

A Journal For Military Defense Counsel
THE ADVOCATE

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THE ADVOCATE

Volume 11, Number 4

July-August 1979

CHIEF, DEFENSE APPELLATE DIVISION

COL Edward S. Adamkewicz, Jr.

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TRANSITION

IMPORTANT MESSAGES FROM THE JUDGE ADVOCATE GENERAL AND CHIEF, USATDS

Defense counsel should be encouraged upon reading the messages of The Judge Advocate General and the Chief, United States Army Trial Defense Service, beginning on the next page. We are especially pleased to publish the information provided by two former Chiefs of DAD, who greatly helped The Advocate progress through its formative years.

* * * * *

THE SCOPE OF BRADY v. MARYLAND CONTINUES TO EXPAND . . .

. . . and an example of the expansion is set forth in the lead article, "Defense-Requested Lineups."

* * * * *

CIVILIAN RESOURCES / HELPFUL PUBLICATIONS

After he has been been advised of his right to obtain a civilian lawyer, the accused might ask trial defense counsel for information on civilian organizations available to help him. Attorney David F. Addlestone, Co-Director of the National Veterans Law Center, provides a listing of some of these organizations. For counsel's own benefit, he also includes some publications dealing with various aspects of military justice.

* * * * *

PAYING THE INDEPENDENT EXPERT

In order to employ an independent expert at government expense, the defense must demonstrate "necessity." If defense counsel seeks an independent expert to test tangible evidence, he might consider the necessity argument presented in "Defense Testing of Physical Evidence at Government Expense."

EXERCISE OF INDEFENDENT PROFESSIONAL
JUDGMENT BY DEFENSE COUNSEL



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
NASSIF BUILDING
FALLS CHURCH, VIRGINIA 22041

20 JUL 1979

JALS-TD

SUBJECT: Exercise of Independent Professional Judgment by Defense Counsel

Senior Defense Counsel
All General Court-Martial Jurisdictions

1. The inclosed memorandum from The Judge Advocate General provides guidance concerning the exercise of independent professional judgment by defense counsel. It requires a report whenever a defense counsel believes he or she has been subjected to improper influences or pressures.
2. You should insure that all defense counsel in your jurisdiction, whether or not assigned to the U.S. Army Trial Defense Service, read and fully understand this memorandum. You should also review Canon 5 of the Code of Professional Responsibility and Ethical Considerations 5-1 and 5-21, extracts of which are inclosed.
3. The U.S. Army Trial Defense Service and the Field Defense Services Office are available at all times to provide assistance and advice to trial defense counsel in the field. Reports as required by The Judge Advocate General's memorandum may be made to any supervising Senior or Regional Defense Counsel, or directly to my office when appropriate.

2 Incl
as

Robert B. Clarke
ROBERT B. CLARKE
Colonel, JAGC
Chief, Trial Defense Service/
Field Defense Services Office



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF:

19 JUL 1979

DAJA-ZA

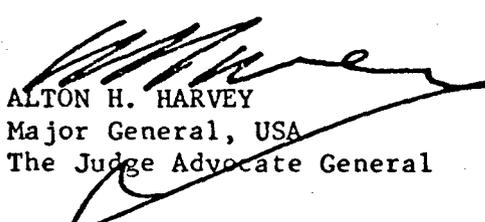
MEMORANDUM THRU ASSISTANT JUDGE ADVOCATE GENERAL FOR CIVIL LAW
FOR CHIEF, US ARMY TRIAL DEFENSE SERVICE/FIELD DEFENSE SERVICE OFFICE
SUBJECT: Exercise of Independent Professional Judgment by Defense Counsel

1. In one recent instance brought to my attention, a trial defense counsel, perceiving improper influence in the performance of his duties, failed to report that matter to proper authorities. Canon 5 of the American Bar Association's Code of Professional Responsibility, applicable under paragraph 2-32, AR 27-10, requires every defense counsel to exercise independent professional judgment on behalf of a client. The attendant Ethical Considerations make it clear that this duty can not be compromised or diluted by persons outside of the attorney-client relationship. They enjoin counsel to be alert to factors or circumstances which might impair the exercise of free judgment. Articles 37 and 98, UCMJ, insulate defense counsel from improper influences as a matter of law, and provide penalties for those who attempt such action.
2. Under the law and Army Regulations, I am charged with staff supervision of our military justice system. In carrying out this duty, I want to insure that each defense counsel understands the ethical and legal responsibilities in this sensitive area. I expect every judge advocate to adhere strictly to the requirements of the UCMJ and the Code of Professional Responsibility. Specifically, I expect and require any defense counsel who feels he or she has been subjected to pressures which restrain or impair the full exercise of independent professional judgment to report that fact promptly to appropriate authority.
3. The Assistant Judge Advocate General for Civil Law is my representative in supervising the defense function. Every report of an attempt to improperly influence a defense counsel must ultimately be forwarded to him for disposition. Such reports may be made directly to the Chief, US Army Trial Defense Service/Field Defense Services Office, to the Assistant Judge Advocate General for Civil Law, or to me personally. One of us will, in each case, determine the nature and extent of inquiry or investigation necessary to resolve the matter. Local judge advocates will not attempt to dispose of these matters in a manner inconsistent with this memorandum.

DAJA-ZA

SUBJECT: Exercise of Independent Professional Judgment by Defense Counsel

4. While I am confident that "reportable" incidents will be few, even one instance, unreported and unresolved, is unacceptable. I request that you bring the contents of this memorandum to the attention of all defense counsel.



ALTON H. HARVEY
Major General, USA
The Judge Advocate General

CODE OF PROFESSIONAL RESPONSIBILITY*

CANON 5

"A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

ETHICAL CONSIDERATIONS

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

* * * * *

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

* As adopted by the House of Delegates of the American Bar Association.

DEFENSE-REQUESTED LINEUPS

Captain Charles E. Trant, JAGC*

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."

Justice Brennan, United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149, 1158 (1967).

Introduction

The defendant's right to pretrial discovery of the government's case has evolved tremendously from the days when Lord Kenyon, an English judge, in denying a discovery request, could state "there is no principle to warrant it . . . and if we were to grant it, it would subvert the whole system of criminal law."¹ Nowhere in Anglo/American judicature is this evolution more obvious than in the formal Article 32 investigation,² where virtually the entire government case is at the disposal of the defense to probe and test as it sees fit. However, there is a certain category of cases where a detrimental side effect occurs. That is where the determinative issue of guilt or innocence rests on eye-witness identification, and the accused is vulnerably exposed to the identifying witness, who may positively reinforce in his mind the

* An action attorney at Defense Appellate Division, Captain Trant received his B.A. and J.D. from Suffolk University. Prior to his arrival at DAD, he served at Fort Polk as defense counsel, Chief, Claims Branch, and assistant chief of military justice.

1. The King v. Holland, 4 T.R. 691, 100 Eng.Rep. 1248 (K.B. 1792).

2. Uniform Code of Military Justice, Art. 32, 10 U.S.C. §832 [hereinafter cited as UCMJ].

image of the defendant as the perpetrator of the crime.³ In an effort to discover the strength or weakness of this witness' ability to identify the defendant in a non-suggestive atmosphere, trial defense counsel may consider the gambit of requesting a pretrial identification lineup.⁴ As did our learned colleague in King v. Holland, supra, counsel should pursue his request on two bases: (1) as a matter of right (in contemporary American parlance, "due process"), or, alternatively, (2) as a matter of the trial court's discretion.

Due Process

Trial defense counsel's pursuit of a pretrial identification lineup on due process⁵ grounds, will provide him with an innovative opportunity to expand the parameters of constitutional law. The Supreme Court of the United States has not decided whether a defendant can request a pretrial identification

3. See United States v. Williams, 436 F.2d 1166, 1168 (9th Cir. 1970), cert. denied, 402 U.S. 912, 91 S.Ct. 1392, 28 L.Ed.2d 654 (1971).

When asked to point to the robber, an identification witness - particularly if he has some familiarity with courtroom procedure - is quite likely to look immediately at the counsel table, where the defendant is conspicuously seated in relative isolation.

4. Caveat. This gambit, not to be confused with gamble, is obviously not for use in every case. A detailed analysis of the government's case, particularly the target witness' apparent abilities to identify the culprit in the abstract, must be undertaken before making this move. Using his best professional judgment, trial defense counsel should satisfy himself that the witness will not be able to identify the defendant. He should enter this arena with much trepidation, as a positive identification of the defendant could be devastating to his case.

5. United States Constitution, Amendment V, "No person shall . . . be deprived of life, liberty, or property, without due process of law"

lineup as a distinct due process right.⁶ Until relatively recently, all jurisdictions which had decided the issue held that no constitutional right to a lineup exists.⁷ Neither the United States Court of Military Appeals nor any of the Courts of Military Review has addressed this issue, thus leaving trial defense counsel with "issue of first impression" maneuverability.

The harbinger for recognition of a due process right is Evans v. Superior Court of Contra Costa County.⁸ Evans and a companion were apprehended by policemen who had observed them running from the scene of a drive-in restaurant robbery. Within fifteen minutes of the robbery, the two suspects were returned to the scene of the crime in the back of a police cruiser. The owner identified the two suspects as "appear[ing] to have the same physical builds as the men who had robbed him."⁹ Even though he had faced the robbers during the crime, the owner identified the suspects only by observing the backs of their heads and shoulders through the rear window of the police cruiser.

Evans filed a "Notice of Motion for Lineup" at trial, which was denied by the judge, who, while feeling that fair play should allow one, did not believe he had the power to

6. Albeit, the Court has denied certiorari in cases where lower courts have held no constitutional right existed.

7. See, e.g., United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970); United States v. Hill, 449 F.2d 743 (3rd Cir. 1971); United States v. White, 482 F.2d 485 (4th Cir. 1973); United States v. McGhee, 488 F.2d 781 (5th Cir. 1974); United States v. Kennedy, 450 F.2d 1089 (9th Cir. 1971); Haskins v. United States, 433 F.2d 836 (10th Cir. 1970); United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973). See also, Cook, "Constitutional Rights of the Accused, Trial Rights" (copyright - The Lawyers Co-operative Publishing Co. 1974) Section 52 - Lineup Identification.

