

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

Vol. 2 No. 5

June 1970

The views expressed in THE ADVOCATE are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

CONTENTS

Cross-Examination of the Dangerous Drug Expert	1
Forensic Pathology Services Available to Military Counsel	8
Defense Problems in Death Cases	11
The Miscellaneous Docket	15
Recent Cases of Interest to Defense Counsel	17

CROSS-EXAMINATION OF THE DANGEROUS DRUG EXPERT

Effective pretrial preparation in and adequate trial advocacy for dangerous drug cases require intensive and analytical study by the trial defense counsel. This includes a thorough familiarity with the nature of the dangerous drug alleged, as well as a familiarity with the various laboratory tests used to determine its presence. One rarely sees an effective cross-examination based on the

technical chemical aspects of an expert's testimony, even though this may be his most vulnerable area. A good forensic chemist can testify easily about his qualifications and the neatness of his laboratory, but few military chemists are ever called upon to defend scientifically their analysis.

Possession, use, sale, transfer or introduction of lysergic acid diethylamide and amphetamines, its salts and optical isomers are prohibited by name in the military by Change 4, Army Reg. 600-50 dated 18 August 1969. This regulation, in addition, proscribes any other substance which the Secretary of HEW or the Attorney General, or their delegates have designated by regulation as being habit forming because of its central nervous system stimulant effect, or as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

The administration of drug abuse control has been delegated to the Director, Bureau of Narcotics and Dangerous Drugs [a part of the Department of Justice] and the current "Attorney General's List" is now found in 21 CFR § 320.3 (1 January 1970). Consequently, any drug on that list is a prohibited substance in the military, and possession, use, sale, transfer or introduction of such drug is a violation of Article 92, Uniform Code of Military Justice. Army courts have ruled that the Army regulation is punitive and that it does not amount to a fatal delegation.

Lysergic Acid Diethylamide

The Army regulation does not further define lysergic acid diethylamide, but reference to 21 CFR § 320.3c(3) makes it clear that use of the shorthand "LSD" or "LSD-25" refers only to the chemical compound "d-lysergic acid diethylamide" [dextro-LSD]. Counsel

should be aware that two other types of LSD exist, at least one of which is apparently not a prohibited substance. Levolysergic acid diethylamide (l-LSD) is similar to dextro-LSD, but its chemical composition varies slightly in the arrangement of carbon atoms. It is not known if this substance is as physiologically active as dextro-LSD, and it is not now a controlled drug. It has been synthesized only in the laboratory, and only after a painstaking process. Dextro-LSD is the common form.

LSD is legitimately manufactured only by Sandoz Pharmaceuticals Company of New Jersey under a federal government contract, and all standardized samples used for comparison testing must come from that one source. Local laboratories receive samples through the Bureau of Narcotics and Dangerous Drugs.

There are several types of laboratory identification tests commonly used to determine the presence of LSD. Some of these are absolutely conclusive, while others are only indicative. Fluorescent spectrophotometry, for example, indicates the presence of LSD, which fluoresces, but it is not a conclusive test because it also reacts similarly to ergot alkaloids, some of which are found in some migraine headache remedies. Erlich's reagent, a color reaction test, also indicates the presence of LSD, but the test is specific only for the presence of an endol nucleus, common to other legitimate substances.

Gas chromatography is not too satisfactory for LSD, since this test requires heat and LSD, which breaks down rapidly, is usually degraded before the test can be completed.

Perhaps the most widely used test for the presence of LSD is thin layer chromatography. This test requires that a drop of known LSD be placed on an adsorbent, usually silica gel. A drop of the

unknown substance is placed on the adsorbent along side a drop of the known substance. The adsorbent is then placed upright in a shallow solution container, and solvent is allowed to migrate upward in the adsorbent. The known sample and the unknown will migrate upward as well. When the adsorbent is then placed under a fluorescent light, a comparison of the distances of migration can be made. Similar compositions should migrate the same distance in a given solvent. Thus, if the migration of the unknown is the same as the migration of the known LSD, a preliminary conclusion can be drawn that the unknown is LSD. A differential of more than 1/8th of an inch in the migration distances will indicate that the two substances are probably not the same. Since dissimilar substances can have similar migrations in one solvent, the test is not conclusive unless the test is run in two and preferably three different solvents.

