sup> or make no evaluation at all, holding that information received from a source is itself an articulable fact which can be combined with other facts to justify an investigative stop.<sup>13</sup> While the military standard is unclear, it is probably less strict than that required for the issuance of a search warrant. In United States v. Gillis,<sup>14</sup> the Court of Military Appeals implicitly approved an investigative stop

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6. United States v. Texidor-Perez, 7 M.J. 356, 358 (CMA 1979) (quoting Brown v. Texas, 443 U.S. 47 (1979)).

7. Terry v. Ohio, supra note 1; United States v. Thomas, 10 M.J. 687 (ACMR 1981).

8. United States v. Short, 570 F.2d 1051 (D.C. Cir. 1978).

9. People v. Tooks, 271 N.W.2d 503 (Mich. 1978).

10. Adams v. Williams, supra note 2.

11. United States v. McLeroy, 584 F.2d 746 (5th Cir. 1978).

12. People v. Tooks, supra note 9.

13. United States v. Sierra-Hernandez, 581 F.2d 760 (9th Cir.), cert. denied, 439 U.S. 936 (1978).

14. 8 M.J. 118 (CMA 1979).

based on an unidentified informant's general description of a car carrying marijuana. The Court did not comment on the lower tribunal's holding that the investigative stop of the accused was proper, and reversed because the government had already decided to search the vehicle, and the stop therefore had to be predicated on probable cause.<sup>15</sup>

A police officer may conduct a stop and frisk if he has received directives or radio bulletins from an officer who is cognizant of facts which raise a reasonable suspicion of criminal activity.<sup>16</sup> Some courts have required proof of the actual foundation of the relayed message,<sup>17</sup> while others have approved stops based on radio bulletins with no discussion of the basis of the message.<sup>18</sup> When a radio bulletin is based on information from an unofficial source, the reliability of the informant and the information must be assessed.<sup>19</sup>

The Supreme Court has endorsed the use of a reliable informant's tip to justify a stop and frisk of a suspect.<sup>20</sup> Even if the information is not sufficient to justify a search warrant or an arrest, it may support an investigative stop.<sup>21</sup> Courts have approved the use of anonymous tips or tips from untested informants when the information was corroborated by personal observations of the police, even if the corroboration applied only to innocent details.<sup>22</sup> However, other courts have refused

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15. United States v. Gillis, supra note 14.

16. People v. Finlayson, 431 N.Y.S.2d 839 (App. Div. 1980).

17. United States v. Robinson, 536 F.2d 1298 (9th Cir. 1977).

18. United States v. Short, supra note 8.

19. See State in Interest of H.B., 381 A.2d 759 (N.J. 1977).

20. Adams v. Williams, supra note 2.

21. Id. See United States v. Gillis, 6 M.J. 570 (NCMR 1978), rev'd, 8 M.J. 118 (CMA 1979).

22. United States v. Fields, 458 F.2d 1194 (3rd Cir. 1972); People v. Tooks, supra note 9 (citizen-informant witnessed commission of offense but refused to identify himself). See generally, Green, The Citizen Informant, The Army Lawyer, January 1982, at 1.

to allow reliance on unproven information to meet the "reasonable suspicion" standard,<sup>23</sup> and the Supreme Court warned that some tips are so unreliable that further investigation must be conducted before an investigative stop will be justified.<sup>24</sup> In addition, police may not conduct an investigative stop based on a "drug courier profile" without observing actual conduct raising reasonable suspicion.<sup>25</sup> Nor may police officers routinely stop persons without any particularized suspicion. The police must either have reasonable suspicion in order to make a stop, or effect detentions pursuant to a plan which completely divests them of discretion as to whom they will stop.<sup>26</sup> Even so, a police officer may approach a person on the street without reasonably suspecting criminal activity if he does not detain the person.<sup>27</sup> The test is whether the individual may refuse to cooperate and feels free to leave.<sup>28</sup> Few courts determine whether approaching a suspect for investigative purposes is a "stop" or merely an encounter not amounting to a constitutionally cognizable detention. However, New York, the District of Columbia, and the Army Court of Military Review analyze whether an encounter constitutes a detention which must be based upon reasonable suspicion.<sup>29</sup>

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23. *United States v. DeVita*, 526 F.2d 81 (9th Cir. 1975); *Ebarb v. Texas*, 598 S.W.2d 842 (Tex. Crim. App. 1979)

24. *Adams v. Williams*, supra note 2.

25. *Reid v. Georgia*, 448 U.S. 438 (1980).

26. *Delaware v. Prouse*, 440 U.S. 648 (1979); see *United States v. Foster*, 11 M.J. 531 (ACMR 1981).

27. *United States v. Spencer*, 11 M.J. 539 (ACMR 1981); *United States v. Giraud*, SPCM 15428 (ACMR 29 Oct 81) (unpub.); see *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978).

28. *Terry v. Ohio*, supra note 1; *United States v. Mendenhall*, 446 U.S. 544 (1980).

29. *People v. DeBour*, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); *Matter of J.G.J.*, 388 A.2d 472 (D.C. 1978); *United States v. Spencer*, supra note 27.

Factors Creating Reasonable Suspicion of Criminal Activity

The police officer's personal knowledge and experience is almost universally regarded as a significant factor in determining whether reasonable suspicion exists.<sup>30</sup> However, courts carefully distinguish between reliance on experience to interpret events and reliance on "hunches" when sufficient facts suggesting possible criminal activity are absent.<sup>31</sup> They have rejected contentions that suspicion was based on "developed intuition," and instead require an officer to articulate specific facts which, in conjunction with his experience, led to a reasonable suspicion that criminal activity was afoot.

One specific, articulable fact is suspicious conduct by the suspect. In Terry,<sup>32</sup> undercover officers observed the defendants conferring on a public street and repeatedly looking in a store window. This supported a reasonable suspicion that the individuals were preparing to rob the store. Similarly, a man carrying two television sets in a neighborhood beset by burglaries<sup>33</sup> and an individual exchanging an object for money<sup>34</sup> are sufficiently suspicious to support an investigative stop. Some conduct, of course, is so innocuous that courts have held a stop to be

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30. United States v. Oates, 560 F.2d 45 (2d Cir. 1977); United States v. Wallins, 486 F.2d 229 (9th Cir. 1973), cert. denied, 434 U.S. 878 (1977).

31. People v. Bower, 156 Cal. Rptr. 856, 597 P.2d 115 (1979); see also United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977).

32. Terry v. Ohio, supra note 1.

33. Cooper v. United States, 368 A.2d 554 (D.C. 1977).

34. United States v. Magda, supra note 5; but see Commonwealth v. Greber, 385 A.2d 1313 (Pa. 1978) (commercial transactions between citizens on street corner involving unidentified property do not necessarily create reasonable suspicion)

unjustified.<sup>35</sup> While nervousness or excited demeanor in the presence of officers may arouse reasonable suspicion of criminal activity when combined with other unusual circumstances,<sup>36</sup> those characteristics, standing alone, are insufficient.<sup>37</sup> Courts are divided as to whether an attempt to flee from or avoid a uniformed officer establishes a reasonable suspicion of criminal activity.<sup>38</sup> Unusual physical appearance may justify an investigative stop if other factors contribute to a reasonable suspicion of criminal activity.<sup>39</sup> If a person has obviously suffered a recent physical injury or appears to be under the influence of narcotics or alcohol, his appearance alone will usually justify an investigative stop.<sup>40</sup> The use of race or ethnic background in combination with other factors to justify investigative stops has been emphatically

35. United States v. Foster, supra note 26 (serviceman in high crime area quickened pace and looked over shoulder at undercover agents); State v. Davis, 359 So.2d 986 (La. 1978) (accused viewed smcking hand-rolled cigarette)

36. United States v. Purry, 545 F.2d 217 (D.C. Cir. 1976).

37. United States v. Foster, supra note 26; United States v. Montgomery, supra note 31.

38. United States v. Jones, 619 F.2d 494 (5th Cir. 1980) (evasion of and flight from unmarked police car constitutes natural reaction); People v. Tebedo, 265 N.W.2d 406 (Mich. App. 1978) (flight from police car, standing alone, does not warrant pursuit); People v. Waits, 580 P.2d 391 (Colo. 1978) (driver who turned car around and sped off in opposite direction after seeing officers parked on highway aroused reasonable suspicion).

39. United States v. Gidley, 527 F.2d 1345 (5th Cir.), cert. denied, 429 U.S. 821 (1976) (bulge at waist of bank robbery suspect and presence in crowded restaurant); United States v. Mack, 421 F.Supp. 561 (W.D. Pa. 1976), aff'd, 568 F.2d 771 (3rd Cir. 1978) (suspect's trench coat provided opportunity for concealment of weapons).

40. United States v. Thomas, supra note 7; State v. Hodgman, 257 N.W.2d 313 (Minn. 1977).

rejected.<sup>41</sup> However, physical appearance fitting the description of a person wanted for a reported offense or a vehicle used by a suspect, providing the person or vehicle corresponds to the description in more than a general way, will usually support reasonable suspicion to stop the person and investigate further.<sup>42</sup> Even a general description may be sufficient if the person is stopped near the reported offense,<sup>43</sup> at a point where persons fleeing the situs of the offense could be located when the stop occurred,<sup>44</sup> or at a location sufficiently isolated to reduce the likelihood that other persons fitting the description will also be present.<sup>45</sup>

The nature of the area in which the suspect is seen may "color" otherwise innocuous conduct and create a reasonable suspicion of criminal activity.<sup>46</sup> However, the mere presence of a person in a known center

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41. *United States v. Rias*, 525 F.2d 118 (5th Cir. 1972); *Scott v. State*, 549 SW.2d 170 (Tex. 1976); but see *United States v. Santore*, 619 F.2d 1052 (5th Cir. 1980) (defendant's Italian-American appearance combined with presence near scene of crime sufficient)

42. *United States v. Hall*, 557 F.2d 1114 (5th Cir.), cert. denied, 434 U.S. 907 (1977); see *United States v. Gillis*, supra note 21.

