

# T H E A D V O C A T E

## A Monthly Newsletter for Military Defense Counsel

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

Vol. 3 No. 1

January 1971

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

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## APPELLATE REVIEW OF EVIDENTIARY CONTESTS IN NONJURY TRIALS

In the recent case of United States v. Martinez, \_\_\_ CMR \_\_\_, (ACMR 26 October 1970), the Army Court of Military Review, en banc, affirmed a case where a military judge sitting alone received evidence of a blood alcohol test over a defense objection that the evidence was not properly authenticated due to laboratory mishandling in storage.

Judge Finkelstein, in an "opinion of the court" in which, however, only four other judges joined (six others concurred in the result and three dissented) attempted to formulate a rule to be used by the Court of Military Review when reviewing questions of the admissibility of evidence in cases tried before a military judge alone.

At issue was the question whether the blood sample had been stored under circumstances which substantially undermined its authenticity. Holding such matters as the security of the storage location, and the failure to account for all persons who had access thereto, to be matters going to the weight of the evidence, but not its admissibility, the opinion would require only "reasonable probability the article has not been changed in any important respect." Some reliance was also placed on the inference "that public officials properly discharged their official duties and that sufficient protection was provided." The opinion then moved on to point out that the ruling in question was an "interlocutory determination of materiality" and that this ruling of the military judge "will not be overturned except for a clear abuse of discretion." Without first reaching the question of the admissibility of the evidence the opinion went on to focus upon the fact that there was no jury in this case. The opinion would allow "a working hypothesis that the trial judge disregarded the inadmissible and relied on legal and competent evidence of record tested by all the rules of evidence." Then, in language overstating the authority of a minority opinion, Judge Finkelstein continued:

"The rule we expressly adopt is that in reviewing the introduction of evidence when the military judge presides over a trial without members, we will reverse the findings of the trial court due to the receipt of inadmissible evidence only if

all the admissible evidence together with the inferences reasonably drawn therefrom is insufficient to support the findings, or if it affirmatively appears that the incompetent evidence induced the trial court to make an essential finding which would not otherwise have been made. See Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377 (8th Cir. 1950)." Id. at 7.

Utilizing this test, and without ever deciding the ultimate issue of admissibility, the opinion affirmed the findings of guilty.

The case of Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377 (8th Cir. 1950) is the basic source material cited in support of the opinion's new rule of law. A less authoritative case would be hard to imagine. Builders Steel Co. was not a criminal case at all but an excess profits tax deficiency case. Moreover, unlike even a civil case where the right to a jury trial exists, the Builders Steel Co. case was in the Tax Court of the United States where there are no jury trials at all. In addition, the precedents utilized in the Builders Steel Co. opinion were also all civil cases.

The rule advanced by Martinez, supra, would have the practical consequence of encouraging military trial judges without juries to receive any evidence at all which the government offers against the accused. In fact, the Builders Steel Co. case encourages the introduction of evidence of doubtful admissibility on the grounds that retrials would be minimized in those cases where an appellate court would hold admissible evidence which the trial court had excluded. This logic disregards the fundamental difference between criminal and civil appellate litigation, for retrials in favor of the government are usually not available in criminal cases in any event. This reasoning does not reach the basic problems: should the rules of evidence govern a bench trial; how can we ever know whether inadmissible evidence hasn't actually caused judgment to go one way or another; whether appellate courts shouldn't be required to decide contested evidentiary issues even though other uncontested evidence was introduced at trial.

The change in the Uniform Code of Military Justice which permits bench trials in courts-martial provides a golden opportunity to re-examine the role played by evidentiary rules in cases tried without juries. The "bald presumption"

approach, maintaining that judges presumably disregard incompetent evidence, has not been universally accepted, and it should not be accepted by the military courts blindly. See Note, Improper Evidence in Nonjury Trials: Basis for Reversal? 79 Har. L. Rev. 407, 408 (1965). Sharp attention should be paid to the difference between civil and criminal litigation, for somewhere the dichotomy between admissible and inadmissible evidence must overlap the continuum between the civil standard of preponderance of evidence and the criminal standard of evidence beyond a reasonable doubt, that is, at some point in a criminal trial the reception of inadmissible evidence becomes incompatible with the reasonable doubt standard of proof. Moreover, the distinction between judge as trier of fact and jury as trier of fact must certainly depend on the specific evidentiary problem involved: at some point their common humanity must react similarly to a given item of evidence. For example, one article suggests that while a judge can handle the fact that a negligence defendant was insured with more objectivity than a jury, he might well react similarly to a jury where improper evidence (e.g. hearsay) contradicts a criminal accused's alibi defense. Note, Improper Evidence in Nonjury Trials: Basis for Reversal, supra. Furthermore, other considerations might point in the direction of treating a military judge more like a military jury than like an Article 3 judge: the life tenure of a federal judge vs. the career pattern of the military officer; the responsibility of a federal judge to the whole community vs. the primary responsibility of the military judge to the military community; the independent role of a federal judge vs. the advisory role of a military judge to a convening authority.

Re-examination of the role of evidentiary rules in bench trials must go hand in hand with establishing a standard of appellate review. The rule proposed in Martinez is an inadequate standard by any yardstick. First, it would look, not to the contested piece of evidence and to its prejudicial propensities, but rather would not consider it at all. For example, the Martinez opinion did not attempt to assess the impact of the contested evidence on the findings of guilty:

"Even if we felt the trial judge abused his discretion in admitting the questioned evidence, consideration of the evidence of drinking, the facts and circumstances surrounding the accident itself, the accused's conduct and appearance at the scene detailed above and recognition of the accused's interest in the outcome of this litigation and the relationship between Private F and the accused convinces us that the accused's guilt has been established beyond a reasonable doubt." Id. at 8.