The most conclusive test at present for the presence of LSD, or indeed any other chemical substance, is infrared spectrophotometry, because each substance will in theory have a unique spectrograph or "fingerprint." This test is rarely, if ever, used to detect LSD, however, because at least two milligrams of the substance are required, and this is an unusually high quantity of LSD, not ordinarily encountered out of the laboratory. The usual dosage of LSD is 100 micrograms, or 100 millionths of a gram.

Most good laboratories will run a combination of tests for the presence of LSD, if they cannot perform infrared spectrophotometry, and counsel should be extremely wary of an expert who bases his conclusion on a single test.

Fertile areas for cross-examination exist for all tests. Some tests, as we have noted, are only

indicative, and will show positive reactions for substances other than LSD. Thin layer chromatography should be run with more than one solvent to be conclusive. In addition, thin layer chromatography creates an evidentiary problem. Since this requires that the laboratory technician use a known sample with which to compare the unknown substance, he must be sure that his known sample actually is what he thinks it is. For LSD, this would require an additional infrared spectrophotometry test on the known sample, and this is usually not done because the known sample is so small. Thus the expert's conclusion is necessarily based on hearsay--that is he only believes that his known sample is LSD. Logically, the government's burden of proof should include chain of custody testimony from the testing laboratory to Sandoz Pharmaceuticals, or proof of an infrared spectrophotometry test performed on the known sample.

One significant problem still exists in laboratory identification of LSD. All of the tests routinely performed by local crime laboratories, including, Erlich's reagent, infrared spectrophotometry, fluorescent spectrophotometry and thin layer chromatography react in the same manner with dextro-LSD as well as levo-LSD, but only dextro-LSD is a controlled and prohibited drug. Therefore, in order to exclude the hypothesis that the tested drug was levo-LSD, the expert must have performed spectropolarimetry. The only known physical difference between the two types of LSD is the difference in their ability to refract polarized light. This is a difficult test, and one not ordinarily performed.

Other dangerous drugs

Since most of the listed prohibited drugs are not found in the "US Pharmacopoeia and National Formulary" and are therefore not pharmacologically

verifiable, the laboratory experts usually employ thin layer chromatography as the standard test. This test, as we have noted, is subject to the hearsay and chain-of-custody difficulties encountered whenever a presumably known substance is used as a standard for comparison.

Marihuana

Laboratory tests for the presence of marihuana usually include microscopic analysis for its characteristic cystolith hairs, tests for the presence of calcium carbonate in the leaves, and the modified Duquenois test. A combination of all three tests is regarded as conclusive, and some experts will refuse to make a positive identification based on only one test. The modified Duquenois test requires that a reagent be added to the unknown substance; a distinctive color ranging from green to purple will result. This half of the test is not specific for marihuana, however, since other substances will produce colors within this range as well. Chloroform is then added to the substance and this clear liquid will immediately go to the bottom of the solution. After a few minutes, the purple color will transfer, or diffuse down into the chloroform layer. This test is said to be specific for marihuana, but more correctly it can be said to be quasi-specific. It is not known exactly why the color transfers for marihuana, but it is known that it does. Thus, unless the expert witness has personally tested every known substance, he cannot testify of his personal knowledge that no other substance will have a similar reaction. It should be noted, however, that no other substance has ever been reported as acting in such a fashion. Thin layer chromatography also is sometimes used to test for tetrahydrocannabinol.

A few years ago, the active ingredient in marihuana, tetrahydrocannabinol was identified and synthesized in the laboratory. In fact that ingredient is on the "Attorney General's List" in its own right. It should be noted that since the federal statute dealing with marihuana, 26 USC § 4761 (1964), defines marihuana as excluding mature stalks and sterilized seeds not capable of germination of the cannabis sativa L. plant and since this definition appears to be adopted similarly in military law cf. United States v. Sutton, 39 CMR 884 (CGBR 1968), the government bears the burden of proving not only that the substance tested was marihuana, but that the non-prohibited parts of the cannabis sativa plant would not render false positive laboratory tests. Simply put, the government must prove that if there was tetrahydrocannabinol in the non-prohibited parts of the plant, this substance was not responsible for the positive reaction gained from the prohibited parts of the sample.