43. *Matter of J.G.J.*, supra note 28.

44. *Patterson v. State*, 386 N.E.2d 936 (Ind. 1979).

45. *United States v Constantine*, 567 F.2d 266 (4th Cir. 1977), cert. denied, 435 U.S. 926 (1978).

46. *United States v. Magda*, supra note 5.

of criminal activity is insufficient to justify a stop in the absence of other factors.<sup>47</sup> On the other hand, presence at the scene of an observed crime is enough to arouse reasonable suspicion,<sup>48</sup> and a car's proximity to the situs of a recent crime may justify an investigative stop.<sup>49</sup>

### Limitations of Stop

A search which is reasonable at its inception may nevertheless violate the fourth amendment by virtue of its intolerable intensity and scope.<sup>50</sup> In general, evidence seized during a stop and frisk will be tainted if the scope of the intrusion exceeds that necessary to further the initial purpose of the stop.<sup>51</sup> An investigative stop based upon reasonable suspicion must be brief. The officer may ask the suspect to identify himself and explain his activity.<sup>52</sup> Once this is accomplished, the suspect must be allowed to leave.<sup>53</sup> If, however, the officer's suspicions are not allayed, he may detain the suspect in order to conduct further investigation or await the assistance of other officers.<sup>54</sup>

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47. Sibron v. New York, 392 U.S. 40 (1968); State v. Saia, 302 So.2d 869 (La. 1974).

48. Crowder v. United States, 379 A.2d 483 (D.C. 1977).

49. See Irwin v. Wolff, 529 F.2d 1119 (8th Cir. 1976).

50. Terry v. Ohio, supra note 1.

51. See United States v. Foster, supra note 26; United States v. Duckworth, 9 M.J. 861 (ACMR 1980).

52. United States v. O'Looney, 544 F.2d 385 (9th Cir 1976), cert. denied, 429 U.S. 1023 (1977).

53. Christmas v. United States, 314 A.2d 473 (D.C. 1973).

54. United States v. Thomas, supra note 7; Harris v. United States, 382 A.2d 1016 (D.C. 1978).

Although mere refusal to answer questions does not, standing alone, support an inference of wrongdoing,<sup>55</sup> such a refusal, combined with the suspicious behavior which originally justified the stop, may create the probable cause needed to arrest him.<sup>56</sup> However, the Supreme Court recently granted review on a 9th Circuit decision that struck down a California statute that makes it a crime to fail to produce proper identification during a valid "stop and frisk." The 9th Circuit decided that such a law authorizes arrests on less than probable cause.<sup>57</sup> Generally, Miranda<sup>58</sup> warnings need not be issued during an investigative stop.<sup>59</sup> If, for some reason, the stop becomes a "custodial interrogation", Miranda warnings must be presented before questioning commences.<sup>60</sup> In addition, if the initial stop lasts more than twenty minutes, courts usually conclude that the detention constitutes an illegal arrest.<sup>61</sup>

A police officer may use reasonable force to effectuate a stop. Since any stop involves some coercion, the border between permissible and impermissible force remains ill-defined. The Fifth Circuit approved the taxiing of a plane in front of a suspect's aircraft and the agents' subsequent approach with drawn guns,<sup>62</sup> while the Ninth Circuit disapproved

55. Terry v. Ohio, supra note 1.

56. Commonwealth v. Ellis, 335 A.2d 512 (Pa. Super. 1975).

57. Kolender v. Lawson, 30 Crim.L.Rep. (BNA) 2155 (9th Cir. 15 Oct. 1981), prob. juris. noted, 30 Crim.L.Rep. (BNA) 4237 (8 Mar. 1982).

58. See Miranda v. Arizona, 384 U.S. 436 (1966).

59. United States v. Jones, 534 F.2d 1171 (5th Cir. 1976), cert. denied, 430 U.S. 957 (1977).

60. See United States v. Phelps, 443 F.2d 246 (5th Cir. 1971).

61. See Sharpe v. United States, 29 Crim.L.Rep. (BNA) 2550 (4th Cir. 4 Sep. 1981); United States v. Chamberlin, 28 Crim.L.Rep. (BNA) 2159 (9th Cir. 7 Oct. 1981); United States v. McDevitt, 508 F.2d 8 (10th Cir. 1974). However, inanimate objects may be detained for longer periods. Compare United States v. Place, 30 Crim.L.Rep. (BNA) 2049 (2nd Cir. 16 Sep. 1981) with United States v. Martell, 29 Crim.L.Rep. (BNA) 2552 (9th Cir. 31 Aug. 1981)

62. United States v. Worthington, 544 F.2d 1275 (5th Cir.), cert. denied, 434 U.S. 817 (1977).

a case in which officers in three squad cars surrounded the suspect while a patrolman approached with a drawn weapon.<sup>63</sup>

To ensure his own safety, a police officer may order a person stopped for a traffic violation to exit the vehicle.<sup>64</sup> Several courts have applied this rationale to similar orders issued during an investigative stop,<sup>65</sup> but other courts have refused to apply this rationale to a "stop and frisk."<sup>66</sup> Police may transport a suspect to a nearby location more conducive to an efficient investigation,<sup>67</sup> or to the scene of the suspected offense in order to obtain eyewitness identification or otherwise facilitate the investigation.<sup>68</sup> However, if the suspect refuses to cooperate with the agent or if the initial questioning has already been carried out at the scene of the initial stop, any further detention of the suspect is likely to be viewed as exceeding the limits of an investigative stop. In addition, the Supreme Court has not approved transportation to the police station for further questioning.<sup>69</sup>

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63. *United States v. Strickler*, 490 F.2d 378 (9th Cir. 1974).

64. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

65. *Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978); *State v. Darrington*, 376 N.E.2d 954 (Ohio 1978).

66. *Jones v. United States*, 391 A.2d 1188 (D.C. 1978).

67. *United States v. Oates*, supra note 30.

68. *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *United States v. Short*, supra note 8; *People v. Holdman*, 383 N.E.2d 155 (Ill. 1978).

69. *Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Hill*, 626 F.2d 429 (5th Cir. 1981).

## The Frisk

### Justification

During a valid stop, a police officer may conduct a limited frisk of a suspect for weapons if he is aware of specific and articulable facts suggesting that his safety or the safety of others is threatened.<sup>70</sup> Under the prevailing view, the validity of the frisk and the stop are independently determined.<sup>71</sup> The officer need only demonstrate a substantial possibility that the person possessed an instrumentality which could be used to commit bodily harm.<sup>72</sup> Most courts are unwilling to set the standard too high when the protection of the individual officer is at stake.<sup>73</sup>

The same factors that justify an investigative stop are relevant to an assessment of the legality of a frisk: the physical appearance of the suspect;<sup>74</sup> quick or furtive movements;<sup>75</sup> the time and place of the stop;<sup>76</sup> and the experience of the officer.<sup>77</sup> A factor that does not enter into the justification of a stop but may nevertheless warrant a frisk is the severity of the suspected offense. Most courts allow an "automatic" frisk if the offense is a violent one, because the officer may assume the suspect is armed and dangerous.<sup>78</sup> In addition, some courts have allowed an automatic frisk where a drug offense is suspected, because drug offenders often carry weapons.<sup>79</sup>

70. Terry v. Ohio, supra note 1; Adams v. Williams, supra note 2.

71. United States v. Short, supra note 8.

72. United States v. Kirsch, 493 F.2d 465 (5th Cir. 1974).

73. United States v. Riggs, 474 F.2d 699 (2d Cir.), cert. denied, 414 U.S. 820 (1973).

74. United States v. Oates, supra note 30.

75. United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978).

76. United States v. Sink, 586 F.2d 1041 (5th Cir. 1978).

77. Crowder v. United States, supra note 48.

78. United States v. Grist, 633 F.2d 316 (D.C. Cir. 1979).

79. United States v. Oates, supra note 30; United States v. Mack, supra note 39.

### Scope

Since the sole justification for a frisk is the protection of the police officer and others nearby, it must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden weapons.<sup>80</sup> A frisk is usually limited to a "pat-down" of the outer clothing, but it need not be if the officer suspects that a weapon is secreted in a particular place.<sup>81</sup> An officer may also investigate an unusual bulge in the person's clothing,<sup>82</sup> or reach inside a bulky outer garment.<sup>83</sup> As soon as an officer discovers that there is no dangerous instrumentality, he must cease his search.<sup>84</sup> However, courts have often allowed an examination of pockets even when the pocket contains only soft objects.<sup>85</sup> Some courts have extended the range of the frisk to personal property in the suspect's possession,<sup>86</sup> including

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80. Terry v. Ohio, supra note 1.