Thus, by making appellate review turn on the other, uncontested evidence in the case (surely an appellate court is not going to examine the admissibility of all the evidence de novo), such a rule assumes that the allegedly inadmissible evidence has not prejudiced the case. A test which would determine whether the evidence was inadmissible, and, if so, whether its introduction contributed to the verdict obtained would be much preferable. Cf. Chapman v. California, 386 U.S. 18 (1967).

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EDITORS' NOTE

Since the first issue of THE ADVOCATE appeared in March 1969, we have been attempting to provide useful service and advice to the defense counsel in the field. Our motivation has been our appreciation of the special needs and problems of the defense counsel based upon our personal experience at the trial level. The intent has been to achieve this goal by a publication which would be topical without being superficial and which would furnish reliable basic research without attempting to become a scholarly law review. Consequently, while we have regularized our format somewhat, it remains flexible and subordinate to the goal of providing maximum service to the trial defense counsel.

It is true that we have had trial experience, but it is equally true that we are, in varying degrees, removed from that experience. In short, we are soliciting advice from you on how we can be more effective. Thus, we welcome comment from trial defense counsel concerning the format or content of THE ADVOCATE. Your letters will be acknowledged and will receive sympathetic attention

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SOME VIEWS ON THE NEW DRUG ABUSE REGULATION (AR 600032)

On 1 December 1970 the Army's new drug regulation, AR 600-32, "Drug Abuse Prevention and Control," became effective. Designed to announce "Department of the Army policies for reducing drug abuse by members of the Army," it "specifically prohibits the wrongful use, possession, sale, manufacturing, compounding, or transfer of narcotics, marijuana, and certain depressant, stimulant, and hallucinogenic drugs by persons subject to the Uniform Code of Military Justice." Violators of the provisions of the regulation, it specifies, "shall be subject to appropriate punitive action." The new rules supersede paragraph 18.1, AR 600-50.

Trial defense counsel, therefore, should be alert to drug violations being laid under Article 92, Uniform Code of Military Justice, instead of Article 134. Moreover, counsel should be thoroughly familiar with all aspects of AR 600-32, particularly as it provides for "amnesty" and rehabilitation of drug users. Although this analysis of AR 600-32 is based upon preliminary reflection only, the following observations are offered for the immediate guidance of counsel. A more comprehensive treatment of the new drug regulation will appear in a future issue of THE ADVOCATE.

In the first instance, counsel may be wise to now challenge all drug violations laid under Article 134. Although AR 600-32 suggests that violations "may be prosecuted under Article 92 . . . or other appropriate articles of the Code," the new regulation clearly purports to be comprehensive, and counsel could argue that any formerly assimilated federal or state laws are now preempted. Moreover, specifications laid under Article 134 now provide for a 5 or 10 year maximum punishment, while Article 92 violations carry a maximum of 2 years confinement. Counsel might also suggest that lesser penalties are in keeping with the new federal drug abuse law. The Comprehensive Drug Abuse Prevention and Control Act, Pub. L. 91-513, 27 October 1970; 39 U.S.L.W. 47 et seq.

Once a violation of AR 600-32 can be demonstrated, counsel will discover a number of approaches in defense of the charge. If the government can be bound to prosecute under Article 92,

its proof will be channelled into the confines of AR 600-32. The regulation was prepared in response to criticism over the handling of drug cases in the military and was obviously designed to hinder automatic resort to the criminal process. However, its drafting may provide several unintended impediments to successful prosecution. A few examples follow.

"Marijuana" is defined by AR 600-32 as "the intoxicating products of the Indian hemp plant, *cannabis sativa*, or any synthesis thereof, including hashish." Quite simply, this is not marijuana, but only its active ingredient, tetrahydrocannabinol (THC). Hashish, moreover, is not a synthesis of marijuana, but the resin of the marijuana plant, that is, a concentration of THC in the plant resins. Counsel should force the issue, therefore, in cross-examining the forensic chemist, by asking what THC content was present in the suspected sample, and whether or not the amount of THC found was enough to be intoxicating. The latter question particularly disturbs chemists, who are seriously unqualified to answer it. But the question now appears indicated by the definition set forth in AR 600-32. At the least, such an approach will serve to undermine the government's case, and force the factual question of actual intoxication--thus narrowing the thrust of the regulatory definition.

"Drug abuse" is defined as the "illegal, wrongful, or improper use of any narcotic substance, marijuana, or other dangerous drug, or the illegal or wrongful possession, sale, transfer, delivery, or manufacture of the same." When prescribed by competent medical personnel, however, the regulation states that the "proper use" of the prescribed drug is not drug abuse. It is difficult to know what is meant by "proper use". If counsel find this regulatory double-talk confusing, be mindful that even properly used, some prescribed drugs may have intoxicating side-effects in some individuals.