Guidance for the Defense

Counsel should be aware that help in evaluating technical evidence can be gained from a variety of published sources. One of the best of these is E.G.C. Clarke, Identification and Isolation of Drugs, which lists the various tests commonly employed, together with their limitations. Also helpful, but difficult to obtain, is Internal Revenue Publication 341 dealing with tests for opiates. Counsel may also obtain technical guidance directly from the Bureau of Narcotics and Dangerous Drugs. Inquiries should be made in writing, on the command letterhead, and should be addressed to the Laboratory Operations Division of that Bureau, Washington, D.C. 20537.

* * * * *
 *
 * An excellent, but slightly out-
 * of-date bibliography on LSD can
 * be found in 56 Calif. L. Rev.
 * 162 (1968). A comprehensive
 * overview of the subject of
 * hallucinogens can be found in
 * 68 Colum. L. Rev. 521 (1968).
 * Other articles which may be help-
 * ful are Symposium, Narcotics
 * and Hallucinogenic Drugs, 19
 * Hast. L. J. 602 (1968); LSD-25
 * and the Other Hallucinogenics,
 * 36 Geo. Wash. L. Rev. 23 (1967);
 * and Ford, LSD and the Law, 54
 * Minn. L. Rev. 775 (1970).
 *
 * * * * *

FORENSIC PATHOLOGY SERVICES AVAILABLE TO MILITARY COUNSEL

Most military counsel actively engaged in trial practice will, at least once in their career, have cases turning on the testimony and opinions of medical experts--usually pathologists. Almost every Army hospital will have a staff pathologist whose testimony will be available on the cause and manner of death or injury, and in some cases this testimony will be crucial.

A little known and often under-utilized service exists in the military for the rendering of expert pathological consultation at a level far superior to the local-level pathological services, and this service is available to all interested and qualified parties who have need of the service. The Armed Forces Institute of Pathology, headquartered in Washington, D.C., is a joint-service institute financed by the Army whose services are available on a common service basis. The three major missions of the Institute are consultation, research and education.

Counsel should be fully aware of the pathology services of the Institute before proceeding to trial in any death-related case.

By regulation [Para. 14a, Army Reg. 40-31] all autopsy protocols and related materials originally prepared in military facilities must be forwarded to the AFIP for final review. Related materials usually include tissue samples, paraffin blocks, photographs, X-rays and a report of investigation. Thus it should be a general rule for defense counsel that the trial of a death-related case should always be delayed until counsel has access to the information contained in the AFIP case conclusions. In cases where the autopsy protocol and related materials have not been forwarded to AFIP for consultation, counsel should make a request directly to the local hospital commander that this be done immediately, pointing out the relevant regulation. In the unlikely event that the hospital commander refuses to forward autopsy material to AFIP, counsel should communicate directly with the Director of the Institute.

In cases where the autopsy materials have been forwarded to AFIP, defense counsel should feel free to communicate directly with the Institute whenever a question arises as to the meaning of AFIP's action, or whenever AFIP's conclusion differs from that of the local pathologist.

The Institute maintains a Forensic Pathology Branch which has consultative facilities available for all forensic pathology problems. Counsel should be aware that forensic pathology is a subspecialty of pathology which requires intensive additional training. Forensic pathologists are peculiarly capable of rendering opinions as to the cause and manner of death, and are sensitive to the evidentiary and other legal uses to which their work may be put.

Local hospital pathologists, for example, may not be trained for proper on-scene evaluation and investigation, and may begin their autopsy on an unclad body, whereas a forensic pathologist may spend more time on scene and clothing investigation than he would on the autopsy proper.

Gaining access to the forensic pathology services at AFIP may in some cases be a problem for defense counsel. Generally, AFIP answers inquiries on a formal basis from intermediate-level medical facilities (Appendix II, Army Reg. 40-31) or local pathologists who have need of their services. If the local hospital commander refuses to ask for AFIP consultation in cases where he is not required to ask for such consultation, counsel seem to be limited to asking for AFIP services only through normal expert-witness channels [Paragraph 116, Manual for Courts-Martial, United States, 1969 (Revised edition)].