81. Adams v. Williams, supra note 1.

82. United States v. Hill, 545 F.2d 1191 (9th Cir. 1976).

83. United States v. Mack, supra note 39.

84. United States v. Short, supra note 8.

85. State v. Yuresko, 493 P.2d 536 (Ariz. 1972) (cigarette pack contained hand-rolled marijuana cigarettes).

86. Johnson v. United States, 350 A.2d 738 (D.C. 1976) (grocery bag between suspect's legs); United States v. Vigo, 487 F.2d 295 (2nd Cir. 1973) (handbag); United States v. Riggs, supra note 73.

property that clearly could not have contained any dangerous instrumentality.<sup>87</sup> Several courts have allowed a protective search of a vehicle during a valid investigative stop.<sup>88</sup> The Fifth Circuit has refused to allow a frisk of a vehicle once the suspects had disembarked and the police had separated them from the vehicle,<sup>89</sup> but the Seventh Circuit has permitted such a frisk because of possible retaliation by the suspects if the stop proved fruitless and they were released.<sup>90</sup> Courts have also permitted frisks of persons accompanying a suspect, ostensibly to ensure the officer's safety, especially when the persons have close ties to the suspect.<sup>91</sup> Police officers conducting valid investigative stops may see incriminating objects in plain view. Provided an officer is legitimately in a position from which he can view objects giving him probable cause to suspect that a crime is being committed, he may seize the articles and arrest the suspect under the "plain view" doctrine.<sup>92</sup>

87. State v. Yuresko, supra note 85.

88. United States v. Rainone, 586 F.2d 1132 (7th Cir. 1978); Lawrence v. State, 375 N.E.2d 208 (Ind. 1978).

89. Canal Zone v. Bender, supra note 65; see United States v. Texidor-Perez, supra note 6; but see United States v. Ullrich, supra note 75 (search upheld when suspect moved toward area underneath vehicle's seat).

90. United States v. Rainon, supra note 88; see United States v. Bray, 12 M.J. 553 (AFQMR 1981).

91. United States v. Sink, supra note 76; Meade v. Cox, 438 F.2d 323 (4th Cir. 1971).

92. United States v. Gorin, 564 F.2d 159 (4th Cir 1977), cert. denied, 434 U.S. 1080 (1978); United States v. Solven, 512 F.2d 1059 (8th Cir. 1975); see Note, Search and Seizure: A Primer, Part Six - Plain View, 12 The Advocate 357-61 (1981).

### Conclusion

A valid Terry<sup>93</sup> stop must be based on a reasonable suspicion of criminal activity. The suspicions of the officer must be based on specific, articulable facts rather than a mere "hunch" that criminal activity was occurring.<sup>94</sup> In addition, if the officer can articulate facts to suggest that his safety is threatened, he may conduct a limited frisk of the suspect for weapons.<sup>95</sup> The reasonableness of the stop and the frisk are independently assessed, but both actions must be limited in scope and intensity to merely accomplish the purpose of the intrusion.<sup>96</sup> Once the intrusion goes beyond the minor scope of an investigative stop and frisk, it must be supported by probable cause, or any evidence discovered will be tainted.<sup>97</sup>

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93. Terry v. Ohio, supra note 1.

94. People v. Bower, supra note 31.

95. Terry v. Ohio, supra note 1.

96. United States v. Brignoni-Ponce, supra note 2.

97. Dunaway v. New York, supra note 9.

## SIDE BAR

### *A Compilation of Suggested Defense Strategies*

#### Tailored Instructions

Jury instructions which are specifically tailored to the evidence and the defense theory of the case should result in more acquittals. Yet many defense counsel decline to request such instructions because the practice is time consuming, and the final tailoring must often be postponed until all the evidence has been presented. These problems should not deter the defense attorney: criminal trial practice is rife with opportunities to cast the defense case in a better light.

In several recent cases, defense-requested witnesses asserted their their rights under Article 31, UCMJ, or the fifth amendment and refused to testify.<sup>1</sup> The convening authority refused to grant -- and the military judge declined to order -- immunity.<sup>2</sup> While the defense counsel should object to a refusal to grant or order immunity at trial, he should also request jury instructions tailored to the particular situation. For example, trial defense counsel should urge the military judge to inform the court members that only the government may grant immunity for witnesses and thereby compel their testimony; that the defense has not been granted that power; and that neither the military judge nor the members can immunize defense -requested witnesses who refuse to testify. Counsel should then, of course, tailor his final argument accordingly.

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1. The steps for counsel to take when a witness invokes the privilege against self-incrimination were discussed at 13 *The Advocate* 117 (1981).

2. Pending before the U.S. Court of Military Appeals is the issue "[w]hether the military judge erred by refusing to compel the production and immunization of a defense requested witness in light of that witness' invocation of his Article 31 rights." *United States v. Jones, pet. granted*, No. 42279 (CMA 1 February 1982).

Tailored instructions may also help illuminate a government informant's motive for testifying. If the government witness informs on the accused because of promises or threats related to his own drug violations, the defense counsel should request specific instructions addressing the witness' reason for testifying. In a recent case, government agents apprehended the informant and told him that he would be imprisoned that night and would ultimately be sentenced to 40 years of confinement unless he implicated a drug dealer that day. The informant stopped the first soldier he saw and badgered him until he obtained drugs. The trial defense counsel should request a specifically tailored instruction in this situation: a defendant, upon request, is entitled to have his theory of the case included in the court's charge if there is any evidence in support of it, regardless of how tenuous, improbable or inherently incredible it might be. See United States v. Vole, 435 F.2d. 774 (7th Cir. 1970) (conviction reversed where trial judge declined to present defense-requested instruction on defendant's theory that he was framed).

Merely offering a proposed instruction might not be enough to preserve the issue for appeal. In United States v. Paris, CM 440210 (ACMR 11 January 1982) (unpub.), the defense counsel drafted a proposed reasonable doubt instruction which deleted the language equating reasonable doubt with substantial doubt. See United States v. Salley, 9 M.J. 189 (CMA 1980); United States v. Cotten, 10 M.J. 260 (CMA 1981). The defense counsel did not object to the standard instruction contained in the Military Judge's Guide, nor did he object when the military judge declined to give the requested instruction. The Army Court of Military Review found that the issue was waived, since both Cotten and Sally require a specific objection to the challenged language. Trial defense counsel should therefore interpose specific, detailed objections and, where appropriate, make an offer of proof.

#### Inattentive Court Members

In a recent case, one of the court members fell asleep. The trial defense counsel and accused, both noting the dozing juror, discussed the matter and decided to do nothing rather than risk irritating the panel. A preferable solution would be to request an Article 39(a), UCMJ, session, bring the matter to the attention of the military judge, and ask that he conduct an inquiry without identifying the objecting party.

### Learned Treatises

Learned treatises, periodicals, or pamphlets on history, medicine or other sciences or arts are admissible under an exception to the hearsay rule, subject to two caveats. See Mil. R. Evid. 803(18). First, the Rule only permits the introduction of that part of the treatise "called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination." In addition, the Rule requires that this evidence be presented orally: it must be read to the jury rather than introduced as an exhibit. See United States v. Phillips, 515 F. Supp. 758 (E.D. KY 1981); United States v. An Article of Drug, 661 F.2d 742 (9th Cir. 1981).

### Abandoning Pretrial Agreements After Trial

In United States v. Hannan, CM 438946 (ACMR 12 January 1982) (unpub.), the appellant, an officer, was sentenced, inter alia, to confinement at hard labor for one year and a day. His pretrial agreement provided that the convening authority would approve no confinement at hard labor in excess of one year, and the convening authority therefore did not approve the additional day of confinement. On appeal, the appellant contended that because of the parole provisions of Dept. of Army Reg. 190-47, The United States Army Correctional System, 1 October 1978 (C 1, 1 November 1980), prisoners sentenced to confinement for more than one year are eligible for parole consideration after serving six months of confinement or one-third of the approved sentence to confinement; prisoners sentenced to a year or less of confinement are not automatically eligible for parole. Thus, the convening authority's approval of one year of confinement increased the potential duration of incarceration. Compare United States v. Surry, 6 M.J. 800 (ACMR 1978) with the discussion of eligibility for parole in USATDS Training Memorandum 82-2, 24 February 1982.

Obviously, the convening authority could not unilaterally withdraw from the pretrial agreement after trial, although the appellant could have released him from it. The Court specifically addressed this point in a footnote:

We note that even though the appellant and counsel were well aware prior to the convening authority's action of the effect of the pretrial agreement on parole eligibility, the appellant did not relieve the convening authority of his obligation to approve no more confinement than for one year. To have done so would have been within the powers of the appellant (at that point the beneficiary of the agreement) and it would have mooted the present issue.

United States v. Hannan, CM 438946, slip opinion at 5 n.5 (ACMR 12 January 1982)(unpub.). Because an accused may withdraw from a pretrial agreement at any time prior to action by the convening authority, defense counsel should be alert to those situations where the client may benefit by releasing the convening authority from his contractual obligations. Counsel should insure, however, that the appellant's signed release is in writing, and is attached to the record of trial.