The new regulation also takes great pain to designate several categories of drug abusers, but gives each no separate operative effect throughout the regulation itself. Thus, a "drug abuser" is one who has "illegally, wrongfully, or improperly used" any of the prohibited substances, or who has "illegally or wrongfully possessed, sold, transferred, delivered, or manufactured the same." "Drug abuser" is then further categorized as follows:

(1) "Drug experimenter": one whose use of the prohibited drug is casual, or, in the words of the regulation "not more than a few times for reasons of curiosity, peer pressure, or other similar reason." The touchstone for placing an individual in this category is suggested to be not the number of usages, but the "intent of the user, the circumstances of use, and the psychological makeup of the user." No further guidelines are given, other than to prescribe that any "final determination of the category will be made by the appropriate commander." (Emphasis added.)

(2) "Drug user": his use is more frequent--"several times"--for "reasons of a deeper and more continuing nature." Again, final determination is left up to the "appropriate commander."

(3) "Drug addict": is defined as "one who exhibits a behavioral pattern of compulsive drug use, characterized by overwhelming involvement with the use of a drug, and the securing of its supply," whether or not physically dependent on the drug.

Since AR 600-32 decrees that "appropriate disciplinary and administrative actions . . . will be dependent upon all the facts and circumstances of each case and will include consideration of whether the individual involved is a drug experimenter, drug user, drug addict," etc., intermediate commanders should be closely cross-examined as to whether or not they made any such determinations in accordance with AR 600-32, before forwarding the charges for trial. Counsel may be able to show prejudice where the considerations mandated by the regulation were not made at the earliest stages of the proceedings. Pretrial discovery of any such oversights will be an invaluable asset in the defense of a client's cause.

In addition, counsel should insist that all drug cases be guided by the statement of policy set forth in paragraph 1-3 of the new regulation. It is there recited that the Department of the Army policy is to "prevent and eliminate drug abuse (a term that includes trafficking) and to attempt to restore and rehabilitate members who evidence a desire and willingness to undergo such restoration." Paragraph 2-4 also provides that persons having responsibility for "discipline and personnel administration" consider each case on an individual basis, and seek advice from the chaplain, medical officer and legal officer.

Finally, AR 600-32 opens new avenues of post-trial remedies, directing that "Soldiers convicted by court-martial of offenses involving narcotics, marijuana, or other dangerous drugs will be considered for rehabilitation." (Emphasis added.) Such factors to be considered are the number and nature of the offenses and the type of drug abuse involved, the age and background of the accused, his attitude and motivation for further service, and so on.

The use of the word, "involving" seems to invite the interpretation that non-drug offenses, when committed while under the influence of narcotics, may trigger application of the rehabilitative standards. Thus, if an assault is perpetrated under circumstances wherein drug abuse is the sine qua non of the accused's actions, it might be argued that the considerations required by AR 600-32 be taken into account after conviction. A clearer case, perhaps, are theft offenses directly relating to the sustaining of a drug habit. Counsel might find some encouragement for this approach.

"Rehabilitative potential", as a standard to be weighed, contemplates an evaluation by a medical officer, legal officer, chaplain and an officer in the grade of O-3 or higher. But nowhere does the regulation give any guidance as to the appointment of such evaluators. Thus, if conviction is obtained, defense counsel may be wise to ask for a continuance prior to sentencing, and find sympathetic officers of the character described to make evaluations and testify in open court. This, at least, gives defense counsel a decided advantage in controlling the direction of the rehabilitative arguments.

If confinement is part of the adjudged sentence, a medical and psychiatric evaluation must be conducted before determining the place of confinement or treatment. Thus, these provisions clearly seem to provide additional considerations that must be treated in the staff judge advocate's post-trial review, in any cases in which drugs had an operative effect on the accused's conduct. Counsel should press these considerations vigorously.

It can be reasonably anticipated that AR 600-32 will change the direction of drug prosecutions throughout the military. Wisely advanced and employed, it can be a tremendous tool in

the successful defense of drug violators. Counsel are strongly encouraged to become familiar with the regulation, and to challenge vigorously any attempts to denigrate its favorable applications, being seriously mindful to preserve any such issues for appellate review.

#### DIRECT EXAMINATION OF WITNESSES

Lawyers, as a class, are preoccupied with cross-examination. This romance is perfectly legitimate so long as it does not obscure the basic principle that, in the normal case, the trial lawyer elicits more facts favorable to his client by direct examination of his own witnesses than by cross-examination of the opposition's witnesses. With this in mind, the defense counsel should periodically review his performance on direct and ask himself whether the facts supporting his theory of a particular case were presented to the court in their best possible light.

Effective direct examination is purely a product of preparation and common sense presentation. When a direct examination runs out of gas or backfires, there is little difference of opinion on who is to blame. To help insure that this does not happen, the following suggestions are offered.

1. Respect your witness for what he has to offer

Each witness has a definite limit on how much he can advance your case. The time to measure and test these limits is during your pretrial interviews with him. To do so in the courtroom is to risk unexpected damage to the case. This is directly related to the familiar cross-examination fault of asking one question too many. Even if a damaging response is not elicited, this practice is bound to result in a lessening of confidence in the questioner and his case on the part of the jurors. There is an undeniable temptation occasionally to try for more than what you really know you can get. Find out what you can get from a witness before you put him on the stand. This is one "substantive" rule of direct examination. The rest are designed to present the available facts effectively.

## 2. Put the witness at ease

There are few natural witnesses. Most people don't want to take the witness stand, but if they must, will try to get out of it as quickly as possible. Your job is to make the experience easier for him and more profitable for your client. Make sure you tell the witness what exactly you will question him about and in what sequence. When he takes the stand try to ask the preliminary questions in a measured and deliberate way so that he is given a chance to get his feet on the ground and overcome his initial stage fright. Be sure, also, that he is responding to the jurors (or the judge, as appropriate) and that he is speaking loud enough to be heard.