8. 11 Cal.3d 617, 522 P.2d 681, 114 Cal.Rptr. 121 (1974).

9. Id. at 619, 522 P.2d at 683, 114 Cal.Rptr. at 123.

order it. The Supreme Court of California reversed, stating that the defendant, in an appropriate case, does have a due process right to a lineup if he makes a timely request. The appropriate case is "when eyewitness identification is shown to be in material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve."¹⁰

The court reached the due process conclusion by analogizing Evans' situation to Brady v. Maryland¹¹ and Wardius v. Oregon.¹² In Brady, the Supreme Court of the United States held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹³ There, material favorable evidence known to the prosecution, but unknown to the defense, was suppressed by the prosecution. In Evans, supra, the evidence sought, i.e. a pretrial identification lineup, was unknown to both parties and it was impossible to determine in advance if it would be favorable to the defense. Nevertheless, the court held:

Here petitioner seeks to compel the people to exercise a duty to discover material evidence which does not now, in effect, exist. Should petitioner be denied his right of discovery the net effect would be the same as if existing evidence were intentionally suppressed.¹⁴

This holding greatly expands the prosecutor's duty under Brady, in that it requires the prosecutor, at least where there is a defense request, to develop unknown material

10. Id. at 622, 522 P.2d at 686, 114 Cal.Rptr. at 126.

11. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

12. 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973).

13. Brady v. Maryland, supra, at 87, 83 S.Ct. at 1196-7, 10 L.Ed.2d at 218.

14. 11 Cal.3d at 622, 522 P.2d at 686, 114 Cal.Rptr. at 123.

evidence, even though the favorableness to the defense is uncertain.¹⁵ While, as a matter of constitutional due process, there is no right to general discovery in a criminal case,¹⁶ a request for a pretrial identification lineup should be regarded as a specific request for highly probative evidence.

Of course, trial defense counsel cannot state with certainty that the evidence will be favorable. He should, however, be able to assert sufficient indicia of favorableness to overcome this burden. Some of the factors set forth in Neil v. Biggers,¹⁷ may be helpful, in demonstrating favorableness:

- (1) Opportunity of the identification witness to view the criminal at the time of the crime.
- (2) The witness' degree of attention.
- (3) The accuracy of any prior description of the criminal given by the witness.

15. See generally, Note, "Pretrial Identification Procedures: The Expanded Duty to Disclose Favorable Evidence," 50 Notre Dame Law. 508 (1975); Note, "Criminal Procedure - Due Process - Defendant's Right to a Lineup as a Means of Discovery," 21 Wayne L.Rev. 991 (1975); Comment, "Due Process Fairness Requires that Accused be given a Pretrial Discovery Right to a Lineup," 24 Cath.Univ.L.Rev. 360 (1975); 1974/1975 Annual Survey of American Law 176 (1976).

16. See Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). See also United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); United States v. Lucas, 5 M.J. 167 (CMA 1978).

17. 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). See also Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Any other salient factors bearing on probable favorability should also be addressed.¹⁸

If the case is one in which eyewitness identification could be the decisive issue, trial defense counsel should be able to establish materiality in the "constitutional sense."¹⁹ The mere possibility that the evidence sought by the defense may affect the outcome of trial is insufficient to establish materiality.²⁰ The proper standard for testing materiality in the constitutional sense, set forth in Agurs, was adopted by the United States Court of Military Appeals in United States v. Horsey, supra:

It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial.²¹

The ability of the witness to identify the defendant in a non-suggestive lineup should be sufficient to overcome this materiality issue.

18. If the trial defense counsel cannot amass a sufficient array of factors leaning toward favorableness, he should reconsider the soundness of his decision to pursue a lineup. See note 4, supra.

19. United States v. Agurs, supra at 110, 96 S.Ct. at 2400, 49 L.Ed.2d at 353.

20. United States v. Horsey, 6 M.J. 112, 115 (CMA 1979): "The evidence must be highly probative of the innocence of the accused in more than an isolated way."

21. Id. at 115, quoting Agurs, supra, at 112-113, 96 S.Ct. at 2402, 49 L.Ed.2d at 355.

The alternative underpinning of Evans was the court's reliance on Wardius, wherein the Supreme Court struck down an Oregon statute that required the defendant to file a notice of alibi prior to raising it at trial. The statutory sanction for failure to so file was a preclusion of raising alibi at trial.²² The court, while not requiring that discovery practices be established,²³ found that, where discovery procedures are in effect, it would be fundamentally unfair to require disclosure by the defendant without a reciprocal disclosure by the government.²⁴ Thus, the Evans court held that, since the government could compel the accused to appear in a lineup²⁵ and utilize any incriminating information derived therefrom,²⁶

22. Note, "The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense," 81 Yale L.J. 1342 (1972).

23. Cf. United States v. Augenblick, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); Cicenia v. LaGay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958).

24. Wardius, supra, at 476, 93 S.Ct. at 2213, 37 L.Ed.2d at 88:

[W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The state may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.

Id. at 475, 93 S.Ct. at 2212, 37 L.Ed.2d at 88 (footnote omitted).

25. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

26. Assuming it is not violative of other constitutional mandates. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

an accused should "be given a reciprocal right to discover and utilize contrary evidence."²⁷ As trial counsel can utilize the information-gathering expertise of law enforcement officials, while the defendant's discovery resources are limited, due process and fundamental fairness should require the government to provide a right to the defendant, equal to its own, to compel a lineup.

Discretion

Defense counsel will find considerably more direct support for a defense requested pretrial identification lineup as a matter within the sound discretion of the trial judge.²⁸

27. Evans, supra, at 621, 522 P.2d at 685, 114 Cal.Rptr. at 126. See also Article 46, UCMJ, which grants, inter alia, trial counsel and defense counsel with an equal opportunity to obtain evidence. Cases defining the compulsory production of witnesses pursuant to Article 46, UCMJ, have measured this right by the relevancy and materiality of the expected testimony. United States v. Jouan, 3 M.J. 136 (CMA 1977). Once the materiality of the witness is shown, he must be produced or the proceedings abated, United States v. Carpenter, 1 M.J. 384 (CMA 1976), unless the evidence is merely cumulative. United States v. Williams, 3 M.J. 239 (CMA 1976). A strong argument can be made that Article 46, UCMJ, provides for the "reciprocal right" to the defense to compel a lineup after establishing relevancy and materiality. Cumulativity could only be used as a rejoinder where a valid lineup has already been held.

28. See, e.g., United States v. Ash, 149 U.S.App.D.C. 1, 461 F.2d 92 (1972), reversed on other grounds, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Jackson v. United States, 395 A.2d 99 (D.C. Ct. of App. 1978); State v. Boettcher, 338 So.2d 1356 (La. 1976); Commonwealth v. Core, 348 N.E.2d 777 (Mass. 1976); People v. Farley, 254 N.W.2d 853 (Mich. App. 1977); Commonwealth v. Sexton, 25 Crim.L.Rptr. 2216 (Pa.Sup.Ct. 1979). See also ABA Standards, Discovery and Procedure before Trial §2.5(a) (1970): "Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information [not otherwise covered by the standards];" and §3.1(a)(i) which authorizes a judge to require the accused to appear in a line-up.

The standard by which the discretion²⁹ of the judge will be tested for abuse has been generally accepted as:

- (1) where defendant, on timely motion,
- (2) makes a showing that eyewitness identification is materially at issue, and
- (3) there exists, in the particular case, a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.³⁰

Using this standard, defense counsel must initially determine the most advantageous time to submit his request, while being mindful of the timeliness requirement. Any request made relatively soon after an individual becomes a suspect³¹ will ordinarily be timely. This would satisfy

29. "The term 'discretion' denotes the absence of a hard and fast rule [citation omitted] when invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Langnes v. Green*, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520, 526 (1931). "We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.'" *Cardozo, The Nature of the Judicial Process*, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496, 73 S.Ct. 397, 441, 97 L.Ed. 469, 509 (1953) (Frankfurter, J.).

30. *Jackson v. United States*, supra at 104; *Berryman v. United States*, 378 A.2d 1317, 1320 (Ct. of App. D.C. 1977); *State v. Boettcher*, supra, at 1361.

31. One becomes a suspect at that point in time in a criminal investigation when it ceases to be exploratory and focuses upon an individual, *United States v. Webster*, 40 CMR 627 (ACMR 1968), that is when the evidence crystallizes and tends to incriminate the defendant as an objective fact not just according to the subjective intent of the investigator. *United States v. Longoria*, 43 CMR 676 (ACMR 1971).

the dual considerations of the government to collect incriminating evidence if available, and the defense to seek exculpatory evidence and the early release of the suspect if he has been wrongly taken into custody.³² If the witness cannot identify the defendant at this time, any later purported identification surely will be suspect and subject to a motion to strike. If an Article 32 investigation is to be held, a request prior to or at the commencement thereof would probably be timely. As a practical consideration, of course, trial defense counsel should seek the lineup prior to the witness' obtaining the opportunity to view the defendant in the suggestive setting of the investigation. The longer the period of time between the offense and the request, the more likely the judge will exercise his discretion against the request as untimely. However, if the government intends to have an in-court identification, then a strong argument can be made for a lineup closer to the trial date.³³ It might be assumed that a witness who shortly before trial cannot identify

32. See Wise v. United States, 127 U.S. App. D.C. 279, 282, 383 F.2d 206, 209 (1967), cert. denied, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed.2d 1164 (1968).

33. In Jackson, supra, the government stated in oral argument opposing the defense request that:

By waiting until a long period after the event occurred, as it occurred in the instant case, it is much more likely that the witness is not going to be able to make an identification.

The court found the government's argument supportive of the timeliness of the defense motion by stating:

[T]he very uncertainty of identification provides a sound reason why a lineup near the trial date would be a timely, indeed desirable, check against a potentially suggestive, even refreshed in-court identification.