#### Guilty Plea Checklist

*The Defense Appellate Division has compiled a comprehensive list of potential trial errors in uncontested cases. The checklist is designed to serve both as a training aid and as a research tool for any lawyer reviewing a record of court-martial. Only a few of its sections deal exclusively with issues raised by a plea of guilty. The first part of the checklist is divided into 21 sections covering the major logical divisions of a record of trial. Each section contains a list of issues that may arise from that portion of the record. The second part contains case law annotations corresponding to the topics in the checklist. United States Army Trial Defense Service attorneys and staff judge advocates may obtain copies of the Guilty Plea Checklist by addressing requests to Case Notes Editor, The Advocate, Defense Appellate Division, United States Army Legal Services Agency, 5611 Columbia Pike, Falls Church, VA 22041.*

## USCMA WATCH

*Synopses of Selected Cases In Which  
The Court of Military Appeals Granted  
Petitions For Review or Entertained  
Oral Argument*

In United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980), pet. granted, 9 M.J. 398 (CMA 1980), argued 23 June 1981, reargued 17 February 1982, the Court of Military Appeals embarked on an exhaustive reexamination of the insanity defense. The appellant was originally convicted of premeditated murder. On appeal, the Army Court of Military Review reversed and authorized a rehearing on the basis of United States v. Frederick, 3 M.J. 230 (CMA 1977). United States v. Cortes-Crespo, CM 434897 (ACMR 22 August 1977) (unpub.). On appeal from a rehearing at which the appellant was again convicted of premeditated murder, the lower appellate court affirmed the findings and sentence, and defined "mental disease or defect." United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980). The Court of Military Appeals granted the appellant's petition for review on the issue of whether the evidence was sufficient, as a matter of law, to rebut appellant's claim of mental irresponsibility.

During the original argument on 23 June 1981, the appellant challenged the lower court's definition of "mental disease or defect" on the basis that it excluded certain character and behavior disorders which arguably could provide grounds for the defense of lack of mental responsibility. Although the Court specified seven issues concerning the possible statutory and constitutional bases of the defense,\* its inquiry during oral

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\*After oral argument on 23 June 1981, the Court of Military Appeals specified the following issues: whether an insanity defense in courts-martial is required by the Manual for Courts-Martial, United States, 1969 (Revised edition), the Uniform Code of Military Justice, or the fifth or eighth amendments to the United States Constitution; whether court members may be required or allowed to make special findings on the issue of mental responsibility, and, if so, what procedural provisions are appropriate for special findings on mental responsibility, and whether such special findings would require the consent of all parties; whether insanity should be viewed merely as a mitigating circumstance, rather than a defense to criminal liability; whether there is a need for further judicial definition of "mental disease or defect" for purposes of determining mental responsibility; and whether the Army Court of Military Review provided an adequate definition of "mental disease or defect" for purposes of determining mental responsibility.

argument focused on the definition of "mental disease or defect" as that concept is applied under the American Law Institute's standard for mental responsibility, adopted by the military in United States v. Frederick, supra. The appellate defense counsel argued that although the Army Court of Military Review should be commended for attempting to define that phrase, it had gone too far by excluding character and behavior disorders. The causative link between an accused's abnormal condition and his cognitive and volitional abilities is more properly the crux of the insanity defense, regardless of the medical or psychiatric label attached to the mental condition. The lower court's definition also injected confusion into the area by emphasizing the moral nature of the defect, for that concept shifts the focus from the necessary area of inquiry - the degree of impact that the mental condition has on the individual. Finally, the lower court deleted the cognitive aspect of the ALI/Frederick standard in its definition, despite the clear language of Frederick. Thus, "mental disease or defect" must be defined in such a manner as to make clear that the mental impairment may impact on either cognition or behavior controls.

The government, on the other hand, contended that the insanity defense should be reserved only for those cases in which the mental condition amounts to one of the "most serious afflictions of the mind," since the defense would otherwise be raised in every court-martial. The government urged the Court to clarify the definition of "mental disease or defect" to the extent that it would provide the foundation for an insanity defense only in cases in which a serious abnormal condition is present. In addition, the definition of the term "substantial" as used in the Frederick standard should be interpreted to mean "almost total" lack of the accused's capacity "to both appreciate the criminality of his conduct and to conform his conduct to the law."

The Court was primarily concerned with the difficulties in conforming a definition of "mental disease or defect" to the realities of psychiatric practice. Because psychiatrists are reluctant to attach labels to specific mental conditions which would describe both the condition and its effects on the individual, Chief Judge Everett and Judge Fletcher queried counsel on the advisability of defining the terms "mental disease or defect" with any degree of specificity. Rather, Judge Fletcher suggested, should not the focus of the inquiry be the effect of a perceived abnormal condition on the accused's commission of the offense? Further, assuming a broad definition of "mental disease or defect" were adopted, how would the military judge meaningfully instruct the court members of the factors to be considered in resolving the insanity issue? Chief Judge Everett noted that the ALI standard did not define the term "mental disease or defect" nor did it distinguish between character disorders and mental diseases.

Judge Fletcher also expressed concern about the dynamic nature of psychiatry. Specifically, psychiatrists "speak their own language," and do not describe conditions as "mental diseases or defects". In that light, wouldn't any definition of "mental disease or defect" necessarily have to be very broad? He apparently feels that the appropriate inquiry should address the issue of whether there is "something wrong" with the individual, and whether it had any effect on the commission of the offense. Judge Cook asked about the options available to serve as vehicles for changing the insanity defense. Specifically, he questioned both counsel about the experiences of Illinois, Michigan, and Indiana in treating insanity as a sentencing factor. He also queried whether a presidential commission might more appropriately address the proposed changes in the insanity defense.

Regardless of the manner in which these issues are resolved, the insanity defense will continue to present both conceptual and procedural difficulties. Because the defense necessarily involves complex psychiatric principles as well as moral, social, and, at times, ethical considerations, no single definition or rule will apply in all cases. Practitioners in the field should not rely solely on expert testimony concerning the accused's mental condition. On the contrary, evidence should also be presented which delves into the effects of the condition, both on the accused's alleged criminal conduct and on his behavior in general. This evidence would provide the trier of fact with a better understanding of the issues involved in its inquiry and would afford a broader factual basis upon which the accused's culpability may be determined.

#### GRANTED ISSUES

The Court continues to grant review of several "trailer" issues involving, inter alia, the classification of cocaine as a narcotic, see, e.g., United States v. Tresenrider, ACMR 16304, pet. granted, 12 M.J. 407 (CMA 1982); the alleged multiplicity, for findings purposes, of possession, sale and transfer offenses, see, e.g., United States v. Ragin, ACMR 441013, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982), summary disposition, No. 42351, 12 M.J. \_\_\_\_ (CMA 24 Feb 1982); misadvice in post-trial reviews as to available defenses, see, e.g., United States v. Cardwell, ACMR 15920, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982); sentencing instructions or arguments by trial counsel allowing or urging court members to consider the accused's denial of guilt, on the merits, as an aggravating factor, see, e.g., United States v. Cabebe, ACMR 440875, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982); and instructions on findings equating reasonable doubt with substantial doubt, see, e.g., United States v. Black, NCMR 81-0935, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982).

In several recent cases, the Court, disregarding the lack of any objection at trial, summarily dismissed specifications on multiplicity grounds. A specification alleging a communication of a threat was dismissed as "part and parcel" of an allegation of assault with intent to rape in United States v. Leader, ACOMR 440001, pet. granted with summary disposition, No. 42327, 12 M.J. \_\_\_\_ (CMA 17 Feb. 1982). In United States v. Ragin, ACOMR 441013, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982), summary disposition, No. 42351, 12 M.J. \_\_\_\_ (CMA 24 Feb. 1982), specifications alleging attempted sale of marijuana and LSD were dismissed as a "duplicate" of specifications averring possession and transfer of the same drugs. In United States v. Hale, NCOMR 81-2575, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982), summary disposition, No. 42351, 12 M.J. \_\_\_\_ (CMA 24 Feb. 1982), the Court dismissed a specification alleging assault with a pistol, holding that it was "included" within the separate charge of robbery. In United States v. Fail, ACOMR 440489, pet. granted with summary disposition, No. 42459, 12 M.J. \_\_\_\_ (CMA 1 Mar. 1982), the Court dismissed a specification alleging indecent exposure as "part and parcel" of another specification alleging indecent assault. And in United States v. Donnelly, AFOMR 23135, pet. granted with summary disposition, 12 M.J. 331 (CMA 1981), the Court dismissed a charge containing three specifications of dereliction of duty because these derelictions "constituted" the three larcenies alleged under a separate charge. The Court affirmed the sentences in each of these cases because the military judge had treated the subject specifications as multiplicitious for sentencing purposes. Cf. United States v. Gibson, 11 M.J. 435 (CMA 1981) (findings and sentence relief granted, even though military judge treated specifications as multiplicitious for sentencing). Because of the military practice of alleging as many offenses as possible in order to enable the government to meet the exigencies of proof and to safeguard against appellate reversals, issues arising from an unreasonable multiplication of charges are the most frequently raised assignments of error during appellate review. Perhaps the Court will use Sturdivant, discussed infra, as a vehicle to set forth a "bright line" to clarify this area and resolve the prosecutor's dilemma.

#### REPORTED ARGUMENTS

##### CHARGES: Unreasonable Multiplication

The accused in United States v. Sturdivant, 9 M.J. 923 (ACMR 1980), pet. granted, 10 M.J. 244 (CMA 1980), argued 18 February 1982, was charged with possession of marijuana, attempted possession of marijuana, transfer of marijuana, sale of marijuana, conspiracy to transfer marijuana, conspiracy to sell marijuana, solicitation to possess marijuana, solicitation of another to introduce marijuana onto a military post for purpose of

transfer, and solicitation of another to introduce marijuana onto a military post for purpose of sale. The military judge dismissed three specifications before findings, and the lower appellate court dismissed five more specifications on multiplicity and insufficiency of the evidence grounds, after finding that the government had taken what was essentially one transaction and unreasonably multiplied it into ten offenses. Appellate defense counsel argued that the unreasonable multiplication of charges improperly influenced the court members, and that the weakness of the proof, the evidence of uncharged misconduct, and the lower court's conclusion that the number of charges contributed to erroneous findings demonstrated that the appellant had been denied a fair trial. Both Chief Judge Everett and Judge Fletcher expressed concern over the prosecutorial strategy employed in this case. The government responded that prosecutors face a pleading dilemma and that the law is unclear as to when multiplicitous pleadings are authorized.