## 3. Keep your questions simple

Your examination is really an argument in question and answer form. Consequently, you must insure that the witness stays in pace with you at all times. It will be easier for him and for the trier of fact if the questions each elicit a single pertinent fact. There are, however, frequent situations where the best exposition of the witness's story will be made in a narrative form: asking him to describe an event in his own words. Do not hesitate to do this but remember to remain in control, don't let him wander into areas which merely invite annoying cross-examination. Punctuate the narrative occasionally to underline significant points, as well as to keep him on the right track.

## 4. Prepare for cross-examination

If there are unfavorable aspects to a witness's story which are known to the prosecutor and you are certain he will cover, consider the possibility of bringing them out yourself. One obvious example is where your witness has a conviction with which he can be impeached. There is no justification for allowing it to be "sprung" by the trial counsel. Deal with it and neutralize it on direct. The same applies where the witness has a relationship to your client which would suggest bias in favor of him. Bring it out and have the witness tell the trier of fact that, regardless, he is telling what he knows truthfully.

Conversely there may be times when you wish deliberately to omit a significant and favorable fact from your direct. The theory here is that cross-examination probably generates a little bit more interest and if that fact comes out of your opponent's question, it will have greater impact. This also serves the purpose of lowering the morale of the cross-examiner and possibly subduing his aggressive instincts. "Mousetrapping" of this sort, however, is a sophisticated tactic. It should be used sparingly and with a fine hand.

5. When disaster strikes, don't show it

There will come a time when your witness will give an unexpected, damaging answer to your question. This is equally applicable to cross-examination. If you are fortunate, you may discover that the witness merely misunderstood the question. On the other hand, it may be more serious. Whatever happens, however do not lose control or let it show that you may be losing confidence in your case. This may be difficult but it is important. Keep up the pace of your questions while you figure out how to remedy the situation. Under no circumstances should you loudly repeat the question that hurt you; the jurors may not have found it significant so don't advertise your problems.

6. Finish on a high note

Don't let your examination grind to a halt. Often, you can plan in advance a good question to wrap up with. Keep the pace of your questions moving to a known point. When you reach it, stop.

AMNESIA AND THE GUILTY PLEA

Recently military judges have been faced with a situation where a defendant desires to plead guilty to offenses although he has no recollection that he committed them. The judges, in order to comply with United States v. Care, 18 USCMA 535, 40 CMR 247 (1969), have been requiring the accused to answer the questions as if he could recall that he had committed the acts with which he is charged, and as if he had the required intent at the time of the alleged crime. The accused will normally base his belief of his own guilt upon his knowledge of the Government's investigative file and the Article 32 record.

This approach was recently approved by the Court of Military Appeals in United States v. Butler, USCMA, CMR (8 January 1971). In this case the accused could recall that he had been involved in a fight with another soldier and that some blows were struck. He had no recollection, however, of any other events. Other evidence showed that the accused, Butler, left the area of the first incident, acquired an M-16 rifle, and tried to shoot a third soldier. These basic facts were established by a stipulation of fact introduced into evidence before findings.

The Court of Military Appeals appeared to have backed away from its Care requirement that proof of guilt must come from the accused personally. See THE ADVOCATE, September 1969, p. 7; November 1970, pp. 16-17.

The appellate defense attorney in Butler filed a petition for reconsideration on 15 January 1971. His arguments that Butler is wrongly decided were fourfold:

First, the military guilty plea procedure, which had its birth in the Keeffe Board Report (1947), requires that "the accused admit doing the acts charged", and this means exactly what it says; that the accused must confess in court to his crimes.

Second, where an accused can not vouch for his guilt and the Government does not introduce any evidence through live witnesses, there is no factual basis for the plea contained in the record of trial. This argument is based upon Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966). Maxwell was indicted for first degree murder. He had been drinking, and in a dispute he shot and killed another man. At trial he attempted to plead guilty, but the judge delayed disposition of the request until after the Government's case-in-chief. At that time the judge asked the accused what he had done, and the accused replied that he could not remember anything. The judge then refused to accept the plea, the accused was convicted, and sentenced to life. On appeal the accused argued that the judge erred by not accepting his plea. The Court of Appeals rejected this error, and held that the judge did not err by refusing the plea. It also stated what would be a sufficient factual basis for a plea, as follows:

"We do not hold however, that because Maxwell was unable to recollect the transaction and so could not personally vouch for his guilt, the trial court was obliged to reject his plea of guilty to second degree murder. The offer to plead guilty came at the close of the Government's case, when a factual basis for a plea of guilty to at least second degree murder had been established, or so the trial court might have found. Under these circumstances, the court, if it saw fit, could have accepted Maxwell's plea." Id. at 739, n. 3.

Third, North Carolina v. Alford, 39 U.S.L.W. 4001 (23 November 1970) is not contrary to the above arguments, as there the trial court heard the sworn testimony of a police officer who summarized the State's case, as well as two other sworn witnesses, and this testimony formed the factual basis for the plea.

Fourth, Paragraph 70b, Manual for Courts-Martial, United States, 1969 (Revised edition) requires the accused to admit the allegations to which he pleads guilty. Since the drafters used the word "allegations" rather than Charge and specification, they meant that the facts underlying the offense must also be admitted by the accused when he pleaded guilty. Thus a serviceman who can not recall the crime can not admit the allegations, and consequently can not plead guilty. Butler's petition for reconsideration was denied on 1 February 1971.