The Institute does, however, maintain a fellowship in forensic medicine for nonmedical personnel, and often, military lawyers participate in this fellowship. Informal communication directly with these forensic medicine fellows will give defense counsel information as to what services are available to them in a particular case and advice as to how best to obtain expert medical-legal advice. Indeed, any informal communication with the Forensic Pathology Branch will be quicker and probably more efficient than will formal communication but counsel should be advised that whenever a formal consultation from AFIP is desired, formal (i.e., written) communication is required.

Regulations also authorize AFIP to maintain liaison with other Department of Defense agencies, and with "other governmental agencies and private organizations which have a mutual interest or

responsibility with respect to the performance of any of its functions" [Para. 6, Army Reg. 40-31]. This would mean that in the proper case AFIP can call on the investigative and consultative services of other federal criminalistics laboratories, and thus counsel can indirectly gain access to these institutions through AFIP liaison.

Counsel should also be aware that in nonmilitary death cases related to military accused, where autopsies are performed in nonmilitary installations, AFIP consultation can still be obtained if defense counsel can gain access to the autopsy protocol and related materials such as gross and microscopic findings, reports of investigations, X-rays and photographs. These may be sent by military counsel directly to the Director of AFIP for pathological consultation.

AFIP experts are non-partisan and will work for any side in a case which is properly their concern. Counsel should realize, however, that once a decision is reached by AFIP experts, they will, a fortiori become partisan insofar as their expert opinion dictates. Upon proper request their experts will travel anywhere to testify or consult. If the local pathologist or hospital commander so requests, forensic pathologists will travel to local areas to perform on-scene investigations and even autopsies from a forensic point of view. AFIP services can be helpful to the defense, however, only if local trial-level counsel are aware of the assistance and expert advice available and actively seek it in the proper case.

DEFENSE PROBLEMS IN DEATH CASES

The pathologist occupies a central and critical position in the field of forensic medicine. In death cases, it is his responsibility to perform an autopsy

and ascertain the cause and manner of death. Often, his testimony will form the foundation of the prosecution's case. For example, he may testify that, based upon his autopsy, the victim died by homicide and may further relate that his examination ruled out the possibility of suicide or accidental death. Depending upon the facts of the particular case, the pathologist may even be able to state an opinion concerning possible affirmative defenses such as self-defense. In any event, his opinions will be based upon the professional conclusions he draws from his gross and microscopic examination of the tissues and organs of the victim. It is the responsibility of the defense counsel to test these conclusions by eliciting the exact basis for them. This is clearly a task as formidable as it is necessary.

The defense counsel's work must proceed from a deep and pervasive skepticism toward the conduct of the autopsy and the pathologist's conclusions. This indispensable disposition can be rather difficult to achieve in the face of an autopsy protocol which presents conclusions that seem to march inevitably from precise tests and measurements. However, the defense counsel simply cannot afford to accept uncritically the opinions of the pathologist. What then must he do? First of all, he must have the autopsy results reviewed and scrutinized by a qualified and experienced forensic pathologist. As noted elsewhere in this issue, the Armed Forces Institute of Pathology maintains an office whose primary responsibility is reviewing autopsies. Its Forensic Pathology section should be consulted by defense counsel in every case. In a particular case, counsel may desire to retain a forensic pathologist for the defense. These should be sought from the ranks of the medical examiners of many of the large municipalities and cities. In either event, it is essential that the defense counsel with the aid

of experts satisfy himself that he understands the autopsy results in all particulars. This consultation will open avenues for cross-examination on the more vulnerable aspects of the autopsy.

Secondly, counsel must obtain information about the conduct of the autopsy. This investigation is necessary to establish or negate the existence of facts which cast doubt upon the validity of the pathologist's conclusions. The following are suggested lines of inquiry covering some typical autopsy defects. It is not intended as an exhaustive check list.

1. Were established hospital procedures followed? Army hospitals invariably have SOP's governing the conduct of autopsies in addition to a field manual. (Also, there will be detailed SOP's governing the procedure to be followed in examining into complaints of rape.) If these prescribed procedures are not followed, find out why.

2. What was the initial contact of the pathologist with the remains? Delay in performing an autopsy may cause difficulties in establishing time of death or affect other findings. Counsel should learn the exact length of delay and discuss its significance with an expert. Also, the pathologist's initial contact may occur after the hospital has "prepared" the body by washing, disrobing and destroying the clothes, or dilation of the anus. These actions may well result in dissipation of evidence which to a forensic pathologist would be of great significance. Again counsel must learn the facts and discuss them with an expert.