The charges were preferred against the appellant after his first sergeant picked up an extension line and overheard a private telephone conversation in which the appellant allegedly arranged a drug transaction. The appellate defense counsel contended that the WIMEA statute, 18 U.S.C. § 2511, and the fourth amendment extend to all willful, surreptitious monitorings of conversations through telephone extensions not used in the ordinary course of business. Because Dept. of Army Reg. 105-23, Communications - Electronics - Administrative Policies and Procedures For Base Telecommunications Services (C2, 15 May 1980) prohibits telephone monitoring except in specific circumstances, the first sergeant was not using the extension in the ordinary course of business. The government appellate counsel contended that the WIMEA regulation extends only to police criminal investigations and does not include the "administrative" monitoring in this case. Judge Cook asked whether a violation of the regulation, standing alone, would justify the suppression of the overheard conversation and questioned whether there could be a reasonable expectation of privacy in an orderly room telephone with six extensions.

#### CONVENING AUTHORITY: Disqualification

The Court will assess the extent to which a convening authority may become involved in the prosecution of a court-martial before becoming disqualified to act on the case in United States v. Burrell, ACRM 439670, pet. granted, 12 M.J. \_\_\_ (CMA 1981). The trial defense counsel challenged the court-martial's composition, arguing that enlistees below the rank of E-5 had been systematically excluded. The convening authority refused to disqualify himself from acting on the conviction after averring, in a stipulation of expected testimony admitted at trial, that any exclusion of junior enlistees resulted from his selection of the best-qualified servicemembers available.

## DEFENSE COUNSEL: Ineffective Assistance

Under what circumstances does it become apparent that the defense counsel did not take the necessary actions prior to trial to insure the availability of defense witnesses or otherwise prepare for the court-martial? May the military judge penalize the accused for his counsel's derelictions? Before the Army Court of Military Review in United States v. Jefferson, ACMR 438956, pet. granted, 10 M.J. 94 (CMA 1980), argued 19 September 1981, issue specified, 12 M.J. 70 (CMA 1981), argued 12 January 1982, the appellant challenged the trial judge's denial of his request for two witnesses on the merits. Noting that the defense counsel had not interviewed the requested witnesses and therefore had not established the materiality of their expected testimony; that the request was not timely; that one witness's expected testimony was cumulative and that a medical report adequately encapsulated the other witness's expected testimony, the lower court rejected the appellant's contention that the trial judge committed error, and denied a subsequent motion for reconsideration which urged that the court's opinion amounted to a de facto finding of ineffective assistance of trial defense counsel.

The Court of Military Appeals granted review of the issue relating to the denied request for defense witnesses, and, following oral argument on the granted issue, specified the issue of whether the appellant had been denied effective assistance of counsel at trial. During oral argument on the specified issue, the Court seemed primarily concerned with the measures the defense counsel took in preparing for the trial; it showed little interest in reassessing the established standard of competence expected of counsel in criminal cases. See United States v. Rivas, 3 M.J. 282 (CMA 1977). The Court was particularly interested in whether attorneys are obligated to personally interview potential witnesses prior to trial or whether they can properly rely upon information contained in medical reports, witnesses' statements and investigation reports by law enforcement agents in preparing for trial and averring the materiality of a requested witness's expected testimony.

Judge Fletcher noted that the military places prime importance on CID reports and that a witness could be impeached if he changed his testimony. The government argued that the defense counsel's request for witnesses was sufficiently deficient to have justified the military judge's denial, but was not so deficient as to constitute ineffective assistance of counsel. The government also urged that even if the appellant's counsel was ineffective in preparing for the trial, the appellant was not prejudiced. When the Chief Judge asked whether the government was contending that defense counsel need not interview potential witnesses but could rely on CID reports, the government responded that

counsel could rely on the CID statements in this case because there was nothing inconsistent with the defense. The Chief Judge asked whether that fact underscored the need to interview the prospective witnesses. If the Court agrees with the appellant's basic proposition that the presence of one or both witnesses was necessary to insure a fair trial, it must assess the relative responsibilities of counsel and the military judge in protecting the impartiality of criminal proceedings. For a penetrating analysis of this problem from a trial judge's standpoint, see Schwarzer, Dealing With Incompetent Counsel - The Trial Judge's Role, 93 Harv. L. R. 633 (1980).

#### GUILTY PLEA: Providence Inquiry

Must the military judge explain every element of an offense to an accused before accepting his guilty plea? In United States v. Pretlow, CM 439700, certificate of review filed, 10 M.J. 295 (CMA 1981), argued 19 January 1981, the appellant pleaded guilty to conspiracy to commit robbery. The lower court set aside the findings of guilty to that offense because the military judge explained the elements of conspiracy but neglected to discuss the elements of robbery during the providence inquiry. The government certified the issue and argued that United States v. Care, 18 USCMA 535, 40 CMR 247 (1969), should not be applied in a talismanic manner. Federal appellate decisions do not emphasize the need to explain every element of an offense, and if the record as a whole reflects that the accused committed the charged crime, a lack of explanation of the element is unimportant. Appellate defense counsel argued that paragraph 70b of the Manual adopted the procedure established in United States v. Care, supra, and that the lower tribunal correctly ruled that noncompliance with the required procedures rendered the plea improvident. Judge Fletcher asked whether the issue in this case was resolved by the Court's ruling in United States v. Crouch, 11 M.J. 128 (CMA 1981), that evidence establishing that the accused was an aider and abetter abrogated any requirement to explain aiding and abetting prior to accepting his plea. Judge Cook wanted to know if reversing the lower court would require reversal of Care.

#### MILITARY JUDGE: Mistrial

During trial, a witness responded to a question about the appellant's actions by repeating an inadmissible, inculpatory statement made by the appellant. The military judge denied a motion for mistrial and instead instructed the members to disregard the statement. In United States v. Morris, ACMR 15125, pet. granted, 10 M.J. 334 (CMA 1981),

argued 13 January 1982, appellate defense counsel urged reversal because the military judge's instruction, presented after the witness testified and also prior to the members' deliberation on findings, quoted the inculpatory statement verbatim and thereby highlighted the statement and augmented its prejudicial impact. While court members are presumed to follow the military judge's instructions, the Court's questions reflected concern about the amount of prejudice which will mandate a mistrial.

#### MILITARY JUDGE: Rulings

In United States v. Butler, AFMR 22778, pet. granted, 10 M.J. 392 (CMA 1981), argued 14 January 1982, the Court will determine whether a military judge must explain his denial of a request for a bench trial. Neither party argued that an accused has an unqualified right to trial by judge alone. While minimal due process may require the military judge to at least state the grounds for his decision to deny the request in order to allow adequate appellate review of the ruling, the military judge is not statutorily required to explain his denial, and government counsel contended that no explanation should be required unless the accused gives specific reasons for requesting trial by judge alone. The Court asked why the accused should be required to state his reasons for the request, since there is usually an obvious tactical motivation.

#### OFFENSES: Multiplicity

The case of United States v. Cartwright, ACFM 439544, pet. granted, 10 M.J. 397 (CMA 1981), argued 12 January 1982, raises a question left unanswered in United States v. Ford, 12 USCMA 3, 30 CMR 3 (1960): can a person convicted, as an aider and abettor, of stealing mail also be convicted of receiving that stolen property? Both parties acknowledged that an actual thief cannot be convicted of receiving the property he has stolen, see paragraph 213e(14), Manual for Courts-Martial, United States, 1969 (Revised edition), and that both offenses may be charged to meet the exigencies of proof. However, United States v. Milanovich, 365 U.S. 592 (1961), and the congressional intent reflected in the mail offenses under Title 18 of the U.S. Code, suggest that an accused cannot be convicted of both offenses since, as a thief, he constructively possesses the property. Further, Title 18 of the U.S. Code criminalizes an assortment of mail-related offenses, and the same congressional intent to characterize as one offense a variety of mail-related criminal activity would apply to the military offenses of stealing mail and receiving stolen mail. The government contended that the lack of prejudice as to the sentence obviated the need to resolve the substantive issue; that the interval between the actual taking and the accused's receipt of the

property rendered the offenses sufficiently separate; and that any error was waived by lack of objection at trial and by the accused's guilty plea.

SEARCH AND SEIZURE: Expectation of Privacy

Does an individual have a legitimate expectation of privacy in the contents of a garment he leaves in another's car? In United States v. Miller, NCMR 8000241, certificate of review filed, 10 M.J. 119 (CMA 1980), argued 12 January 1982, the Navy Court of Military Review held that a car owner's consent to a search of his vehicle could not extend to a field jacket which clearly did not belong to him. The government counsel argued that the accused no longer had a legitimate privacy interest in the jacket because he had left it in an unlocked car and had, in effect, made the car owner a gratuitous bailee. The Court was most interested in the applicability of Robbins v. California, 452 U.S. \_\_\_, 101 S.Ct. 2841, 69 L.Ed.2d 794 (1981); New York v. Belton, 452 U.S. \_\_\_, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and United States v. Sanford, 12 M.J. 170 (CMA 1981).