A similar issue is pending before the Court of Military Appeals in United States v. Luebs, No. 23,485 (COMA granted 23 November 1970). Luebs could not recall having been involved in any offense, but he admitted in court that the Government's evidence proved his guilt. Another difference from the Butler case is that the stipulation of fact was not admitted into evidence by the military judge until after the findings of guilty had been entered. Otherwise, the case is similar to Butler.

One often hears expressions such as "one who pleads guilty has waived trial". This is not true. The guilty plea proceeding is the accused's trial. When the accused can recall that he has committed the crime, and knows that he had the required criminal intent, the Government is relieved of introducing evidence of guilt because as the court said in Maxwell the

accused can "vouch for his guilt". But when the accused can neither recall the acts with which he is charged nor the intent he must have had, he can not vouch for his guilt. In this situation, the Government is not relieved totally of coming forward with evidence because before the judge may accept a plea, he must be satisfied that a factual basis for guilt exists. This factual basis may come from any admissible evidence, such as a stipulation of fact, or live witnesses, but it should not come from hearsay statements like those contained in the criminal investigation file or the Article 32 investigation. Only in this manner can there be reasonable assurances that the innocent will not be processed through the machinery of justice into the prisons that await the convicted.

#### THE DEATH PENALTY FOR RAPE--IS IT STILL AUTHORIZED?

A recent decision of the Fourth Circuit Court of Appeals has held that the imposition of the death penalty for rape constitutes cruel and unusual punishment, at least where the rapist's act is not marked with "great aggravation." Ralph v. Warden, \_\_\_ F.2d \_\_\_ (4th Cir. 1970), 8 Crim. L. Rep. 2193. The case arose on a petition for habeas corpus from a death sentence imposed by a Maryland court. The Circuit Court's approach to the issue was characterized by its citation of the Supreme Court's opinion in Weems v. United States, 217 U.S. 399 (1910), where the Court declared that the eighth amendment is directed not only against barbarism and torture, "but against all punishments which by their excessive length or severity are greatly disproportionate to the offense charged."

After examining the facts of the case, the Court declared that imposition of the death sentence in rape cases where life is neither taken nor endangered is contrary to the "evolving standards of decency that mark the progress of a maturing society," and thus cruel and unusual. However, the facts of the case suggest that the degree of "endangerment" or aggravation involved in the rape must be quite substantial in order to justify capital punishment. In this case, the petitioner broke into the victim's home armed with a tire iron. After threatening the victim and her young son with death if she did not submit, he committed rape and sodomy upon her. The Court acknowledged these circumstances but indicated that sufficient aggravation was not present.

In arriving at its decision, the Court was influenced by the accelerating trend of nations and states toward abolition of capital punishment, noting that the United States is one of only four nations retaining the death penalty for rape. The infrequency of its imposition also impressed the Court:

"The high incidence of the crime compared with the low incidence of the death penalty suggests the lack of a rational ground for selecting the prisoners on whom the death penalty is inflicted."

The constitutional foundation of the Court's holding clearly imports a universal application in American criminal jurisdictions. It would seem that only a showing of compelling differences between military and civilian situations could preclude the rule's application to courts-martial. Certainly, the opinion of the Court suggests no basis for such a distinction.

#### THE MISCELLANEOUS DOCKET

In Wilson v. United States, COMA Misc. Docket No. 70-69 (15 December 1970), petitioner, an Air Force Sergeant alleged that he was charged with a violation of Article 93, Uniform Code of Military Justice (cruelty and maltreatment). From his petition, it was apparent that he had made a constitutional attack on Article 93 in a motion to dismiss the charge at an Article 39(a) session and the motion was somehow not ruled upon. Petitioner then sought a ruling by the Court of Military Appeals that the military judge is authorized to pass upon the constitutionality of that article or, in the alternative, a ruling that Article 93 is void for vagueness. The Court denied the petition without prejudice to petitioner's right to raise the issue at trial or on appeal. Although the petition was denied, if it is true that the military judge had ruled that he did not have authority to consider that question, the Court's action undoubtedly would reverse that holding.

#### RECENT CASES OF INTEREST TO DEFENSE COUNSEL

SEARCH AND SEIZURE -- STOP AND FRISK -- The drug producing pocket search of a driver incident to his lawful arrest for

a pure traffic charge (driving on a revoked permit and fraudulent licensing) was held illegal because not reasonably limited in its scope. An officer stopped the defendant's Cadillac at a busy intersection for a "routine spot check" and demanded his license, registration card and draft card. He took notes on them and, after letting the defendant go, checked the records and found that the driver's permit was both revoked and fraudulently procured. Four days later the officer saw the defendant drive by and stopped him. He had the defendant produce the cards and then arrested him for driving on a revoked permit and for fraudulent licensing. He searched him immediately and found in his coat pocket a cigarette package which contained heroin. The Court found that the warrantless seizure of the heroin could not be based on seizure of fruits, instrumentalities and other evidence of the crime for which the arrest is made in order to prevent its destruction and concealment as the arrest was made merely for a pure traffic violation. As for police self-protection, that legitimate goal in the case of a traffic offender could have been accomplished by a mere "frisk" or "patdown" of the defendant's outer clothing for weapons and did not justify going into the defendant's pockets.