3. Was the division of labor properly carried out? Quite often, the pathologist relies upon the

results of tests which he himself did not perform. Satisfy yourself that there exists a proper "chain of custody" between the pathologist and the laboratory and that there was no possibility of a mixup of blood, stomach contents, etc. Find out who performed each test. If the pathologist's conclusions depend upon tests conducted by others, the person who conducted them should be contacted and questioned. Similarly, when the pathologist testifies in court, counsel should be alert to identify any disguised hearsay testimony arising from the pathologist's relating the conclusions of others. For example, the pathologist may testify that the victim was drunk at time of death, where he had not drawn or tested the blood.

4. Is the autopsy's medical terminology precise? Forensic pathologists report that autopsies often contain overly general terminology. The word laceration, for example, is often used incorrectly to describe other kinds of trauma. Discuss the terminology in detail with a qualified forensic pathologist to identify and appraise the inaccuracies.

5. Recognize the limitations of the pathologist and the hospital. If the pathologist who performed the autopsy is not a forensic pathologist, he may not be sufficiently sensitive to the medical-legal aspects of a post-mortem. Also, he may overlook avenues of examination which a forensic pathologist would regard as indicated. This may arise from a failure of the investigators to inform him sufficiently of the circumstances surrounding the death. Discussion of these possibilities with a qualified expert is mandatory. Limitations of the hospital facilities must also be considered. For instance, counsel should inquire whether adequate scales and other testing devices were available and were utilized. Also, it is recommended practice to prepare a full set of color photographs or slides of the remains.

If only black and white photos were taken or none at all, certain of the pathologist's conclusions may be difficult or impossible to verify by a reviewer.

The point of this discussion is simply to alert the defense counsel to the necessity for a skeptical attitude toward an autopsy protocol, and the need to review the evidence in detail with an experienced forensic pathologist.

THE MISCELLANEOUS DOCKET

In Gagnon v. United States, COMA Misc. Docket No. 70-31 (decided 18 June 1970) [See THE ADVOCATE, Vol. 2, No. 4, p. 13], the military judge had refused to rule on the accused's motion for release from confinement, believing that he did not have the power to do so. The convening authority failed to follow the judge's strong recommendation for the accused's release. The Air Force Court of Military Review agreed that the military judge lacked the power to order the release from confinement and the accused, on 8 April 1970, applied to the Court of Military Appeals for a "Writ of Mandamus or Other Appropriate Relief."

In its action on 18 June 1970, the Court of Military Appeals granted a government motion to dismiss the petition for writ of mandamus. The Court's order is a memorandum denial, leaving it unclear as to whether the military judge has power to grant appropriate relief under the All Writs Act, 28 U.S.C. § 1651 (1964). Until a more definitive answer is rendered by the Court of Military Appeals, counsel should not presume the presence or the absence of the military judge's extraordinary power.

In MacDonald v. Tolson, COMA Misc. Docket No. 70-43, (decided 10 June 1970)

military investigative authorities are seeking to obtain from the accused a sample of his hair. The Court of Military Appeals denied accused's petition for a writ of injunction and temporary restraining order, "without prejudice to assertion of appropriate objections at trial to the admissibility of the evidence, if any, obtained as a result of the proceedings challenged in the petition." It should be of interest to defense counsel that the authorities refrained from obtaining the sought-after evidence while the accused's motion was pending. [We are informed that a similar motion remains pending in federal court and that restraint in seizing the evidence is, at this date, still being employed.]

In two cases in which a convening authority was dilatory in taking action on a conviction, petitions for writs of mandamus were filed to the Court of Military Appeals. The Court issued orders to the convening authority to show cause why mandamus ought not lie. The petitions were then dismissed as moot after the convening authority rapidly completed his action and forwarded the records of trial to the Navy Court of Military Review for appellate review. Culver v. United States, COMA Misc. Docket No. 70-38 (25 May 1970), McNeil v. United States, COMA Misc. Docket No. 70-30 (25 May 1970). Thus, as was evidenced in Montavan v. United States [See THE ADVOCATE, Vol. 2, No. 4, p. 14], defense counsel can continue to aid their clients after trial by assuring that the record is forwarded for appellate review without undue delay.