Id. at 105.

the defendant in a nonsuggestive atmosphere can identify the defendant in court only by aid of the suggestive setting of the courtroom.

Next, defense counsel should be prepared to establish the fact that the eyewitness identification is materially in issue. A recitation of the facts affecting the witness' ability to identify the defendant, coupled with a lack of other direct incriminating evidence, will clearly place the identification materially in issue. Examples of such facts are poor lighting conditions, the witness' poor eyesight, his lack of attention, the brief time of observation, any emotional stress that the witness was under at the time of the offense, any prior conflicting descriptions by witness, any prior inability to identify the defendant, any prior identification of someone else, the only eyewitness identification was made from photographs, etc. The proof of materiality is inextricably intertwined with the averment of a likelihood of mistaken identification which a lineup would tend to resolve.

Finally, counsel should stress to the judge that his discretion should be exercised in favor of the defense because in so doing he will "enhance the search for truth in the criminal trial by insuring both the defendant and the [government] ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."³⁴

Procedure

Trial defense counsel must determine the procedure to be utilized in making his request. Depending upon the rapport that he has with the local law enforcement officials, he may wish to request the agent in charge of the investigation directly to conduct a lineup. Also, counsel should consider getting the staff judge advocate or chief of military justice to intercede in his behalf to the law enforcement authorities. If unsuccessful, he should submit a request in writing to the trial counsel, and, in cases of disagreement between counsel, to the convening authority if the trial has not commenced; to the Article 32 investigation officer,

34. Williams, supra at 82, 90 S.Ct. at 1895, 26 L.Ed.2d at 450. See Generally, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash.U.L.Q. 279.

if applicable; or to the military judge at an Article 39(a) session.³⁵ If a pretrial determination had been made not to honor the defense request, the request should be renewed at trial to preserve the issue. Such requests should cite the provisions of Article 46, UCMJ, and paragraph 115c, Manual for Courts-Martial, United States, 1969 (Revised edition),³⁶ setting forth the bases discussed in Due Process and Discretion, infra. Although lineups are not specifically enumerated,³⁷ the government certainly has within its control the means to conduct one.³⁸

35. UCMJ, Article 39(a), 10 U.S.C. §839(a).

36. "If documents or other evidentiary materials are in the custody or control of military authorities, the trial counsel, the convening authority, the military judge . . . will, upon reasonable request and without the necessity of further process, take necessary action to effect their production for use in evidence and . . . to make them available to the defense to examine or to use, as appropriate under the circumstances."

37. Referring to paragraph 115c, MCM, 1969, the court in United States v. Brakefield, 43 CMR 828, 833 (ACMR 1971), stated:

"Military law provides a much more direct and broader means of discovery by an accused that is provided by the Jencks Act in particular and the Federal Rules of Criminal Procedure in general."

38. [W]e are not concerned that the petitioner's motion for a pretrial lineup sought the discovery of evidence not necessarily then within the people's knowledge if within the people's reach. We have held in other instances that the people cannot escape a responsibility to disclose merely by passive conduct or the failure to acquire precise knowledge sought by but unavailable to an accused.

Evans, supra at 621, 522 P.2d at 685, 114 Cal.Rptr. at 125.

Defense counsel should exhaust all avenues of request before seeking relief from the military judge. A motion for appropriate relief in the nature of a motion to compel a lineup should be filed. Trial defense counsel could seek to have the military judge adopt a procedure similar to Rule 435, Uniform Rules of Criminal Procedure³⁹ which states:

Rule 435 [obtaining nontestimonial evidence from accused person upon his motion.]

- (a) Authority. Upon motion of an accused person who has been arrested, cited, or charged in an information [or indictment], the court by order may direct the prosecuting attorney to provide one or more of the procedures specified in Rule 434(c)⁴⁰ for participation therein by the accused person if the court finds that the evidence sought could contribute to an adequate defense.⁴¹
- (b) Contents of Order. The order shall specify with particularity the authorized procedure, the scope of the accused person's permitted participation, the time, duration, place, and other conditions of the procedure,⁴² and who may conduct the procedure.

39. Uniform Rules of Criminal Procedure, adopted by National Conference of Commissioners on Uniform State Laws (August 1974).

40. Id. Rule 434 provides in pertinent part (c)(1) appearing, moving, or speaking, for identification in a lineup

41. American Law Institute Model Code of Pre-arraignment Procedure, Section 170.2(8) is similar to subparagraph (a) above.

42. Id. Section 170.3 is precisely the same as subparagraph (b), above.

- (c) Implementation of Order. Rule 434(f)
(1) through (3)⁴⁵ applies to procedures
ordered under subdivision (a).⁴⁴

To assist the military judge in his decision, trial defense counsel should draft a proposed court order as an appendix to his motion. His involvement in setting the conditions under which the lineup will be conducted⁴⁵ will help assure his client of a non-suggestive lineup. Among the considerations which defense counsel may seek to resolve in his proposed order are: composition of the lineup, to include number of people, general physical characteristics of participants (i.e. height, weight, sex, race, hair color, eye color, etc.); the clothing that will be worn (keeping it as identical as possible, but if uniforms are worn be wary of name tags and ranks); the setting of the lineup, such as lighting to be used (as close to that in effect at the time of offense); the position that the participants will be in, e.g. standing or sitting, facing front, profile or back, etc; and the supervision of witnesses, if more than one, to insure that one does not influence any other.⁴⁶

43. Uniform Rules of Criminal Procedure, supra, Rule 434(f)(1) through (3) provides for:

- (f)(1) Right to counsel
- (2) Order carried out with dispatch
- (3) No investigative interrogation.

44. American Law Institute Model Code of Pre-arraignment Procedure, supra, Section 170.7 is precisely the same as subparagraph (c), above.

45. Counsel should take a greater role in how the lineup is actually conducted to help decrease any suggestiveness. United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969).

46. See generally, P. Wall, "Eye-witness Identification in Criminal Cases" (1965).

Since any of counsel's suggestions at the lineup itself could be disregarded,⁴⁷ the best opportunity for actually influencing the conduct of the lineup would be to attempt to incorporate his suggestions into the court's order. The fact that counsel has requested the lineup does not mean that he must acquiesce in any of the procedures to be followed. He should note his objection to any procedure that he feels is suggestive in order to enable him to later attack the lineup at trial.

Conclusion

Defense-requested pretrial identification lineups, when used selectively, can be a valuable defense tactic in cases where the identification issue may be determinative of the findings. In such instances, it is preferable to the alternative of having the witness respond to the trial counsel's proforma scenario of identifying the defendant at the Article 32 investigation or in-court where suggestiveness is inherent. Trial defense counsel should pursue his request on due process grounds and as a matter within the discretion of the judge. Any denial of his request should be documented and preserved at trial. The fallibility of human perception and memory, concomitant with the susceptibility of the human mind to subtle influences, such as the natural identification of the enlisted-accused as the offender by viewing him alongside officer-defense counsel, make eyewitness identification cases a challenging test of defense counsel's adversary skills.

47. Webster, supra, at 634.

RESOURCES AVAILABLE TO A MILITARY ACCUSED AND COUNSEL

David F. Addlestone, Esq.*

Frequently, after advising his client of the right to select individual counsel pursuant to Article 38(b), Uniform Code of Military Justice, military attorneys are faced with a client's question about obtaining civilian counsel. The request stems from several possible motivations: lack of faith in any uniformed lawyer, dissatisfaction with a particular lawyer, blind faith that any civilian lawyer can help, an abundance of caution in wanting an "outside consult," a belief that a "hired" attorney is better than an appointed defender, or, in some cases, fraud by a civilian practitioner who makes a living by exaggerating his or her firm's ability to help military accused.

Since the accused servicemember is likely to be young, afraid and far from home, the JAG lawyer should assist.** I have observed that the degree of assistance varies from the

* A graduate of Duke University Law School, the author is currently the co-director of the National Veterans Law Center. He has practiced military law as a judge advocate and for nine years as a lawyer with the American Civil Liberties Union. This article was originally intended for publication in Vol. 10, No. 5 (Sept.-Oct. 1978), which was dedicated as a special "civilian-military symposium" issue, but we were unable to print it in that issue.

Editor's Note - As the purpose of this article is to provide legal assistance to Army members, the restrictions of AR 380-13 do not apply. The opinions and conclusions expressed herein are the author's and do not reflect the views of the Department of the Army.

** Editor's Note - Para. D-2b, Appendix D, AR 27-10, states that the best method of assisting the accused in obtaining civilian counsel is to show the accused a list of local attorneys. This list should be compiled in cooperation with local bar associations.

JAG actively assisting the accused in finding good representation to being offended by the request and then doing nothing. The first part of this article offers some possible answers to questions that may be asked by a military accused regarding the civilian resources available to him.

The American Civil Liberties Union

The ACLU is a national organization with semi-autonomous affiliates in most states. Contrary to popular belief, the ACLU has a relatively small staff and budget, relying in most cases on volunteer attorneys. The ACLU military cases are largely restricted to those raising major constitutional issues, particularly free speech and association. However, most cases of this nature are not currently referred to courts-martial. (In general, these affiliates are free to choose their own cases and may take military cases because a volunteer attorney is interested in a particular issue or client.) The ACLU also participates as amicus before the United States Court of Military Appeals when significant issues are presented and when time permits. The ACLU also represents respondents in appeals from military administrative proceedings when significant issues are raised. Most of these cases are handled by the National Military Discharge Review Project (NMDRP) which is exclusively engaged in test case litigation involving less than fully honorable discharges. The NMDRP also functions as the ACLU's Military Rights and Amnesty Projects. Individual clients usually should not be referred to ACLU affiliates as the volume of requests often does not permit the unscrambling of the facts to find the issue or interest to the ACLU. To the extent possible, it is a better practice for a military counsel to present the case by a phone call or a letter. The NMDRP is located at The National Veterans Law Center, Washington College of Law, The American University, Washington, D.C., 10016, (202) 686-2741.