SELF-INCRIMINATION: Compelling Accused's Testimony on Sentencing

The Court will address the impact of the Supreme Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), on court-martial sentencing procedures in United States v. Saur, NCMR 80-1114, certificate of review filed, 12 M.J. 86 (CMA 1981). The lower appellate tribunal in that case held that the military judge may not require an accused to testify about data missing from a facially incomplete record of nonjudicial punishment introduced during sentencing. The Air Force Court of Military Review has also held that the accused may not be compelled to testify about such matters unless he waives his rights under Article 31, UCMJ. United States v. Hardy, AFCMR 525320, certificate of review filed, 12 M.J. 405 (CMA 1982). In both cases, the courts of review concluded that Estelle modifies or overrules United States v. Spivey, 10 M.J. 7 (CMA 1980) and United States v. Mathews, 6 M.J. 357 (CMA 1978).

SENTENCING: Consideration of Pretrial Confinement

In United States v. Yuhas, NCMR 79-1138, pet. granted, 12 M.J. \_\_\_ (CMA 1982), the Court agreed to examine the question of whether the 75 days of pretrial confinement served by the appellant should have been added to his five month sentence in order to determine whether he had been sentenced to a period of confinement longer than the 6-month maximum period of incarceration that a special court-martial is empowered to adjudge.

### STAFF JUDGE ADVOCATE: Post-Trial Responsibilities

In United States v. Carr, ACMR 440271, pet. granted, 12 M.J. \_\_\_\_ (CMA 1982), the Court will have an opportunity to examine several issues, including the question of whether a staff judge advocate is obligated to inform the convening authority of the manner in which the latter can consider polygraph evidence which is favorable to the accused, see United States v. Massey, 5 USQMA 514, 18 CMR 138 (1955), and a post-trial letter from a court member alleging juror misconduct. In addition, the Court will determine whether a "mistake of fact" instruction may be presented in a rape case, and will review the scope of the military judge's discretion to allow court members the opportunity to call witnesses.

### TRIAL: Right to Speedy Trial

Can involuntary detention beyond a serviceman's obligated term of service ever amount to involuntary servitude? In United States v. Davenport, NCMR 801356, pet. granted, 11 M.J. 88 (CMA 1980), argued 19 January 1981, the accused's expiration of active obligated service (EAOS) date was 25 May 1979. Court-martial charges were not preferred until 22 August 1979, and he was tried on 4, 14 and 17 September 1979 for offenses which had occurred between 14 and 8 months prior to trial. He had demanded a speedy trial prior to his EAOS date and again two months prior to trial. This timetable demonstrated a lack of concern for expeditious prosecution; further, retention in a non-pay status for four months amounts to involuntary servitude and constitutes sufficient prejudice to justify dismissal. The government counsel countered that, absent actual pretrial confinement, the appellant must show prejudice at trial, and that retention beyond an EAOS date does not in itself establish this prejudice. The Court summarily terminated the oral argument, indicating that the case would be remanded to the Navy TJAG for further factual determinations of whether the appellant had in fact been in a non-pay status and whether he had been court-martialed only because nonjudicial punishment could not justify retention beyond his EAOS date.

## CASE NOTES

### *Synopses of Selected Military, Federal, and State Court Decisions*

#### COURTS OF MILITARY REVIEW DECISIONS

##### EVIDENCE: Admissibility of Expert Testimony

United States v. Hood, CM 441047, \_\_\_ M.J. \_\_\_ (ACMR 28 January 1982).  
(ADC: CPT Vitaris)

Before sentencing, a prosecution witness properly testified, over defense objection, that the contraband sold by the accused on the Korean black market garnered two or three times its cost. The witness's experience as a CID agent qualified him as an expert in this matter. See Mil.R.Evid. 702. Furthermore, the prosecutor properly argued that in light of the substantial gains reaped by the accused, the members should feel no compunction about adjudging a punitive discharge. The court affirmed the findings and sentence.

##### EVIDENCE: Admissibility of Expert Testimony

United States v. Wallace, CM 440989 (ACMR 27 January 1982) (unpub.).  
(ADC: CPT Gray)

The accused was convicted of committing a lewd and lascivious act with a 3-year old child. A psychologist called by the government opined that the victim's testimony was credible. However, because a defense psychologist was not given an opportunity to examine the victim, "fundamental fairness" required the judge to strike the doctor's testimony. The appellate court nevertheless determined that the testimony "did not appreciably influence the fact finders" and affirmed the findings and sentence. See United States v. Woolery, 5 M.J. 31 (CMA 1978).

##### EVIDENCE: Admissibility of Matters Bearing on Victim's Chastity

United States v. Hollimon, CM 440392, \_\_\_ M.J. \_\_\_ (ACMR 21 January 1982).  
(ADC: CPT Gray)

The accused, charged with rape, argued that his sexual intercourse with the alleged victim was consensual. The military judge, relying upon Mil.R.Evid. 412(a), correctly refused to admit evidence of the victim's reputation for unchastity. Evidence of a rape victim's unchasteness is ordinarily insufficiently probative either of general credibility

or of the issue of consent to outweigh its highly prejudicial effect; since the rule "was invoked to exclude only irrelevant evidence in this case, [the accused was not] deprived of any constitutional rights." The court affirmed the findings and sentence.

EVIDENCE: Discovery Under Jencks Act

United States v. Ali, CM 440672, \_\_\_ M.J. \_\_\_ (ACMR 25 February 1982).  
(ADC: CPT Walinsky)

The victim of two acts of forcible sodomy submitted written statements about the incidents to the charge of quarters: one was forwarded to the company commander, who destroyed it after the victim was interviewed by the authorities and made a similar statement. The other statement was lost. The trial defense counsel unsuccessfully moved to suppress the victim's testimony because the loss and destruction of the statement violated the Jencks Act, 18 U.S.C. §3500. The appellate court held that the destroyed statement was in the possession of the United States within the meaning of the Act because the commander received it "in his investigative role" and he was the accuser. See United States v. Dansker, 537 F.2d. 40, 61 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). But see United States v. Woodward, CM 439977 (ACMR 29 May 1981) (unpub.). The charge of quarters, although a representative of the commander, was, in this case, little more than a "conduit" of information to him; therefore, the lost statement never came within the Act. The court found no prejudice, however. The statement would have been of "little value to the defense for impeachment purposes" and the commander acted in good faith. See also United States v. Bosier, SPCM 15342, \_\_\_ M.J. \_\_\_ (ACMR 23 February 1982) (confidential informant's destruction of his account of drug transactions he participated in, although a statement within the meaning of the Act, was not prejudicial). The court affirmed the findings and sentence.

GUILTY PLEA: Improvidence

United States v. Phippen, SPCM 16638 (ACMR 29 January 1982) (unpub.).  
(ADC: CPT Russelburg)

The accused unsuccessfully contended that his plea was improvident because he was too intoxicated to remember the offenses to which he pled guilty, and no stipulation of fact was admitted into evidence. The court held that his description of what he had done, based upon his reading

of pretrial statements and interviews with witnesses of the incident, adequately established a factual predicate for the plea. The court affirmed the findings.

JURISDICTION: Substitution of Members After Arraignment  
United States v. Watkins, SPCM 16497 (ACMR 24 February 1982) (unpub.).  
(ADC: CPT Walinsky)

After arraiging the accused, the military judge warned him that the trial would proceed in his absence if he voluntarily failed to appear. The accused did not return from leave and was tried in absentia. During the interim, three original members were replaced. The accused unsuccessfully claimed that the court-martial lacked jurisdiction because it was not the one before which he was arraigned. The appellate court noted that the members were not required to be present during the arraignment; they had not been subject to challenge; and they had not performed any judicial function. Therefore, he was arraigned before and tried by the same court. See United States v. Peebles, 2 M.J. 404 (ACMR 1975), rev'd on other grounds, 3 M.J. 177 (CMA 1977). The court affirmed the findings and sentence.

MENTAL RESPONSIBILITY: Personality Disorder  
United States v. Reynolds, CM 440388 (ACMR 19 February 1982) (unpub.).  
(ADC: CPT England)

A mental condition classified by psychiatrists as a "personality disorder" can be a mental disease or defect within the meaning of the mental responsibility test established in United States v. Frederick, 3 M.J. 230 (CMA 1977). However, the court speculated that it is unlikely that a "personality disorder" would be "serious enough to amount to a mental disease or defect as defined by this Court in United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980)[, pet. granted, 9 M.J. 398 (CMA 1980)]." The "definitions of mental disease or defect for psychiatrists' diagnostic purposes are different from the definitions of those terms for the purpose of determining mental responsibility in criminal cases, and because the triers of facts in criminal cases are ultimately responsible for determining the issue of defendants' mental responsibility, they should not be controlled by psychiatrists', or other experts' labels or opinions." Convinced that the accused was mentally responsible at the time he engaged in an act of sodomy with a 5-year old boy, the court affirmed the findings and sentence.