The recent case of Thompson v. Chafee, COMA Misc. Docket No. 70-41 (10 June 1970) is of interest as it offers further insight into the requisites for extraordinary remedies. Subsequent to a decision by a United States Attorney to

dismiss a case against the petitioner (nonservice connected offense), Naval Intelligence [OSI] obtained a confession from him. The confession was to be used as a basis for an administrative discharge. Thompson applied to the Court of Military Appeals for a writ of prohibition, alleging that the confession had been involuntarily given. The Court said, "it appearing that the proceedings complained of are entirely administrative in nature, and that no charges against petitioner are pending before any court-martial, nor are any charges contemplated," the petition is dismissed.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

ASSAULT WITH A DANGEROUS WEAPON -- UNLOADED RIFLE --
Accused was charged with assault with a dangerous weapon by pointing an M-16 rifle at another individual. The prosecution failed to prove beyond a reasonable doubt that the rifle was loaded. The Court of Military Review held that: "It is well established law that an unloaded pistol or rifle, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means likely to produce grievous bodily harm whether or not the assailant knew it was unloaded." The Court approved the lesser included offense of assault. United States v. Reid, ___ CMR ___ (ACMR 1970).

CONFESSIONS -- REPEATED INTERROGATIONS -- The accused, in two interviews with CID agents on the same day, declined to make any statement and specifically requested and received an appointed military attorney. The following day the accused was again interviewed by a CID agent and advised of his rights. At this interview, he did not ask for counsel and made an inculpatory statement. The Court of Military Review noted that, at this third interview, the accused was not told that he could have military counsel of his choice present during the interview,

and that the lawyer he conferred with the previous day could be present during the interview. The Court also noted that this particular lawyer was in the CID office when the interview was conducted although no attempt was made by the CID agent to contact the lawyer prior to questioning the accused. The Court stated that such conduct is "violative of both the letter and the spirit of the law" and that although the failure to deal directly with defense counsel was not reversible error, per se, under the facts of this case (the accused had previously invoked his right to remain silent), the procedure employed could not be sanctioned. The Court also cited United States v. Attebury, 18 USCMA 531, 40 CMR 243 (1969), concerning an accused's repeated reliance on his right to remain silent, and held that it was "incumbent upon the agent to desist in his attempts to get the accused to talk" and that his failure to do so rendered the statement inadmissible. United States v. Miller, No. 421790, (ACMR 12 Jun 1970).

CONFESSIONS -- VOLUNTARINESS -- A defendant being transferred from one jail cell to another became obstreperous, had to be subdued with tear gas and was placed in a cell called "the hole." About a half an hour later, with tear gas still in the air, the defendant, still crying, asked for his release from this cell. In response to a question by a police officer, he confessed to the burglary of a grocery store. The Illinois Supreme Court held that the confession, coming so soon after the gassing, was not free and voluntary. O'Leary v. State, ___ N.E.2d ___ (Ill. Sup. Ct. 24 May 1970); 7 Crim. L. Rep. 2098.

CONFINEMENT -- PUNITIVE SEGREGATION -- The United States District Court for the Southern District of New York, by means of a Civil Rights Act injunction, set forth a system of legal requirements for dealing with infractions of rules by inmates of prisons.

The instant case arose out of the solitary confinement for more than a year of a Black Muslim prisoner. The solitary confinement in question was "inexcusably dehumanizing including denial of access to any other prisoners, to literature or other communications media." The Court found that the conditions of punitive segregation could undermine the sanity of a prisoner when imposed for more than 15 days and stated: "Subjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by present standards of decency." The Court held that solitary confinement or punitive segregation as practiced in the instant case must be limited to no more than 15 days, for serious infractions of prison rules, and only after the following minimum procedural due process safeguards were complied with: (1) written notice of the charges against the prisoner designating the prison rule violated, (2) a hearing before an impartial official at which the prisoner has the right to confrontation and to call witnesses, (3) a written record of the hearing, decision and reasons therefor, and (4) assistance of counsel or a counsel substitute. The Court also stated that a prisoner retains the "right to unfettered communication with courts, government officials, counsel, and others capable of responding to lawful calls for assistance." In addition, punishment of a prisoner for political activities was held unlawful. Sostre v. Rockefeller, ___ F. Supp. ___ (S.D.N.Y. 14 May 1970); 7 Crim. L. Rep. 2164.