The Veterans Education Project

This is a project sponsored by the ACLU, the Public Law Education Institute (published by the Military Law Reporter), and the United Church of Christ's Office for Church in Society. Servicemembers receiving bad discharges may be referred to the Veterans Education Project (VEP) which maintains a master

referral list of attorneys and counselors willing to assist in applications to the Discharge Review Boards. The VEP also maintains a list of current materials on discharge upgrading, and has produced useful self-help materials for veterans with less than honorable discharges. The VEP is located at 1346 Connecticut Avenue, N.W., 6th floor, Washington, D.C., 20036, (202) 296-7592.

Military Counseling Agencies

There are quite a few military counseling agencies that provide services such as assistance in conscientious objector applications, assistance to AWOL's, discharge ungrading, VA counseling, and lawyer referrals. Some of these groups are:

CCCO
2016 Walnut Street
Philadelphia, PA 19103 (215) 568-7971

CCCO
1251 Second Avenue
San Francisco, CA 94122 (415) 566-0500

Midwest Committee for Military Counseling
317 Fisher Building
343 South Dearborn Street
Chicago, Illinois 60604 (312) 939-3349

AFSC
2426 Oahu Avenue
Honolulu, HA 96822 (808) 988-6266

Quaker House
223 Hillside Avenue
Fayetteville, NC 28301 (919) 485-3213

Enlisted People's Rights Organization
820 5th Avenue
San Diego, CA 92101 (714) 239-2119

Fight Back
Ingrimstrasse 28
6900 Heidelberg, Germany

Forward
Postfach 163
1 Berlin 45
W. Germany

There are dozens of other counseling groups but these geographically representative groups can get someone started in finding closer assistance.

Lawyer Referral Services

The District of Columbia Bar Association has started a Lawyer Referral Service with a Military Law Panel. This panel has lawyers who are willing to handle courts-martial, administrative boards, applications to a Discharge Review Board or Board for Correction of Military Records, appeals from court-martial convictions, back pay suits, etc. Fees are listed. The Lawyer Referral Service is located at the D.C. Bar, 1426 H Street N.W., Washington, D.C. 20005, (202) 638-1500.

The Military Law Panel at 2588 Mission Street, Room 220, San Francisco, California, (415) 285-4484, also provides referrals.

The bulk of the following list, with some changes, first appeared in On Watch, a publication of the National Lawyers Guild Military Law Task Force. Subscriptions are available from Kathy Gilberd, On Watch, National Lawyers Guild Military Law Task Force, P.O. Box 33544, San Diego, California 92103. The price is \$6.00 for individuals and \$12.00 for insitutions. There are about eight issues a year.

Resources in Military Law and Counseling

The Advocate: From Army Defense Appellate, stressing trial and legal strategies, from the defense point of view; available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; six issues a year, \$8.00 (domestic), \$10.00 (foreign).

The Air Force Law Review: Traditional law review format, with in-depth articles on military law; quarterly; available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; \$1.45/single copy, \$5.55/year.

The Army Lawyer: Army pamphlet with short articles on military law topics, news notes, bibliography, summaries of TJAG opinions, and legal assistance notes; monthly; available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; \$0.80/copy, \$9.00/year.

The Discharge Upgrading Newsletter: From The Veterans Education Project; published monthly; an essential source of current discharge upgrade developments in Congress and around the country including significant DRB decisions; available from VEP, 1346 Connecticut Avenue, N.W., 6th Floor, Washington, D.C. 20036, (202) 296-7592; subscription \$12.00/year.

The JAG Journal: The law review of the Navy, with in-depth articles and book reviews; semi-yearly; available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; \$1.10/copy.

The Judge Advocate Bulletin: An "informal survey of selected current developments in military law, with emphasis on recent litigation and other matters of general interest to judge advocates;" monthly; available from Office of the Staff Judge Advocate, U.S. Army Forces Command, Fort McPherson, GA 30330; usually free for public interest organizations.

Los Angeles Military and Selective Service Law Panel Newsletter:

An informative newsletter with brief case and news notes; monthly; available from Max Gest, L.A. Military Law Panel, 1888 Century Park East, Suite 225, Los Angeles, CA 90067; \$6.00/year.

Military Justice Reports: The West Publishing Company reporter of decisions of the Court of Military Appeals and selected opinions of the Courts of Review; biweekly; available from West Publishing Company, 50 West Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165; \$50.00/year for advance sheets; bound volumes additional.

Military Law Reporter: Loose-leaf legal service, reporting on all decisions of the Court of Military Appeals, all four Courts of Review, and all related federal court decisions, plus regulations changes, current news and articles, bibliography, current litigation, practice-oriented articles and indexes; this is the only publication offering a complete at-hand source of all cases concerning military and veterans law. The Army does not procure MLR centrally as do the Air Force and Navy. However, since it is in the Federal Supply Schedule, single orders from any Army installation can be ordered at the appropriate discount; this publication is highly recommended; bimonthly; available from Military Law Reporter, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036; \$175.00/year, with binders.

Military Law Review: The Army's law review, with in-depth articles, case notes and bibliography; quarterly; available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; \$1.95/copy, \$7.65/year.

Newsletter on Military Law and Counseling (NOMLAC): Highly informative and up-to-date CCCO counselors and lawyers newsletter, with news notes and federal and military casenotes, and current regulation change information; ten issues/year; available from CCCO-Western Region, 1251 Second Avenue, San Francisco, CA 94122; \$7.50/year.

The Reporter: The Air Force counterpart of the Army Lawyer. Six issues/year; Information available from USAF/JAES, 1900 Half Street, N.W., Washington, D.C. 20324; Subscription procedures not yet established but anticipated.

Off the Record: The Navy counterpart of the Army Lawyer. Six issues/year. Current policy is to refuse subscriptions to any person, including law school libraries outside DOD. Information and individual copies available under the FOIA from Office of The Judge Advocate General, Department of the Navy, Washington, D.C. 20370.

Index to Army Article 69 Appeals: Revised quarterly pursuant to the Freedom of Information Act; available from the Chief, Examination and New Trials Division, Nassif Building, Falls Church, VA 22041. None currently available from Navy and Air Force.

Index to Army Article 138 Complaints: HQDA (DAJA-ASR), The Pentagon, Washington, D.C. 20310; unknown if Navy and Air Force maintain such an index.

The Stars and Stripes (The National Tribune): Informative weekly veterans' newspaper. Available from P.O. Box 1803, Washington, D.C. 20013; \$11.50/year.

ACLU Practice Manual on Military Discharge Upgrading: (Revised ed. 11/75), by David Addlestone and Susan Hewman. This publication includes 235 pages of text and 71 pages of appendices. The text discusses in detail all aspects of case preparation before the Discharge Review Boards and Board for Correction of Military Records. There are sections dealing with homosexuality, drugs, alcoholism, federal litigation, procedural errors, etc. Currently out of print. Revised edition expected in fall, 1979. Direct inquiries to National Military Discharge Review Project, Washington College of Law, American University, Washington, D.C. 20016; \$10.00

The Rights of Military Personnel: By Robert Rivkin and Barton Stichman; 158 pages of readable text for lay people; available from bookstores or contact your local ACLU affiliate or ACLU Literature Department, 22 East 40th Street, N.Y., NY 10016; \$1.50 (\$1.75 if ordered by mail).

The Rights of Veterans: By David Addlestone, Susan Hewman and Fredric Gross; 269 pages discussing many problems faced by veterans; available from bookstores or contact your local ACLU affiliate or ACLU Literature Department, 22 East 40th Street, N.Y., NY 10016; \$1.75 (\$2.00 if ordered by mail).

Litigation Under the Amended Freedom of Information Act: Edited by Christine M. Marwick, 3rd Edition, November 1977. Very useful source book on the FOIA available from Project on National Security and Civil Liberties, 122 Maryland Avenue, N.E., Washington, D.C. 20002; \$20.00 for lawyers, government, libraries, and institutions; \$6.00 for non-profit public interest organizations, law students and law school faculty.

Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals: By Eugene R. Fidell, 1978. Excellent and exhaustive summary of the subject. Available from PLEI, 1346 Connecticut Avenue, N.W., Suite 610, Washington, D.C. 20036; \$4.50/copy. Bulk discounts available.

DEFENSE TESTING OF PHYSICAL EVIDENCE AT GOVERNMENT EXPENSE

Mr. James H. Gilliam*

Introduction

Government experts often supply a key element in the prosecution's case against an accused. Through analysis of physical evidence, they may establish the illegality of the act or link the defendant to the evidence. One defense tactic to counter the effectiveness of the prosecution's use of experts is to subject the evidence to examination by an independent expert.

The Military Rule

Although the military accused has access to evidence in the Government's control,¹ his ability to secure the employment of independent experts at government expense is limited by the Manual² to situations where it is "necessary."³ The military cases which have dealt with the question of necessity of independent experts generally have arisen from situations in which defense counsel have sought independent psychiatrists to examine the accused. Even so, those cases provide precedent for limiting the use of independent experts to test tangible evidence.

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1. Manual for Courts-Martial, United States, 1969 (Revised edition), para. 115c [hereinafter cited MCM, 1969].

2. MCM, 1969, para. 116.

3. Of course, one reaches the necessity question only after other questions concerning expert testimony have been considered. See, e.g., United States v. Hulen, 3 M.J. 275 (CMA 1975) (anticipated testimony of individual sought as expert must involve demonstrable scientific principle).