MILITARY JUDGE: Instructions on Sentencing

United States v. Mason, CM 440976 (ACMR 25 February 1982) (unpub.).  
(ADC: CPT McCarty)

Prior to sentencing, the military judge, over defense objection, properly instructed the members that "[i]f you find beyond a reasonable doubt that [the accused], while under oath. . . made a material false statement that he did not then believe to be true, you may consider this as a matter in aggravation in determining an appropriate sentence. [The accused] does not have the right to make such a false statement to effect a determination of guilt or innocence." See United States v. Grayson, 438 U.S. 41 (1978). The court affirmed the sentence. However, the issue whether the Grayson holding may be extended to sentencing by court members is pending before the Court of Military Appeals. See, e.g., United States v. Warren, pet. granted, 10 M.J. 407 (CMA 1981); United States v. Grace, pet. granted, 11 M.J. 154 (CMA 1981) (trial counsel argued court-members should consider in sentencing that accused lied under oath). To preserve the issue, trial defense counsel should continue to object to any attempt by the government or the military judge to apply Grayson to a trial with members.

OFFENSE: Unauthorized Absence

United States v. Bews, NMCM 81 1927 (NMCMR 17 November 1981) (unpub.).  
(ADC: LCDR Caruthers)

While absent without authority, the accused went to an Air Force base close to his home to surrender. However, the post gate guard, to whom the accused explained his situation, told him that "they" could not accept him and that he should surrender elsewhere. Ignoring this advice, he was apprehended more than eight months later. The appellate court held that regardless of the accused's subsequent behavior, the unauthorized absence ended when he attempted to turn himself in; a "constructive surrender may be effectuated even when no control is exercised by military authorities." See United States v. Rayle, 6 M.J. 836 (NCOMR 1979). The court modified the findings accordingly and reassessed the sentence.

OFFENSE: Carrying Concealed Weapon

United States v. Martin, CM 440468 (ACMR 15 December 1981) (unpub.).  
(ADC: CPT Russelburg)

The accused unsuccessfully contended that his plea of guilty to carrying a concealed weapon -- an unloaded pistol -- was improvident

because the pistol was not a "dangerous weapon." While an unloaded pistol is not a dangerous weapon when presented as a firearm or as a means likely to produce grievous bodily harm, see United States v. Johnson, 46 CMR 714 (ACMR 1972); paragraph 207c (1), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter Manual], it is with respect to the charged offense. See United States v. Ramsey, 18 CMR 588 (AFBR 1954). Accordingly, the court affirmed the findings and sentence.

OFFENSE: Larceny

United States v. Hayes, SPCM 16610 (ACMR 10 February 1982) (unpub.).  
(ADC: CPT Chapin)

The accused unsuccessfully contended that her plea of guilty to larceny was improvident because she intended to repay the victim. However, she admitted that at the time of the theft she intended to use the money to discharge several debts. A larceny occurs if the requisite intent to permanently deprive another of the use or benefit of their property "is entertained at any time during the wrongful possession," and a "change of heart" is no defense. See United States v. Krawczyk, 4 USMA 255, 15 CMR 255 (1954). The court affirmed the findings and sentence.

POST-TRIAL REVIEW: Sufficiency

United States v. Brown, NMCM 81 0299 (NMCMR 8 February 1982) (unpub.).  
(ADC: LT Taylor)

The staff judge advocate's post-trial review was fatally deficient because it failed to discuss legal issues raised by the defense both at trial and in the rebuttal to the post-trial review. A review must address "any issues which could have determined the ultimate outcome of the case" and provide "lucid guideposts" to assist the convening authority in the exercise of his duties under Article 64, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §864 (1976). Furthermore, even if a defense counsel's comments are not submitted in accordance with United States v. Goode, 1 M.J. 3 (CMA 1975), "he would [still] be entitled to have them considered as an Article 38, UCMJ, brief, if . . . received before the reviewing authority acted." See United States v. Jones, No. 80 2578 (NMCMR 13 August 1981) (unpub.). But cf. United States v. Jernigan, SPCM 16014 (ACMR 27 January 1982) (unpub.) (staff judge advocate not required to respond to defense rebuttal).

SENTENCE: Legality

United States v. Trujillo, NMCM 81 1058 (NMCMR 30 October 1981) (unpub.).  
(ADC: LT McReynolds)

While announcing the accused's sentence, the military judge said that "I don't think in my own mind that on the facts of this case -- absent the accused's unsworn [request to be discharged] -- that a bad-conduct discharge is warranted . . . . But I will leave that up to . . . the convening authority." The appellate court disagreed with the accused's contention that the sentence was illegal because the military judge believed it to be unwarranted by the facts of the case, and held that his reliance upon the accused's statement was proper. But see United States v. St. Ann, 6 M.J. 563 (NCOMR 1978). The court affirmed the sentence.

SIXTH AMENDMENT: Effective Assistance of Counsel

United States v. Dupas, CM 440507 (ACMR 5 February 1982) (unpub.).  
(ADC: CPT Roberts)

On appeal, the accused claimed that he was denied effective assistance of counsel because a sergeant, who by post-trial affidavit stated that he could have provided an alibi to the accused, was not interviewed or called to testify at the trial. The trial defense counsel countered that the sergeant, a convicted drug abuser, had earlier told the authorities that he was unaware of the accused's whereabouts at the time of the charged offenses. The court advised that "it [is] prudent for a defense counsel to interview a witness suggested by his client as having potentially helpful information," but concluded that the sergeant would not have been called to testify under any circumstances. The court affirmed the findings and sentence.

SPECIFICATION: Sufficiency

United States v. Mitchell, CM 440773 (ACMR 22 January 1982) (unpub.).  
(ADC: CPT Bloom)

A specification alleging that the accused took indecent liberties with a child under sixteen failed to aver that the accused intended to arouse, appeal to, or gratify his or the child's lust, passion, or sexual

desires. The specification was therefore treated as an allegation of the lesser offense of assault and battery. Although no words specifically alleged a "wrongful" touching, "indecent" is synonymous with "lascivious", which signifies "that form of immorality which has relation to sexual impurity." United States v. Gaskin, 12 USCMA 419, 422, 31 CMR 5, 8 (1961). Therefore, the word "indecent" adequately characterizes the touching as wrongful. The court affirmed the findings and sentence.

SPECIFICATION: Sufficiency

United States v. Shelton, CM 441165 (ACMR 13 January 1982) (unpub.).  
(ADC: CPT Wilson)

The accused was originally charged with striking his superior non-commissioned officer in violation of Article 91, UCMJ. The specification reflected no allegation of wrongfulness or unlawfulness. See United States v. Jones, SPCM 16557, \_\_\_ M.J. \_\_\_ (ACMR 29 January 1982). At trial it was discovered that the victim was only an acting noncommissioned officer at the time of the offense. Therefore, the specification was amended to allege an Article 128, UCMJ, offense by deleting the words "his superior noncommissioned officer." However, the resulting specification was insufficient "because it [failed] to allege words of criminality such as 'unlawfully strike' or 'assault'." See United States v. Jones, 20 USCMA 90, 42 CMR 282 (1970); United States v. Webb, 45 CMR 472 (ACMR 1972). The court dismissed the charge and reassessed the sentence.

TRIAL: Request for Continuance

United States v. Flowers, SPCM 16175 (ACMR 29 December 1981) (unpub.).  
(ADC: CPT Castle)

A week before trial and more than three months after the accused had been informed of the original charges, he told his military attorney that he intended to retain civilian counsel. The day before the trial, the accused scheduled an initial interview with a civilian counsel for two days later. The military judge did not abuse his discretion by refusing to grant the accused a continuance in order to meet with the civilian attorney. The appellate court noted the tardiness of the request, the expense and effort the government had expended in preparing for trial, the accused's intent to retain his military attorney, and the inconvenience a delay would cause all other parties. See United States v. Kinard, 21 USCMA 300, 45 CMR 74 (1972); United States v. Johnson, 12 M.J. 670 (ACMR 1981). The court affirmed the findings and sentence.

VACATION OF SUSPENSION: Legality of Proceedings Under Article 72, UCMJ  
United States v. Robinson, SPCM 14718 (ACMR 28 January 1982) (unpub.).  
(ADC: CPT Moriarty)

The accused absented himself without authority several times while his sentence to a bad-conduct discharge was in suspension, and he was convicted by a special court-martial for those offenses. Action was then initiated pursuant to Article 72, UCMJ, to vacate the suspension. The special court-martial convening authority was detailed as the investigating officer, and his recommendation that the suspension be vacated was adopted by the general court-martial convening authority. The accused unsuccessfully contended that the vacation proceedings were invalid because the special court-martial convening authority was not "neutral and detached." The appellate court noted that United States v. Bingham, 3 M.J. 119 (CMA 1977), requires that an Article 72, UCMJ, hearing "be conducted personally by the officer exercising special court-martial jurisdiction over the probationer" and found that the special court-martial convening authority was not biased or disqualified by virtue of his previous action. The court sustained the vacation of the suspension.

#### FEDERAL COURT DECISIONS

EVIDENCE: Admissibility of Expert Testimony  
United States v. Hill, 655 F.2d. 512 (3d Cir. 1981).

Charged with distributing heroin, the defendant raised the defense of entrapment. The judge erred by ruling that a psychologist who would have opined that the defendant was particularly susceptible to persuasion and psychological pressure could not testify until after the doctor had observed the defendant's testimony. The testimony was admissible without this restriction. Federal Rule of Evidence (FRE) 703 allows an expert to base his opinion on out-of-court observations. Furthermore, FRE 405(a) permits opinion evidence on relevant character traits; the defendant's susceptibility to inducement was an element of his defense. The court reversed.