CONFINEMENT -- RELEASE FROM PRETRIAL CONFINEMENT --
The Ninth Circuit Court of Appeals ordered the release of a black youth incarcerated in a juvenile detention home pending trial on a charge arising out of a schoolyard fight so that he could assist his lawyers in the preparation of his case. The

Court mentioned the youth's "strong showing" that only he could line up other black youths as witnesses. The Court indicated that the youth's white lawyers would "have great practical difficulty in interviewing and lining up the witnesses, and that appellant is the sole person who can do so." Kinney v. Lenon, ___ F.2d ___ (9th Cir. 21 April 1970); 7 Crim. L. Rep. 2154.

ENTRAPMENT -- INTEGRITY OF THE LAW -- In a case stated to be one of first impression in the federal courts, the United States District Court for Central California considered the issue of entrapment when the government supplied counterfeit money to a person and then arrested him for receiving it. The Court acknowledged that the intent to commit the crime arose solely in the mind of the defendant without inducement from the government. The defendant indicated to an FBI agent that he wanted to purchase some counterfeit money. Therefore, under the origin-of-intent test, there would be no entrapment. The Court however cited the "integrity of the law" rationale which was contained in the concurring opinions of the two Supreme Court decisions on entrapment, Sorells v. United States, 287 U.S. 435 (1932) and Sherman v. United States, 356 U.S. 369 (1958). Utilizing the integrity of the law, or absence of police misconduct, standard, the Court stated: "When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it . . ." The Court also stated: "Were the courts to sustain the law enforcement acts committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a concept thoroughly repugnant to constitutional principles." The Court noted, however, that if it was an offense to attempt to receive counterfeit bills, the defendant could be prosecuted for such offense. United States v. Chisum, ___ F. Supp. ___ (C.D. Cal. 24 April 1970); 7 Crim. L. Rep. 2159.

ENTRAPMENT -- REBUTTAL OF DEFENSE -- A defendant was charged with selling depressant/stimulant drugs. To rebut a claim of entrapment, the government attempted to show the defendant's predisposition or readiness to commit the crime by what the Seventh Circuit Court of Appeals characterized as vague, hearsay evidence that the defendant had made a "hard narcotic" sale at some time in the distant past. The Court held that, despite careful limiting instructions, the uncharged misconduct evidence was "so remote and so prejudicial as to outweigh its probative value on the issue of predisposition." The Court remanded the case for a new trial. United States v. Johnston, ___ F.2d ___ (7th Cir. 14 May 1970); 7 Crim. L. Rep. 2181.

MUTINY -- CONCERTED INTENT TO OVERRIDE AUTHORITY -- The Court of Military Review, in the first of the Presidio mutiny cases, cited United States v. Duggan, 4 USCMA 396, 15 CMR 396 (1954) and United States v. Woolbright, 12 USCMA 450, 31 CMR 36 (1961), held that for a nonviolent mutiny, there must be a concert of action and a concert of intent to override lawful military authority. This latter element was absent from the law officer's instructions. The Court also found erroneous a conspiracy instruction that once an unlawful combination was proved, the court could consider the acts and declarations of one individual against all of the other individuals. The Court held that such an agency instruction could not be used by the court until it finds the required concert of action and concert of intent. In regard to factual sufficiency, the Court held that the facts "show" the absence of the concerted intent to override lawful military authority. Rather, the evidence demonstrated "an intention to implore and invoke the very military authority which they are charged with seeking to override." The Court noted that the collective intent to defy authority by refusing to obey the confinement officer's order

"falls far short" of the required collective intent to usurp or override lawful military authority. Although specific orders to the prisoner were disobeyed, the authority of the confinement officer and the military police was not supplanted. The Court approved the lesser included offense of willful disobedience. United States v. Sood, No. 420276 (ACMR 16 Jun 1970).