The leading case in the area is United States v. Johnson, 22 USCMA 424, 47 CMR 402 (1973), in which the Court of Military Appeals found unpersuasive defense arguments that the absence of a military physician-patient privilege, the inherent partiality of government experts, and the potential for self-incrimination problems supported the need for an independent, non-government psychiatrist.⁴ Short of showing actual bias in the government expert, no proof of necessity could be made. However, the Court reserved decision on the use of independent experts at government expense in "other circumstances."⁵

Recent Developments in Civilian Courts

In light of the current military rule, counsel might note that several state and federal courts have elevated to constitutional status the right of access to independent experts, grounding the right generally in the Fifth Amendment requirement of due process and the Sixth Amendment right to effective assistance of counsel.⁶ In the recent case of State v. Hanson, 278 N.W.2d 198 (S.Dak. 1979), the defendant, charged with distribution of marijuana, entered pretrial motions for access

4. See also United States v. Frederick, 3 M.J. 230 (CMA 1977) (civilian psychiatrist at government expense denied, but military sanity board ordered); United States v. Vaden, 1 M.J. 829 (AFCMR 1976) (defense request for supplemental evaluation by expert of their own choosing or civilian psychiatrist at government expense properly denied); United States v. Hines, 2 M.J. 1148 (NCOMR 1975) (request for civilian psychiatrist at government expense denied). But see United States v. Frederick, 7 M.J. 791, 800 (NCOMR 1979) where, concerning sanity issue, trial judge, pursuant to defense request, ordered pneumoencephalogram and tomogram be performed on accused at Duke University, at government expense.

5. Id. at 406.

6. See Patterson v. State, 232 S.E.2d 233 (Ga. 1977); Warren v. State, 288 So.2d 826 (Ala. 1973); State v. McArdle, 194 S.E.2d 174 (W.Va. 1973); Jackson v. State, 243 So.2d 396 (Miss. 1971). Several decisions rest on statutory grounds. See, e.g., State v. Gaddis, 530 S.W.2d 64 (Tenn. 1975); Terrell v. State, 521 S.W.2d 618 (Tx. 1975); People v. Spencer, 361 N.Y.S.2d 240 (N.Y. 1974); State v. Cloutier, 302 A.2d 84 (Me. 1973); James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972).

to a sample of the alleged drug and for a court-appointed expert to test independently the substance. Both motions were denied. The South Dakota Supreme Court held that the failure to comply with the timely requests resulted in a denial of due process under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which demands compliance with a defense request for all evidence in the Government's control favorable to the accused. While noting that the initial evaluation ordered by the prosecution positively identified the substance as marijuana, presumably taking it out of the area of the Brady requirement that the evidence must be "favorable" to the defense, the court ruled that the motions should have been granted, because the evidence was "material and exculpatory."⁷

The court based its finding of the material and exculpatory nature of the evidence on two decisions, White v. Maggio, 556 F.2d 1352 (5th Cir. 1977) and Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975). In White, the defendant was accused of murder. The murder weapon was never recovered, leaving the fatal pellet as the only tangible evidence linking the defendant with the crime. The police lab concluded that the pellet matched those fired by the defendant previous to the murder. A defense request at trial for its own examination of the pellets was denied. The Court of Appeals for the Fifth Circuit held the denial to be a violation of fundamental fairness because the evidence was material or "critical," even though there was other evidence pointing to the accused as the killer.⁸ The court defined "critical" evidence as "evidence having substantial probative force" and "evidence that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction."⁹

In Barnard v. Henderson, the Fifth Circuit earlier had confronted the confusing problem of how evidence, already subjected to testing by the Government, rendering results

7. Hanson, supra at 200.

8. White, supra at 1354, n.1.

9. Id. at 1357, 1358.

unfavorable to the accused, could fall within the Brady requirement. The defendant in that case was also accused of murder. His pretrial request to examine independently the gun and bullet was denied because prosecution testing had already shown the evidence to be unfavorable to him. However, the court determined that, when the piece of evidence to be examined is of the type "whose nature is subject to varying opinion," the Brady condition of favorableness to the accused is satisfied.¹⁰

In addition to requiring government financing of independent experts on general Fifth and Sixth Amendment grounds, both White and Hanson imply that the confrontation clause of the Sixth Amendment necessitates the appointment of independent experts upon request when the evidence is "critical and subject to varying opinion." Both courts explained that the denial of defense requests for evidence and independent testing resulted in denying "effective confrontation and cross-examination" of the prosecution expert.¹¹ The requirement of confrontation and the need to cross-examine should be adequate grounds in themselves for providing an independent expert at government expense.

It should be noted that the accused's right of access to evidence and independent experts is subject to the fact of governmental custody of the evidence. Some courts have recognized the inherent problems when evidence is destroyed or consumed during analysis by a prosecution expert,¹² or when evidence is destroyed after the prosecution has tested the material.¹³ However, they have not deemed the inability to test independently tangible evidence a problem of constitutional dimensions. Still, the problem has been perceived sufficiently important to require the Government to

10. Id. at 746.

11. White at 1356; Hanson at 200.

12. United States v. Love, 482 F.2d 213 (5th Cir. 1973), cert. denied 414 U.S. 1026 (1973). See also United States v. Gantz, NCM 74 1475 (NCMR 21 November 1974).

13. United States v. Sear, 468 F.2d 236 (9th Cir. 1972), cert. denied 410 U.S. 916 (1973).

establish its good faith in the destruction of evidence,¹⁴ or to prove that preservation could not have been accomplished inexpensively and expediently.¹⁵ The cases indicate that when evidence is preserved, the accused may call for an independent analysis.

Counsel's Responsibility

When the necessity of an independent examination becomes apparent, defense counsel should make an application to the convening authority seeking permission to employ the expert. Pursuant to the Manual,¹⁶ the application should state the possible cost of the expert and the reason for "necessity." In the letter of application, counsel should stress that, under the facts alleged, the result of the initial government examination will be critical if used against the client, and, because the nature of the evidence might be subject to a difference of opinion, due process requires an independent analysis. Just as importantly, it should also stress that the expert is needed to cultivate a meaningful cross-examination of the government expert. It should be alleged that, although the evidence is generally discoverable, the denial of the application will be tantamount to a suppression of the evidence.¹⁷

Needless to say, assuring the independent expert's presence at the time that the evidence is first examined by the government expert could prove very beneficial to the defense. Indeed, it might even be necessary in cases in which the evidence is of a delicate nature or so limited in quantity that it will be destroyed or consumed in the test. A problem that counsel might encounter in the Army is that physical evidence acquired by law enforcement personnel is to be forwarded immediately to government laboratories and returned when the

14. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

15. Garcia v. District Court, 589 P.2d 924 (Colo. 1979).

16. MCM 1969, para. 116.

17. See Bowen v. Eyman, 324 F.Supp. 339 (D. Ariz. 1970).

testing is completed.¹⁸ Accordingly, the evidence might have already been delivered to the lab even before counsel is assigned to the accused. In this situation, counsel, as soon as possible after his appointment to the case, should request the commander of the local criminal investigation command (CID) element or the commander of the laboratory to postpone the testing, pending the convening authority's decision on the application.

Another problem which might arise concerns the responsibility for forwarding the evidence to the defense-requested expert.¹⁹ In order to avoid the possibility of defense counsel's becoming a witness in chain-of-custody matters, it is suggested that counsel not personally receive the material. The letter of application to the convening authority should suggest how and to whom the evidence is to be released, such as the independent examiner obtaining it personally from the local evidence custodian or the evidence custodian delivering it by the same means used when sending it to the Government's examiner.

If the application is denied, counsel, of course, should pursue the matter before arraignment at trial.

Conclusion

Civilian case law clearly provides for defense access to independent experts to test evidence. Without financed access to independent experts, the military discovery rules are less meaningful. To say that only a government expert will make a competent and accurate analysis of evidence, in the words of the Supreme Court of Tennessee, "imputes to these examiners an aura of official infallibility inconsistent with the adversary system of the administration of criminal justice."²⁰

18. Army Reg. 195-5, Criminal Investigations - Evidence Procedures, para. 2-7c (14 July 1976) [hereinafter cited AR 195-5].

19. See AR 195-5, para. 2-7.

20. State v. Gaddis, 530 S.W.2d 64, 68 (Tenn. 1975).

CASE NOTES

SUPREME COURT DECISIONS

INSTRUCTIONS -- PRESUMPTION OF INTENT

Sanstrom v. Montana, 47 LW 4719 (U.S. Sup.Ct. 1979)

Petitioner was charged and convicted of "deliberate homicide", an essential element of which is that the homicide be accomplished purposely or knowingly. This element is satisfied by proving intent. In his instructions to the jury, the trial judge addressed this element by explaining that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Petitioner claimed before the Montana Supreme Court that this instruction had the effect of shifting the burden of proof on the issue of purpose or knowledge to the defense. That court affirmed the conviction, however, stating that the allocation of "some burden of proof" to a defendant is permissible.

The U.S. Supreme Court reversed. The instruction was deemed unconstitutional because a reasonable jury could have interpreted the challenged presumption as "conclusive . . . as an un rebuttable direction by the court to find intent once convinced of the facts triggering the presumption." Alternatively, the jury could have interpreted it as a direction to find intent upon proof of petitioner's voluntary acts, unless petitioner proved the contrary - thus effectively shifting the burden of persuasion. If the jury had acted under either interpretation, the Fourth Amendment's requirement that the prosecution prove every element of a crime beyond a reasonable doubt, as required by In re Winship, 397 U.S. 358 (1970), would have been violated.

SEARCH AND SEIZURE -- AUTOMOBILE v. PERSONAL PROPERTY

Arkansas v. Sanders, 47 LW 4783 (U.S. Sup.Ct. 1979)

The Supreme Court has extended its decision in United States v. Chadwick, 433 U.S. 1 (1977) to apply to the situation in which police were told by a reliable informant that

a man, carrying a green suitcase containing marijuana, would arrive on a certain airline flight. The police followed a taxi which picked up a man fitting this description. They stopped the vehicle, searched the unlocked suitcase which was in the trunk, and, as expected, discovered marijuana.

The Court rejected the State's position that the "automobile exception" to the warrant requirement (Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925)) justified the intrusion into the suitcase. The bases for the exception lies in a vehicle's inherent mobility, often making it impracticable to obtain a warrant, and the lesser degree of expectation of privacy an operator of an automobile enjoys (because of its particular "configuration, use, and regulation"), as opposed to a possessor of other items of personal property, such as a suitcase which is a "common repository for one's personal effects." Accordingly, the "automobile exception" applies to the automobile and its integral parts, not to personalty found therein.

Even though the police, armed with probable cause, "acted properly - indeed commendably - in apprehending appellant and his luggage," they were precluded from searching the suitcase after they had exercised exclusive control over it, thus eliminating any exigency of mobility. If they had obtained a warrant - and, again, they had the requisite probable cause to do so - a different result would have been reached.