EVIDENCE: Admissibility of Prior Convictions

United States v. Kiendra, 30 Crim. L. Rep. (BNA) 2178 (1st Cir. 9 November 1981).

A defendant's prior convictions "involving dishonesty or false statements" may be admitted as impeachment evidence if the defendant testifies, even if the trial judge, relying on FRE 403, finds that their prejudicial impact outweighs their probative value. See Mil.R.Evid. 609(a)(2). See also United States v. Toney, 615 F.2d. 277 (5th Cir. 1980).

EVIDENCE: Discovery Under Jencks Act

United States v. Algie, 50 U.S.L.W. 2424 (6th Cir. 8 January 1982).

Neither the Federal Rules of Evidence nor the trial judge's inherent power to control his docket permits a trial court to override the express statutory language of the Jencks Act, which dictates that the government need not produce a witness' previous statement until after he has testified. See United States v. Campagnuolo, 592 F.2d. 852, 858 (5th Cir. 1979). But cf. Brady v. Maryland, 373 U.S. 83 (1963).

EVIDENCE: Prosecutor's Duty to Disclose

Sellers v. Estelle, 651 F.2d. 1074 (5th Cir. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 30 Crim. L. Rep. (BNA) 4178 (25 January 1982).

The petitioner for a writ of habeas corpus contended that during his trial for murder, the state prosecutor withheld material and exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The court held that if a defendant proves that the prosecution has suppressed material and favorable evidence, he has established a Brady violation. Furthermore, Brady applies when the prosecution knowingly uses false testimony, ignores a specific request for a particular item, or fails to volunteer exculpatory evidence in its possession after a general request for information is made. See United States v. Agurs, 427 U.S. 97 (1976). The court concluded that the requested evidence was favorable and material; however, because the record was unclear whether it was withheld, it remanded the case to the district court with instructions to hold a limited evidentiary hearing on that issue.

EVIDENCE: Prosecutrix's Right to Appeal Ruling  
Doe v. United States, 50 U.S.L.W. 2374 (4th Cir. 3 December 1981).

The trial judge erred by failing to exclude evidence of the rape prosecutrix's prior sexual behavior with men other than the defendant. Because the purpose of FRE 412 is to protect a rape victim's privacy, she may "immediately" appeal a trial court's ruling which violates its mandate. Otherwise, "victims aggrieved by the court's order will have no opportunity to protect their privacy from invasions forbidden by the rule."

SEARCH AND SEIZURE: Search Incident to Arrest  
Washington v. Chrisman, \_\_\_ U.S. \_\_\_, 50 U.S.L.W. 4133 (13 January 1982).

A state university police officer stopped a student carrying a bottle of gin because he appeared to be underage. The officer accompanied the student to his dormitory room in order to retrieve his identification card. While in the open doorway of the room, the officer saw what appeared to be marijuana seeds and a pipe; he then entered the room, confirmed his suspicions, and informed the student and his roommate of their rights, which they waived. A consensual search of the room yielded additional illicit drugs. At trial, the defense motion to suppress the seized items was properly denied. The Court held that because the officer had placed the student under lawful arrest, he "had a right to remain literally at [his] elbow at all times," and that "nothing in the Fourth Amendment is to the contrary." The officer has the right to ensure his safety and to maintain the "integrity of the arrest." Therefore, he properly entered the room and seized contraband in plain view.

#### STATE COURT DECISIONS

ATTORNEY: Presentation of Perjurious Witness  
People v. Schultheis, 50 U.S.L.W. 2273 (Colo. Sup. Ct. 19 October 1981).

A defendant cannot compel his attorney to present a witness whom he knows will commit perjury. ABA Code of Professional Responsibility (1979), Disciplinary Rule 7-102 (A) (7) and (8). If the defendant insists on calling such a witness, the attorney should move to withdraw, stating only that he has an "irreconcilable conflict" with his client.

If the motion is denied, he must continue to represent the defendant. However, in anticipation of an allegation of ineffective assistance of counsel, he "should proceed with a request for a [conference with the defendant on the] record out of the presence of the trial judge and the prosecutor." See United States v. Davis, 3 M.J. 430 (CMA 1977); United States v. Radford, 9 M.J. 769 (AFCMR 1980).

FINDINGS: Instructions on Eyewitness Identification  
States v. Warren, 50 U.S.L.W. 2347 (Kan. Sup. Ct. 9 November 1981).

Recognizing the inherent unreliability of eyewitness identification testimony, the court held that whenever such evidence is a critical part of the government's case and there is a serious doubt about its reliability, the judge should advise the jury, in a cautionary instruction, about the following factors they should consider: (1) the witness' opportunity to view the perpetrator; (2) his degree of attention; (3) the accuracy of his prior description; (4) the level of certainty he demonstrated at the confrontation; and (5) the length of time between the offense and confrontation. See United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

#### Notice

*Readers who desire copies of military decisions synopsised in Case Notes, most of which are released by the service courts as unpublished opinions, may contact the editor of that feature by telephoning Auto-  
von 289-1195 during duty hours (289-2277 during off-duty hours), or by writing to Case Notes Editor, The Advocate, Defense Appellate Division, United States Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041.*

## FIELD FORUM

### *Defense Appellate Division Responses to Readers' Inquiries*

In this installment of "Field Forum," the staff reprints a letter submitted by one of our readers.

To the Editor:

Several issues ago [12 The Advocate 411 (1980)], FIELD FORUM responded to a reader's inquiry "why appellate attorneys are appointed to represent servicemembers who have knowingly and voluntarily waived that right after consulting with their trial defense counsel." FIELD FORUM's reply was to the effect that appointments were being ordered by the Army Court of Military Review sua sponte; appointed counsel who found that the accused persisted in the waiver of counsel could ask to withdraw; but, when expeditious appellate review was desired in a case seeming to present no appellate issues, an accused might avoid this added delay by requesting counsel. The authorities mentioned as being relevant were United States v. Palenius, 2 M.J. 86 (C.M.A. 1977), and United States v. Arvie, 7 M.J. 768 (A.C.M.R. 1979).

Perusal of the cases cited suggests another answer to FIELD FORUM's problem: Evidently, the record of trial in such cases does not adequately show that the waiver of appellate representation was in fact "knowingly" made. If such is the case, it appears that an appellate issue has been created when otherwise there may have been none.

Judge Matthew Perry's majority opinion in Palenius stated that:

An accused convicted at trial cannot make an informed decision concerning whether to accept or reject representation by an attorney in his appeal from that conviction unless he is made aware of the powers of the Court of Military Review and of defense counsel's role in causing those powers to be exerted.  
[Emphasis added.]

The Palenius opinion next proceeded to specify the powers of the Court and the role of counsel thought to be significant in the waiver decision-making process. 2 M.J. at 91 n.7, 92. Arvie illustrates that, when a

record of trial fails to show that an accused was advised substantially in accordance with the standards set by Palenius, appellate counsel have been designated to assure that the accused is fully and properly advised.

Without seeming to suggest that waiving appellate representation is a good idea in any case, the conclusion that emerges from the foregoing is that a trial defense counsel who wants to perfect the client's waiver of appellate counsel ought to examine critically the advice to be given and reflected in the record. Counsel seems likely to find that the forms used locally for that purpose take no account of the suggestions in Palenius. A few may still refer to the "board of review;" a larger number may be found to dwell more on the location of appellate counsel than on counsel's functions as an advocate. One may wonder why counsel so alert to deficiencies in a staff judge advocate's general post-trial advice to the convening authority would be content with a record reflecting only minimal advice to his or her own client regarding the appellate process.

It was said in Palenius that "the Government has a heavy burden of demonstrating that a convicted accused has waived the right to be represented by counsel in his appeal." 2 M.J. at 92. In the nature of things, however, the initial burden of showing on the record that the waiver was intelligently made appears to devolve upon the trial defense counsel.

## ON THE RECORD

or

### *Quotable Quotes from Actual Records of Trial Received in DAD*

TC: Did you have occasion to talk to the defendant on 11 May?

WIT: No, sir.

TC: Did you have occasion to talk to him at any time in May?

WIT: No, sir.

TC: Have you ever had any contact with the defendant?

WIT: Yes, sir.

TC: And when was that?

WIT: May 11th, May 12th and May 17th.

\* \* \* \* \*

(Military judge addressing trial counsel):

MJ: I am going to ask you to stand because I think your arguments are shorter when you stand.

\* \* \* \* \*

TC: About what time did you see her that night?

WIT: Between eight and nine I saw her, I think.

TC: And how do you know it was between eight and nine?

WIT: By guessing.

\* \* \* \* \*

(Defense counsel addressing military judge):

DC: May I have a few minutes with my client, your Honor? This is a different story from what he told me yesterday.

\* \* \* \* \*

TC: Specialist, would you describe how these tents were put up?

WIT: They were just put up like most normal GP mediums are put up.

TC: And how is that?

WIT: Somewhat shoddily.

\* \* \* \* \*

(Witness describing configuration of accused's barracks room):

WIT: I had one half [of] the room, and Clay his half, and Tatum had his half.

MJ: That's three halves.

WIT: We combined it after that.

\* \* \* \* \*

TC: What time did the rape occur?

WIT: When Johnny Carson introduced his first guest.

\* \* \* \* \*

(Trial counsel cross-examining accused):

TC: Do you drink on duty?

ACC: I don't drink when I'm on duty, unless I come on duty drunk.