Relying on the Supreme Court's opinion in Sibron v. New York, 392 U.S. 40 (1968), the Court held that whether the detention is based upon probable cause or not, if the crime is one for which no evidence exists, so that the sole legitimate objective of the search is to protect the arresting officer, then any intrusion greater than a frisk will be unconstitutional. United States v. Robinson, No. 23,734 (C.A.D.C. 3 December 1970); 8 Crim. L. Rep. 2179

SEARCH AND SEIZURE -- PROBABLE CAUSE -- STANDING TO OBJECT -- The defendant was convicted of possessing a quantity of unstamped intoxicating liquor. His car collided with another vehicle, whose occupants positively identified him as the person who approached them and asked if anyone was injured. Indicating that he did not know who the driver was and that he was going to find the driver, defendant left the scene in a great hurry. To police officers investigating the collision, the defendant's car appeared to be heavily loaded in the back. Checking the registration through the police station the officers were given the name of the defendant and informed that he was a known boot-legger. They then searched the vehicle in the belief that it had been abandoned and discovered the contraband liquor.

In a divided opinion the Tennessee Court of Criminal Appeals holds that the mere fact that the defendant whose car had been in a minor accident purportedly fled the scene of the accident and was alleged to be a bootlegger did not give investigating officers probable cause to search his car on the spot. The defendant's flight and the loaded-down appearance of the trunk of the car may have, in view of the report that he was a known bootlegger, created a suspicion in the minds of the searching officers, but not probable cause for a warrantless search. The Court further held that the defendant, by his flight, did not abandon his right to possess the automobile and had standing to challenge the search. Denson v. State, (Tenn. Ct. Crim. App.) (21 October 1970); 8 Crim. L. Rep. 2196.

CONFESSIONS AND ADMISSIONS -- VOLUNTARINESS (MENTAL PATIENT) -- Appellant was convicted of murder. At the time of the homicide appellant was a committed patient in a government mental institution. The victim was an employee of the institution. The Court considered and found inadmissible four pretrial confessions made by appellant. The appellant was a suspect and without proper warning admitted being at the scene of the homicide to a police investigator on 5 June 1967. Investigation focused on appellant as the suspect. On 7 June 1967 the Clinical Director of the ward in the hospital to which appellant was assigned asked appellant if he would undergo a sodium amytol interview examination [truth test] to clear the matter up at which suggestion appellant said he would like to consult with his family and an attorney before taking such a test. On 10 June 1967 appellant sought out and confessed the crime to the Clinical Psychologist of the ward with whom appellant had a close doctor-patient relationship. This doctor advised appellant to confess his act to the Clinical Director and the evidence of record suggested that the appellant would do whatever the Clinical Director advised because of the close doctor-patient relationship. No warning was given appellant by the Clinical Psychologist. Without proper warning appellant confessed to the Clinical Director on 12 June 1967. The Clinical Director called the police when the appellant stated he wanted to confess and a few hours later appellant confessed to the police after being given a proper Miranda warning.

The Court of Appeals found the first "confession" to police officers admitting presence in the general area of the homicide inadmissible. The Court further found that the requirements of Miranda attached to the appellant's confessions to the hospital personnel.

"We emphasize also that the case falls within no well defined pattern due to its unusual factual setting. The need for safeguards to prevent compelled self-incrimination by a person suspected and then accused of crime can be no less because he is a mental patient at a Government institution which has special responsibility for his custody and care. On the contrary, by reason of his patient status appellant was entitled to special regard for his rights by those under whose supervision he was placed. It might well have been their duty to have advised him to obtain counsel rather than only of his right to counsel." Miranda v. Arizona, 384 U.S. 276 (1967).

The Court noted that the appellant's confession to the Clinical Psychologist was compelled by the special relationship between them and the investigative pressures then exerting their influence upon him, and that the confession to the Clinical Director was but a continuation of what had become compelled self-incrimination by all that had occurred, including the confession to the Clinical Psychologist. Under the circumstances the Court was of the opinion that the appellant's final confession to the police (the only one introduced at trial) was, though preceded by a warning, involuntary because of the continuing taint of the three prior confessions. United States v. Robinson, \_\_\_ F.2d \_\_\_ (C.A.D.C. 30 December 1970).

HABEAS CORPUS -- CONSCIENTIOUS OBJECTION -- The idea that any post-induction habeas effort by a would-be conscientious objector for release from the Army is doomed from the start because he has already demonstrated his insincerity by submitting to induction is rejected by the United States Court of

Appeals for the District of Columbia Circuit. The Court recognizes that the Government was encouraged to make the argument by the United States Supreme Court's recent dictum in Mulloy v. United States, 398 U.S. 410 (1970), that the sincere objector will not even submit to induction. But one does not have to be that uncompromising to be sincere, the Court of Appeals says. The Court also declined to hold that seven months service in the Army, including basic training is a waiver of the right to petition for habeas corpus where the petitioner was in basic training for the first two months and unsuccessfully pursued the discharge remedy made available by the Army to conscientious objectors for the next five months. The appellant's case was not required to be pursued by the Army in the first place because appellant's objection did not develop subsequent to his entry into active military service. Paragraph 3(a), AR 635-20. Ultimately denying the objector any relief, the Court explains at length its concern over the problem of uneducated, inarticulate applicants for CO classification. Gruca v. Secretary, \_\_\_ F.2d \_\_\_ (C.A.D.C. 23 October 1970).