PHOTOGRAPHIC IDENTIFICATION -- RECOMMENDED TRIAL PROCEDURE -- The Fifth Circuit Court of Appeals offered a suggested procedure for dealing with Simmons v. United States, 390 U.S. 377 (1968), which held that: "[C]onvictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside . . . if the photograph identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Court stated that a trial judge at an out-of-court hearing should determine if the photographic identification or "picture spread" was impermissibly suggestive, either in the photographs used or the manner or number of times they were displayed. If the judge makes such a determination, he must then decide if the impermissibly suggestive picture spread gives rise to a "likelihood of irreparable misidentification." If both of these elements are found, Simmons prohibits the use of the in-court identification. This procedure will "save the defense the Hobson's choice of whether to attack the in-court identification by attacking a prior photographic identification that might wind up being upheld thereby reinforcing the identification of the defendant." Sutherland v. United States, ___ F.2d ___ (5th Cir. 29 May 1970); 7 Crim. L. Rep. 2199.

PHOTOGRAPHIC IDENTIFICATION -- RIGHT TO COUNSEL -- The Third Circuit Court of Appeals held that there is an absolute right to counsel at a post-arrest, pre-lineup photographic identification. In the instant

case, prior to a lineup, the FBI privately confronted each eyewitness with a series of photographs for identification. The Court held that the considerations which led the Supreme Court, in United States v. Wade, 388 U.S. 218 (1967), to guarantee the right to counsel at lineups, apply equally to photographic identifications after an accused is in custody. Also, since an accused is not present at such identifications, he is less able to reconstruct at trial what took place unless counsel is present. In addition, the Court noted that the constitutional safeguards that Wade guaranteed for lineups could be completely nullified if the police were able to privately confront witnesses with suggestive photographs prior to the lineup. The Court indicated that, in the instant case, the photographs of the accused were ordinary snapshots while the other photographs in the "spread" were police "mug shots"-- dual pictures showing full face and profile and bearing police markings. This was suggestive as the witnesses knew that the accused had only recently been apprehended. Furthermore, only the accused was pictured wearing glasses and, according to the witnesses, the actual perpetrator of the crimes in question had worn glasses. The Court stated that the entire procedure was absolutely unnecessary as all of the witnesses were available for the forthcoming lineup. The Court therefore concluded that, even absent the right to counsel issue, the photographic identification was "pointless for any purpose other than suggestion." and thereby violated due process. United States v. Zeiler, F.2d (3rd Cir., 5 June 1970); 7 Crim. L. Rep. 2230.

SENTENCING -- RECORDS OF NONJUDICIAL PUNISHMENT --
The appellant received an Article 15 on 30 September 1968, and was transferred to the unit he was in at the time of trial on 22 August 1969. The Court of Military Review held that under Paragraph 3-15d,

Army Reg. 27-10, the Article 15 was improperly retained in the appellant's 201 file and, therefore, was inadmissible in a court-martial held on 16 December 1969. The Court indicated that, on 1 October 1969, "the condition that required" the retention of the Article 15 in the appellant's personnel records "no longer existed." On that date, one year had elapsed since the punishment was imposed and the appellant had been transferred to a different unit subsequent to the imposition of punishment. United States v. Ward, ___ CMR ___ (ACMR 1970).

WITNESSES -- EXPECTATION OF LENIENCY IN PENDING PROSECUTION -- The appellant charged with the sale of narcotics, raised the defense of entrapment, and attempted to establish a motive for a government informer to "set up" the appellant. Upon cross-examination, the informer admitted that he had been indicted for the sale of narcotics. However, when the defense counsel attempted to question the federal narcotics agent who participated in the case about the present status of the informer's case, the court sustained an objection to the entire line of questioning. The Ninth Circuit Court of Appeals held that the defense should always have the opportunity of showing that the action of a government informer may have been impelled by the expectation of leniency in his own pending prosecution or sentence. The error was not cured by the informer's statement that he received no promise of favorable treatment as a result of his cooperation with the narcotics agents. The Court held that the agent was in a position to know what, if any, pressures were exerted on the informer during the period of his cooperation with the government. Furthermore, the conversations between the agent and the informer may have indicated whether any pressure had been exerted by the informer on the appellant. Hughes v. United States, ___ F.2d ___ (9th Cir., 19 May 1970); 7 Crim. L. Rep. 2212.



DANIEL T. GHENT
Colonel, JAGC
Chief, Defense Appellate Division