FEDERAL DECISIONS

COLLATERAL ESTOPPEL

United States v. Mespouledé, 25 Crim. L. Rptr. 2151
(2d Cir. 1979)

The defendant was charged with conspiracy to distribute cocaine and possession of approximately 1.2 kilograms of cocaine with an intent to distribute. The jury acquitted him of the possession, but failed to reach a verdict on the conspiracy, resulting in a mistrial.

On retrial of the conspiracy charge, over the defendant's protest, the judge admitted evidence of the alleged possession, and the defendant was convicted of the conspiracy. On appeal, the defendant claimed that the doctrine of collateral estoppel should have precluded the Government from relitigating the issue of possession because it already had been decided in his favor.

The U.S. Court of Appeals, Second Circuit, agreed, holding that the evidence concerning the possession charge was inadmissible, based on the collateral estoppel element of the Double Jeopardy Clause. "[O]nce a defendant had satisfied one jury that he is not guilty of a crime, constitutionally-rooted considerations of fairness preclude the Government from injecting any issues necessarily decided in his favor into a second trial for another offense." Id. at 2152.

TRIAL JUDGE'S CONDUCT -- COMMENT ON ACCUSED'S CREDIBILITY

United States v. Anton, 25 Crim. L. Rptr. 2149 (3d Cir. 1979)

In his instructions to the jury, the trial judge characterized the defendant's testimony as absolutely "devoid of credibility." While noting its prior decision that a judge may inform a jury that he does not believe a witness "absolutely and in all respects," United States v. Kravitz, 281 F.2d 581 (3d Cir. 1960), the U.S. Court of Appeals, Third Circuit, concluded that a judge may not state that a defendant's testimony was completely lacking in credibility, especially where, as here, the defendant's believability is crucial. Although the judge instructed the jury that it did not have to accept his assessment of the defendant's testimony, the Court deemed this cautionary advice insufficient.

CONFESSIONS -- WRITTEN STATEMENTS COMPOSED BY INTERROGATORS

Jurek v. Estelle, 25 Crim. L. Rptr. 2158 (5th Cir. 1979)

The Fifth Circuit Court of Appeals considered a number of facts in deciding that a murder defendant's confessions were made involuntarily, despite the fact that they were rendered after several proper Miranda warnings. Among them, the following was found quite significant:

. . . [T]here is a serious danger both that Jurek did not want to confess and that his susceptibility to the police officers' influence made him confess to things he did not do.

This danger is heightened by another circumstance. The statements used against Jurek were apparently not his own words. They are written in complete sentences, mostly grammatical, with even a touch of legalese. Apart from the inherent improbability that a person with Jurek's limited verbal skills could utter such coherent tracts, the prosecutors and a witness to the confessions testified that Jurek was given some help in composing the statements. The Supreme Court has repeatedly said, even in cases not involving a defendant of low intelligence or unusual suggestibility, that confessions are more questionable if they are composed not by the accused but by the prosecutor or the police. See e.g., Spano v. New York, 360 U.S. 315, 322 (1959).

Id. at 2159.

COURTS OF MILITARY REVIEW DECISIONS

SPECIFICATIONS -- FAILURE TO STATE OFFENSE

United States v. Young, CM 437649 (ACMR 22 May 1979) (unpub.)
(ADC: CPT T. Lewis)

Appellant was convicted of violating "a USAREUR regulation, to wit, USAREUR Regulation 632-10 by having in his possession a hypodermic needle and syringe." Because the specification failed to mention either that the regulation was a lawful general regulation or that the appellant had knowledge of it, the Army Court of Military Review, following United States v. Koepke, 18 USCMA 100, 39 CMR 100 (1969), set aside the findings of guilty and dismissed the charge and specification.

TRIAL COUNSEL ARGUMENT -- FAILURE TO OBJECT

United States v. Davis, CM 437550 (ACMR 12 June 1979) (unpub.)
(ADC: CPT Curtis)

Appellant contended in his appeal that, inter alia, his rights had been prejudiced by trial counsel's interjection of personal opinion in his argument on the merits. The Army Court of Military Review, finding no prejudice, considered the failure of defense counsel to object to trial counsel's statements at the time they were made as "some measure of the minimal impact of the remarks upon the court members."

STIPULATION PRACTICALLY AMOUNTING TO CONFESSION

United States v. Castillo, NCM 78 1798 (NCMR 21 March 1979)
(unpub.)

Appellant pleaded not guilty to larceny and housebreaking and was convicted of larceny and unlawful entry. In a stipulation of fact, he admitted to all the elements of the larceny, except that of intent. His defense was that he innocently found the door to a Navy Exchange open, entered the building, and took merchandise, "in order to teach authorities the lesson that their security of the exchange was inadequate." Viewing the stipulation as a tactic to clarify and narrow the issues in the case and focus attention on the only issue the defense considered worth litigating, the Navy Court of Military Review refused to label it as "practically amount(ing) to a confession," as contemplated by paragraph 154b(1) of the Manual for Courts-Martial.

The Court did note, however, that the stipulation included a statement that appellant entered the exchange without authority or consent. Accordingly, while not amounting to a confession of housebreaking, because it contained no admission of intent to commit a crime, it did amount to a confession of the lesser-included offense of unlawful entry, of which appellant was convicted. The military judge therefore erred in accepting the stipulation into evidence without first assuring that there were no pretrial agreements or statements, as required in United States v. Bertelson, 3 M.J. 314 (CMA 1977). The unlawful entry conviction was set aside and a rehearing authorized.

SENTENCE -- EFFECT OF ILLEGAL PRETRIAL CONFINEMENT

United States v. McCaslin, NCM 78 1380 (NCMR 28 Feb. 1979)
(unpub.)

Appellant spent 46 days in illegal pretrial confinement. The military judge therefore ordered that an administrative credit of 46 days be applied against the adjudged sentence which included confinement at hard labor for 60 days. The convening authority applied the credit.

Appellant contended on appeal that he should have been credited with good conduct time for the 46 day period, which would have resulted in his release 8 days earlier. The Navy Court of Military Review agreed. See United States v. Larner, 1 M.J. 371 (CMA 1976). However, here, because appellant had served the confinement portion of the sentence, true relief (freedom from confinement) could no longer be given, and, because there was only a presumption that he would have earned good conduct time, no further relief was granted.

United States v. Moran, NCM 78 1374 (NCMR 13 March 1979) (unpub.)

Appellant had been confined illegally for 43 days pre-trial. The Navy Court of Military Review held that it was improper for the military judge, in his sentencing instructions, merely to mention the illegality of the pretrial confinement and then explain that appellant was entitled to confinement credit. Rather, the judge should have allowed the court members to announce an appropriate sentence based on the evidence they heard, including the illegal pretrial confinement, and then direct application of the credit. The Court found no prejudice, however, because appellant's sentence did not include confinement at hard labor.

MAXIMUM PUNISHMENT -- PHENCYCLIDINE

United States v. Thomas, 7 M.J. 763 (ACMR 1979)
(ADC: CPT Zoscak)

Reiterating the conclusion of the Court of Military Appeals in United States v. Thurman, 7 M.J. 26 (CMA 1979), the Army Court of Military Review has ruled that the maximum

period of confinement an accused faces for conviction of a phencyclidine (PCP) offense is one year under Article 134 of the Code, rather than two under Article 92. Note: Trial Judge Memorandum No. 2-79, 1 July 1979, announced that the maximum confinement for Article 92 "dangerous drug" offenses is that authorized by either the U.S. or D.C. Code, whichever is less. However, it should be argued that the Article 92 punishment applies if the U.S. or D.C. Codes are more severe.

SENTENCING -- ACCUSED'S UNSATISFACTORY APPEARANCE

United States v. Strickland, NCM 78 1826 (NCOMR 21 March 1979)
(unpub.)

Prior to his announcement of sentence, the military judge commented on appellant's unkempt uniform, nonconforming haircut, and generally "disgraceful" appearance. After trial, in a petition for clemency, appellant offered an explanation for his appearance and placed part of the blame on the command. On appeal, he argued that the military judge's comments constituted consideration of uncharged misconduct in arriving at an appropriate sentence and that the duty to ensure proper appearance devolved upon the judge and trial counsel rather than on himself.

The Navy Court of Military Review disagreed with both contentions, while recognizing that the judge and the commanding officer have some responsibilities regarding the accused's proper appearance. Still, the Court concluded that the military judge committed error by considering appellant's appearance without inquiry into the reason for it or affording the defense the opportunity to submit an explanation. The Court set aside the sentence and authorized a rehearing on it.

SJA REVIEW -- SUFFICIENCY

United States v. Cordova, 7 M.J. 673 (ACMR 1979)
(ADC: CPT Ramsey)

The Army Court of Military Review, finding inadequacies in a staff judge advocate's post-trial review regarding appellant's conviction of rape, set it and the action of the convening authority aside. The review was brief, with a stated

purpose to exclude "surplus" material. Although appellant was convicted of rape under the theory of principals, the review only touched on this complex legal theory and did not apply the theory to the facts of the case. It also omitted information on the maximum permissible sentence and the sentences of the co-accused.

The Court held that the convening authority had not been given the information he needed to determine the correctness of the findings "in law". Moreover, the requirement in paragraph 85b of the Manual for Courts-Martial that the staff judge advocate give his reasons for his opinion made it essential that the omissions of the maximum permissible sentence and the sentence imposed on the co-accused be corrected. Regarding the second matter, the Court specifically noted that the two co-accused, who actually participated in the rape, were sentenced to 34 months and 45 months confinement at hard labor, yet appellant, who was convicted on a principal theory, was sentenced to 36 months. Trial defense counsel's specific objection to these deficiencies preserved appellant's "right to raise them" before the Court of Review.