CHARGES AND SPECIFICATIONS -- SUFFICIENCY -- COMMUNICATING A THREAT -- The United States Army Court of Military Review in a divided opinion, considered the following specification set forth in relevant part as follows:

"In that . . . did at . . . wrongfully communicate to First Lieutenant . . . Holmes . . . a threat to injure by saying, 'Holmes, I hope you don't make it your last 60 days, and you may not, ' . . ."

The Court noted that the statement was made following an attempt by Lieutenant Holmes to get appellant to obey an order while the officer was in the process of calling the military police, and the words were spoken by appellant while he appeared to some observers to be "pretty mad," "Furious," and in a "minor rage." Applying the principle that "Conduct takes its legal color and quality more or less from the circumstances surrounding it, and the intent or purpose which controls it, and the same act may be lawful or unlawful as thus colored and qualified,"

a majority of the Court was satisfied that the specification was legally sufficient to allege the offense intended. The author judge found that the communication was equally susceptible of expressing, as the appellant claimed at trial, merely his hope at the time that the lieutenant as a result of combat or accident not related to appellant's activities would not finish his Vietnam tour without injury. The specification and the charge to which it related was ordered dismissed. Concurring in this result, the senior judge of the panel was of the opinion that the allegations of the specification fail to state an offense. United States v. Redmond, \_\_\_ CMR \_\_\_ (ACMR 22 December 1970).

COMMUNICATING A THREAT -- FINDINGS OF GUILTY BY EXCEPTIONS AND SUBSTITUTIONS -- Appellant, charged with communicating a threat to an officer, was found guilty by exceptions and substitutions of wrongfully using provoking words. The specification alleged that he said "I can whip your. . ." and "I'm going to kill your. . .". Appellant was found guilty of saying "If you see a boy, kick his. . ." in violation of Article 117, Uniform Code of Military Justice. In dismissing these findings the United States Army Court of Military Review stated that a variance between pleading and proof is fatal only when it operates to substantially prejudice the rights of the accused, citing United States v. Hopf, 1 USCMA 584, 5 CMR 12 (1952). The Court noted the two-pronged test for prejudice; first was the accused misled; and second is he protected from a second prosecution. The Court's perusal of the record led them to conclude that the accused was misled at trial noting that he made no effort to defend against the substituted offense and that the excepted words were unconditional, aggressive in connotation and fatal in result; the substituted words conditional, passive and non-lethal. United States v. Reid, \_\_\_ CMR \_\_\_ (ACMR 20 December 1970).

CHARGES AND SPECIFICATIONS -- SUFFICIENCY OF SPECIFICATION -- BREACH OF PEACE -- The United States Army Court of Military Review considered the sufficiency of a specification which read, in pertinent part:

"In that . . ., did at . . . on or about . . . participate in a breach of the peace by unlawfully assembling with . . . and others to the number of about five for the purpose of disrupting the operation of said [stockade] by arming themselves with weapons, making threats and burning building number 7658 of said facility."

The Court noted that the specification fails to state an offense, for missing from the specification is an averment of an essential element of breach of the peace, similar to that of riot, that appellant committed an act constituting an "outward demonstration of a violent or turbulent nature" resulting in a disturbance of the peace. The specification only alleges the act of assembly and the purpose thereof, but does not allege execution of that purpose. Citing Paragraph 195b, Manual for Courts-Martial, United States, 1969 (Revised edition); Form 84, App. 6c, Manual, supra; United States v. Metcalf, 16 USCMA 153, 36 CMR 309 (1966); United States v. Ludden, SPCM 6112 (ACMR 10 December 1970).

INSTRUCTIONS -- ASSAULT WITH INTENT TO COMMIT MURDER -- Appellant, contrary to his pleas was found guilty of assault with intent to commit murder. The military judge instructed the court that in order to convict the accused they must find to the required degree of certainty that he intended to "murder" the victim. He then defined premeditated murder; (Art. 118 (2)) i.e. an unlawful homicide accompanied by an intent to kill or inflict great bodily harm, and the offense denounced by Article 118(3), i.e. a killing, resulting from doing an inherently dangerous act evincing a wanton disregard of human life.

In holding that the above instruction was erroneous the Army Court of Military Review noted that Paragraph 213f(1)(a), Manual, supra, in discussing assault with intent to commit murder provides that this is an assault with the specific intent to kill. The intent thus required is to commit the offenses denounced by Article 118(1) and the first half only of Article 118(2). Since the offenses denounced by Article 118(3), (4) and the second half of (2) may be committed even though the accused may have a specific intent not to kill, such offenses play no part in the definition of assault with intent to commit murder. The military judge's instructions thus permitted the appellant to be convicted as charged even though he may have intended only to inflict great bodily harm or simply evinced a wanton disregard for life. The instructional error was therefore prejudicial; citing United States v. Floyd, 2 USCMA 183, 7 CMR 59 (1953); United States v. Carey, No. 422581 (ACMR 14 January 1971).