STATE DECISIONS

SEIZURE -- APPLICATION OF UNITED STATES v. CHADWICK

State v. DeLorenzo, 25 Crim. L. Rptr. 2098 (N.J.Super. 1979)

A policeman stopped the defendant's automobile upon noticing that it had expired inspection stickers. When the defendant could not produce a current registration certificate, his car was impounded and he was instructed to drive it to police headquarters. There, the defendant took a duffel bag out of the car and carried it into the squadroom, accompanied by the officer.

Inside the squadroom, the defendant appeared very nervous and made several movements toward the duffel bag, indicating an attempt to secure it between his legs, although never touching it. When the defendant first reached for the bag, another policeman in the room, concerned for his own safety, went to move it. As the officer touched the bag, the defendant exclaimed, "Oh, no." The officer therefore grabbed the bag,

unzipped it, and searched it, discovering a cellophane bag of marijuana.

The New Jersey Superior Court held the search to be illegal. Since there was no arrest, there was no search incident thereto. Nor could the search be justified as a stop and frisk under Terry v. Ohio, 392 U.S. 1 (1968), because there was no reasonable belief that the defendant was armed. Moreover, to invoke Terry, the officer would have been required to first "pat down" the duffel bag itself in order to determine whether any object he felt could have been a weapon. This, the officer did not do.

Finally, "exigent circumstances" did not save the search. Since the defendant was in a police station in the presence of several officers, it was unreasonable to believe that he or his bag "would disappear." If the officers had a reasonable apprehension for their safety, they could have seized the bag, then secure the requisite search warrant. Finally, under the ruling of United States v. Chadwick, 433 U.S. 1 (1977), once the policeman did take possession of the bag, it was under his exclusive control and easily removable to another room for safekeeping, thus eliminating any exigency of the perceived threat to the officers' lives. Once the officer removed the bag, he could have obtained a warrant.

VEHICLE STOP -- ARTICULABLE CIRCUMSTANCES

Ozuna v. State, 25 Crim. L. Rptr. 2099 (Tx.Ct.Crim.App. 1979)

An odd CB broadcast overheard by police officers that raised suspicion about the activities of a driver of an automobile did not give them the right to stop that automobile, held the Texas Court of Criminal Appeals. One message was, "Look out * * * there is smoke," followed by a warning to a red Ford to "cut off at the red light," causing it to avoid the police car. The police looked for and found the car bearing this description and stopped it. Upon smelling marijuana in the car, they searched it and discovered 285 pounds of the substance in the car's trunk.

The Court held that the policemen's stop was illegal. There was nothing in the record to indicate that the car which was stopped had either sent or received the messages.

Moreover, the two statements, standing alone, were as consistent with innocent activity as with criminal activity, thus not justifying an investigative stop. Finally, the police really stopped the automobile simply to satisfy their suspicions of the reason that appellant was instructed to "cut off at the red light." They were "unable to point to specific articulable facts which, taken together with the rational inferences therefrom, would reasonably warrant [them] in detaining the appellant" The marijuana seized should have been suppressed at trial.

People v. Brand, 25 Crim. L. Rptr. 2160 (Ill.App.Ct. 1979)

The Illinois Appellate Court, First District, has held that an officer may not stop an automobile for driving well below the speed limit, in the absence of a posted minimum speed limit, unless such driving causes a danger to faster moving vehicles. The Court based its decision on the U.S. Supreme Court's prohibition of random, discretionary stops of motor vehicles merely to check drivers' licenses or vehicle registrations in Delaware v. Prouse, 24 Crim. L. Rptr. 3079 (1979). Here, the defendant's driving 20 miles per hour in a 45 mile per hour zone simply did not constitute "at least articulable and reasonable suspicion" that the driver was engaged in activity subjecting him to seizure by stopping his car and checking the license.

IMPEACHMENT -- PRIOR CONVICTION

People v. Fries, 25 Crim. L. Rptr. 2250 (Cal.Sup.Ct. 1979)

A California trial judge ruled that a recent prior conviction for robbery would be admissible for impeachment of the credibility of a robbery defendant if he elected to testify. In light of the judge's ruling, the defendant elected not to take the stand. The California Supreme Court reversed, indicating that, while the prior conviction bore somewhat on credibility, the prejudicial impact of admitting a recent conviction for the identical crime with which the defendant was charged far outweighed its probative values. Moreover, the trial judge's decision could have hampered the jury's understanding of the case, because, with no other witness testifying for the defense, the defendant's version of the facts was not presented.

"SIDE-BAR"

or

Points to Ponder

1. Scope of Article 125 still in issue. On 27 June 1979, the Court of Military Appeals, citing United States v. Scoby, 5 M.J. 160 (CMA 1978), summarily affirmed United States v. Romeo, Docket No. 34, 939 M.J. (CMA 1979) and United States v. Johnson, Docket No. 35,307, M.J. (CMA 1979). Romeo and Johnson dealt with non-consensual and consensual heterosexual sodomy, respectively. Scoby dealt with homosexual sodomy.

The defense contention in both Romeo and Johnson was that Article 125 was unconstitutionally overbroad and vague. Under the authority of its Scoby opinion, the Court affirmed the constitutionality of the sodomy provision as it applies to both non-consensual heterosexual fellatio (Romeo) and consensual heterosexual fellatio (Johnson).

In neither case was the conviction attacked on the ground that Article 125 violated the accused's right of privacy, as was the contention in Scoby. Judge Cook stated in his lead opinion in Scoby that a non-consensual act simply had no privacy protection (presumably eliminating a privacy argument on the Romeo facts), but went even further, holding private acts also constitutionally subject to the article. However, Chief Judge Fletcher, concurring in the result, limited his agreement to acts "between consenting persons of the same sex in a public place," leaving open the plausibility of a privacy argument involving consenting persons in a private place.

In Johnson, the accused was charged with participating in an act of oral sodomy in a guest house with a woman he had paid. Seemingly, a privacy argument could have been made, stressing that a guest house qualifies as a private place. However, the public nature of an act is not always determined by the place of occurrence. The fact that the act was performed in the presence of two friends of the accused would

have been a reason for not pursuing this contention since the absence of seclusion may foreclose a right to privacy issue. See Lovisi v. Slayton, 363 F.Supp. 620, 626 (E.D.Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976), cert. denied sub nom. Lovisi v. Zahradnick, 424 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 (1976). Dictum in at least one other case states to the contrary. Harris v. State, 457 P.2d 638 (Alaska 1969). See also United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956) (fornication in a hotel room in the presence of other parties is service discrediting conduct).

The constitutionality of the sodomy provision as it relates to heterosexual acts in more "romantic" situations and between married partners has yet to be considered. Presently before the Court of Military Appeals is United States v. Gooding, pet. granted, 3 M.J. 389 (CMA 1977), in which the accused was charged with the rape and nonconsensual sodomy of a married woman, not his wife. The facts established at trial indicated that, contrary to the woman's claims, the acts alleged were consensual, took place in the privacy of the woman's home, and occurred as the result of a decision to avoid pregnancy. Accordingly, the accused, convicted of consensual sodomy, is attacking the conviction on privacy grounds. The ultimate decision should settle some of the questions involving Article 125, because the case deals with consensual heterosexual sodomy in a private dwelling.

Also pending before the court is United States v. Harris, Docket No. 31,481, pet. granted 14 January 1976. Harris, also charged with rape, was convicted of consensual sodomy by performing cunnilingus upon a woman. The conviction is being attacked on the sufficiency of the evidence and on the ground that Article 125 does not proscribe an act of cunnilingus. The latter argument focuses on the point that the present Article 125 is substantially a congressional recodification of Article of War 93 which did not embrace the act of cunnilingus. United States v. Barnes, 2 CMR 797 (ABR 1951).

2. Amending specification might authorize new Article 32. Air Force Master Sergeant Ray Louder was charged with violation of a "lawful general regulation . . . by tearing into pieces

and placing in a waste container" a completed promotion test card. The Article 32 investigating officer opined that the paragraph under which the charge was laid was not punitive in nature and recommended withdrawal of the charge. The convening authority disagreed, but amended the specification to add a punitive paragraph of the regulation and to describe the illegal conduct as "unauthorizedly and improperly retaining possession, tearing into pieces and placing in a waste can" a completed test card. At trial, the defense counsel recognized this as an entirely new charge and moved for a new investigation of the charge under Article 32. He did not, however, object to the accused's standing trial on unsworn charges. The military judge denied the motion.

The Air Force Court of Military Review held that the military judge committed prejudicial error in refusing to order a new investigation. United States v. Louder, 7 M.J. 548 (AFCMR 1979). The amendment made by the convening authority converted a specification which did not allege an offense into one that did. The accused was therefore entitled to demand and receive a new investigation without regard to whether it would benefit him at trial or whether he had any new evidence to present. The failure to allow the new investigation was held to be a denial of military due process, and the charge was dismissed.

Trial defense counsel should remain alert to this problem and scrutinize any charge whenever it has been amended. Remember, however, that a new Article 32 hearing is required only if a new "person, offense, or matter not fairly included in the charges as preferred" is added. Paragraph 33d, Manual for Courts-Martial. A demand by the accused for further investigation is required. Article 32(c), UCMJ.

3. Specificity requirement for search warrants still presents problems. The Supreme Court of the United States and the Navy Court of Military Review have apparently reached opposite conclusions concerning the propriety of unspecific warrants. The Supreme Court likens them to the "writ of assistance of the 18th Century against which the Fourth Amendment was intended to protect." Lo-Ji Sales, Inc. v. State of New York,

47 LW 4670, 4671 (1979). However, the Navy Court of Military Review in United States v. Abernathy, 6 M.J. 819, 821 (NCMR 1978), confronted with a complaint of overbreadth of a search warrant, opines, "Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."

In Abernathy, the chief of staff of the Camp Lejeune Marine Corps Base received information that the accused had sold two red toolboxes to an informant. The accused explained to the informant that the toolboxes came from a warehouse on Camp Lejeune. The chief of staff authorized a search of the accused's quarters for "items of stolen Government property and other items identified as contraband." The ensuing search yielded a gray toolbox which was allegedly government property.

The Navy Court refused to find that the search suffered from improper overbreadth, explaining that the authorization only allowed a "search for the tool boxes observed by the informant and seizure of any contraband observed during the search for the toolboxes." The dissent depicted the authorization as reaching "far beyond the matters for which there was probable cause, and, in fact, is almost unlimited."

The Supreme Court in Lo-Ji Sales, however, has affirmed that specificity in the search warrant is still a requirement and not the mere technicality the Navy Court perceives. There, an investigator purchased two films from an "adult" bookstore and took them to a town justice who viewed them. Based on the investigator's affidavit, the justice issued a warrant authorizing a search of the store and the seizure of other copies of the films. The justice agreed to the investigator's request that he personally determine if any other items in the store were in violation of the law and subject to seizure, and added a recital to the warrant to authorize the seizure of items he so determined to be in violation of the law. There was no list of those items on the warrant, however.

The town justice, the investigator, and nine other policemen went to the store, arrested the clerk, and conducted a search for nearly six hours. After seizing and inventorying

numerous films, projectors, and magazines, the police listed them on the search warrant. At trial, after losing a motion to suppress the evidence, the accused entered a plea of guilty.

The Supreme Court reversed on the ground that the search warrant allowed the police to seize whatever items they deemed obscene. The warrant improperly left to the discretion of the police the decision of what was obscene and what could be seized. Further, the warrant was issued simply on the conclusionary statement by the investigator that other similar materials would be found. The Court also condemned the practice of completing the warrant after the search and seizure had been conducted.

Trial defense counsel should be alert to the lack of specificity in search warrants and authorizations. The Court of Military Appeals has indicated a willingness to require specificity and strict compliance with regulations. See United States v. Hood, 7 M.J. 128 (CMA 1979). Defense counsel should examine warrants for failure to be specific in any manner or for failure to comply with paragraph 152 of the Manual for Courts-Martial or Chapter 14, AR 27-10 in any particular.

4. Does United States v. Brownd suggest a right without a remedy? The last issue of The Advocate included a discussion of United States v. Brownd, 6 M.J. 338 (CMA 1979) and the ABA Standards for granting deferment. It was noted that §2.5(b) of the standards suggest that a short sentence should be more of less routinely deferred.

In a recent Army Court of Military Review memorandum decision, United States v. Alicea-Baez, CM 437597 (ACMR 11 July 1979), motion for reconsideration filed 23 July 1979, the accused, convicted of larceny and drunken driving, was sentenced to six months confinement at hard labor, forfeiture of \$220.00 pay per month for six months, and reduction to the lowest enlisted grade. He submitted a written request for deferment of his confinement until final action was taken on his case, allowing his trial defense counsel time to present a petition for clemency prior to action. The convening authority's answer to the request consisted of a handwritten note on the front of the letter, "Request denied!"

Upon reviewing the entire record, the Army Court held that the convening authority had abused his discretion in refusing to grant the deferment. However, since the appellant had served all his confinement, the Court concluded that the issue was moot and affirmed the findings and sentence. The Government has requested reconsideration of the decision, contending that the Army Court improperly considered matters from the record that were not raised in the deferment request.

Both the Court of Military Appeals in Brownd and the Army Court of Military Review in Alicea-Baez have now mooted cases dealing with the improper denial of deferment, on the ground that all confinement had been served by the time they were considered on appeal. The problem of mootness was anticipated by Judge Perry in Corley v. Thurman, 3 M.J. 192, 193 (CMA 1977), wherein he concluded that "not only is a petition for extraordinary relief a legally permissible vehicle for remedying such a situation as this, but is the only practical recourse, for as this Court has recognized, direct appellate review under Article 67 is a wholly inadequate means to remedy illegal confinement already suffered, whether pretrial or post-trial. . . . As to post-trial incarceration, there literally is no remedy afforded by direct appeal, for the nature of the illegality suffered is confinement awaiting appellate review."

It seems that trial defense counsel would be wise to seek immediate review of deferment denials either from the next superior convening authority (see para. 2-30b, AR 27-10 (C17, 15 August 1977)) or by means of an extraordinary writ in the nature of a writ of habeas corpus. Apparently, once confinement has been served, the courts on direct appeal are unwilling to provide sentence relief to one who has been wronged by an improper determination not to grant deferment.

5. "Finances and the Convicted GI," Con't. An article which recently appeared in this journal (Moore and Nyman, Finances and the Convicted GI, 11 The Advocate 122 (1979)) requires an additional remark in light of the decision of Cowden v. United States, No. 242-78, ___ Ct.Cl. ___ (June 13, 1979).

Plaintiff Cowden enlisted in the Army on 7 September 1972 for a term of three years. On 4 September 1975, he was convicted by a general court-martial and sentenced to a dishonorable

discharge, confinement at hard labor for four years, forfeiture of all pay and allowances, and reduction in grade. After serving some eighteen months at the United States Disciplinary Barracks, Cowden was paroled on 16 December 1976. While he was still on parole, the Army Court of Military Review, finding improper admission of incompetent evidence, set aside the conviction and authorized a rehearing. A rehearing was never ordered, however, and, on 22 March 1977, a court-martial order was issued, dismissing the charges and restoring all rights, privileges, and property of which Cowden had been deprived. He was formally released from military control on 13 April 1977.

Cowden brought suit in the Court of Claims, seeking back pay from 7 September 1975, the date of his scheduled ETS, to 13 April 1977, the date of his release from military control. He argued that, under paragraph 2-15c, AR 635-200, he was retained past his ETS "for the convenience of the government," which entailed an extended obligation to the military. Moreover, he contended that paragraph 10104b and table 1-1-2, rule 8, n. 4 of the Department of Defense Military Pay and Allowances Entitlement Manual, which provides that confinement time counts as creditable service when a servicemember is acquitted or his sentence set aside or disapproved, controlled his situation.

The Government replied that AR 635-200, paragraph 2-15c is not designed to entitle servicemembers to pay and that paragraph 10104b(2) of the Pay Manual does not apply to entitlement of pay but only to determining creditable time once entitlement has already been shown. Instead, the Government maintained, paragraph 10316b(2) of the Pay Manual, which provides that pay and allowances of a servicemember serving a sentence to confinement cease on his ETS and do not reaccrete until he is returned to active duty applies. The Government conceded that, if a rehearing had been held, and Cowden was acquitted, his claim would be valid.

The Court of Claims rejected the applicability of paragraph 10316b of the Pay Manual, finding it relating to entitlements "if confinement is due to a valid court-martial, and the sentence did not forfeit the pay." Slip Op. at 5. Cowden, however, did not receive a "valid" court-martial.

Rather, the Court relied on paragraph 10104b, which defines creditable service as including confinement time "if a member is acquitted or the sentence set aside or disapproved." Cowden's retention in the Army beyond his regularly-scheduled ETS clearly was for the Government's convenience. Finally, the fact that Cowden was not "formally acquitted" did not bar his claim. The Court determined it would be inconsistent to conclude that the rights of a service-member whose conviction is set aside are inferior if he is not retried, than if he is retried and acquitted.

6. Is day-for-day sentence credit for lawful pretrial confinement required by Department of Defense Instructions? The Court of Military Appeals has recently granted review on that issue, and the position of the defense is that DOD Instruction 1325.4, paragraph IIIQ6 (7 Oct 1968) requires an affirmative answer. United States v. Padgett, pet. granted, 7 M.J. 118 (CMA 1979).

The referred-to provision is as follows:

Computation of Sentence. Procedures employed in the computation of sentences will be in conformity with those published by the Department of Justice, which govern the computation of sentence of federal prisoners and military prisoners under the jurisdiction of the Justice Department.

The defense is arguing that, since the Department of Justice provides for day-for-day credit (see 18 U.S.C. §3568), so should the military under the DOD incorporation, even though 18 U.S.C. §3568 specifically excludes military prisoners. Needless to say, the ramifications of a decision favorable to Padgett could be tremendous. Under current military practice, lawful pretrial confinement is not credited against the sentence, but is to be considered by the court-martial and the convening authority in determining an appropriate sentence, Hart v. Kurth, 5 M.J. 932 (NCMR 1978) (citing paragraphs 76 and 88 of the Manual). An accused only receives administrative credit for illegal pretrial confinement. United States v. Larner, 1 M.J. 371 (1976).

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

Q (to E & M Witness, direct): Would you like to have him back with you in the unit?

A: Yes, sir.

Q: Would you like to go to combat with him?

A: I wouldn't want to go to combat with nobody, man.

* * * * *

MJ: Are you testifying here as an expert on hickies and bruises?

W (CID): No, sir.

* * * * *

MJ (on voir dire): What were you doing, Mr. _____, during the time that Captain _____ was at that copier in particular, what were you doing?

MBR: I was cheating the coffee fund by putting in a nickel instead of a dime and getting a cup of coffee and talking to Major _____.

* * * * *

(From CID Report concerning rape of a prostitute): "Dr. _____ was briefed on the requirements for hair samples from the victim's head and public area."

* * * * *

Q: Well, what were you doing at the time you saw your own blood?

A: I was punching _____ in the face.

* * * * *

A: Yes, sir. He seemed to simmer down for awhile. And, in the MP's . . . well, they came in after that and they read him his rights, and they cuffed him, and as he got up he kind of got wild again and tried to fight his way out. At that point, that's when he used his head and his face to hit the MP.

* * * * *

DC: No, because it does not indicate a feeling of guilt or innocence of whether there was a rape or not out there. That's why, and I think, Your Honor, I think it's your interpretation of flaky, when he says she's "on and off." That was a very vague comment. I don't think it would necessarily go to her credibility on the witness stand or telling the truth. I mean I feel I'm on and off.

MJ: No comment.

* * * * *

(Defense motion for appropriate relief; a Major detailed as TC and a Captain detailed DC).

MJ: Well, _____, what do you want me to do?

DC: We'd like a Major on this side.

MJ: Or reduce Major _____?

DC: Your Honor, we believe that would be appropriate but, however, I don't think you have the power.

* * * * *

TC: Your Honor, the government would like to make an argument on materiality.

MJ: Yes, you may proceed.

TC: But, we can't think of one, so I'm going to have to concede it.