UNCHARGED MISCONDUCT -- CONSIDERATION ON MERITS IN TRIAL BY MILITARY JUDGE ALONE -- The accused, a first lieutenant, was convicted of fraudulent use of another officer's club card with intent to defraud. The military judge stated that he had considered evidence that the officer's club card had been fraudulently used on

occasions other than alleged in the specification as a basis for determining the element of intent to defraud. The United States Army Court of Military Review was of the opinion that the evidence of other credit charges was properly admitted initially to establish the circumstances surrounding the ultimate discovery of the appellant as the perpetrator of the offense charged. The Court also noted that other acts of misconduct may be admissible as an exception to the general rule when such evidence shows guilty intent. Para. 138g, MCM, 1969, (Rev.); United States v. Pavoni, 5 USCMA 591, 18 CMR 215 (1955). However, because there was no evidence in the record connecting the appellant with these other credit charges, the military judge erred in considering such acts on the issue of appellant's intent to defraud as to the offense charged. In so holding the Court rejects the minority view as expressed by Wigmore that evidence of prior similar acts for the purpose of negating innocent intent as to the crime charged may be resorted to whether the similar acts are connected with the accused or not (2 Wigmore, Evidence §303 (3d ed, 1940)). United States v. Rainbolt, No. 421732 (ACMR 17 December 1970).

AWOL TERMINATION -- Appellant was convicted of an unauthorized absence from 9 May 1969 to 4 April 1970. At the trial, defense counsel argued unsuccessfully that the following morning report entry, properly authenticated, the government's only evidence relating to the termination date, proved that the absence in question was terminated on 19 September 1969, rather than 4 April 1970, the alleged date of which appellant was convicted:

"Ending 2400 8 Apr 70

ACCESSIONS

Duron Arthur M E 546-76-5023 PVI Rtn Jd  
299 99 HQ USATC  
Inf & Ft Ord CA  
Eff date 4Apr70

Fr app March Air Force Base Security  
Police & Riverside CA Sheriff Office for vio-  
lation of probation and violation of Article  
85 UCMJ 0900 hr 19 Sep 69 cnf Riverside County  
Jail appeared in court 6 Oct 69 sent to 8 mos  
cnf in County Jail rel to mil control 1912  
hr 4 Apr 70 and rtn thru mil channels arr this  
unit this sta 0800 hr 8 Ap 70"

The Army Court of Military Review noted:

"As the morning report entry establishes that appellant came under military control on 19 September 1969, albeit momentarily, the government's evidence is insufficient as a matter of law to support the termination date, 4 April 1970, alleged and involved in the conviction (see United States v. Jackson, 1 USCMA 190, 2 CMR 96 (1952), and United States v. Loper, 25 CMR 778 (AFBR 1957); cf United States v. Morris, 11 USCMA 16, 28 CMR 240 (1959), and United States v. Self, 35 CMR 557 (ABR 1965))."

The Court affirmed only so much of the finding of guilty as finds the accused guilty of an unauthorized absence from 9 May 1969 to 19 September 1969. United States v. Duron, CMR (ACMR 25 November 1970).

ABUSIVE LANGUAGE -- COMMISSIONED OFFICER'S USE OF WORD WITH RACIAL OVERTONE -- Appellant was convicted of striking a superior officer who was then in the execution of his office and being disrespectful toward the same superior officer. The officer victim ordered the appellant to "Lock your heels, boy." The appellant, a Negro, was angered by the use of the word "boy" and struck the lieutenant's head with a partially closed fist. Appellant's alleged disrespectful language following the lieutenant's remark was "I do not have to be at ease or to come to attention and don't call me boy."

The United States Army Court of Military Review noted:

"This Court has held that misconduct on the part of a superior in his dealings with a subordinate may divest the former of his cloak of authority as a superior regarding offenses committed upon or against him by the subordinate (see United States v. Revels, CMR (ACMR 22 Sep 1970), and United States v. Garretson, CMR (ACMR: 2 Apr 1970)). . . .

\* \* \*

On the basis of Revels and Garretson, both supra, we will disapprove appellant's conviction of the disrespect charge and that

involving an assault upon a superior officer who was then in the execution of his office." United States v. Johnson, No. 422385 (ACMR 23 December 1970).

MENTAL RESPONSIBILITY -- HEARSAY DISCLOSURE OF PSYCHIATRIC OPINION -- Accused was convicted of premeditated murder and aggravated assault. A psychiatrist evaluated accused and found him not to have been mentally responsible at the time of the offenses. Later a board of three psychiatrists unanimously concluded to the contrary. One of the three psychiatrists testified at the trial for the government. His testimony, to which no objection was made, disclosed not only his opinion but also the opinions of the other two members of the sanity board as to accused's mental responsibility. The Air Force Court of Military Review found that the psychiatrist's opinion was not based upon the opinions of the other two members and thus did not decide the question of the admissibility of testimony of the opinions of other medical board members in cases where the witness has based his opinion partially on theirs. Paragraph 138e, Manual for Courts-Martial, United States, 1969 (Revised edition). United States v. Howard, 19 USCMA 547, 42 CMR 149 (1970). Since Paragraph 122c of the Manual prohibits the receipt in evidence of sanity board reports and since the government psychiatrist's testimony here was nothing else but secondary evidence of the board's findings, it should not have been admitted. The testimony was inadmissible hearsay and was incompetent even in the absence of objection, although the Air Force Court of Military Review pointed out that the trial defense counsel might well have failed to object because a similar objection by him had been overruled in an Article 39(a) session. The Court found that the evidence as to mental responsibility, aside from the inadmissible portion, was in delicate balance. Since there was a fair risk that the members considered the inadmissible opinions of the other two psychiatrists, the rights of accused suffered substantial prejudice and a rehearing was required. United States v. Parmes, ACM 20630, 42 CMR \_\_\_ (AFCMR 30 October 1970).

  
GEORGE J. McCARTIN, JR.  
Colonel, JAGC  
Chief, Defense Appellate Division