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

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This issue of THE ADVOCATE is primarily directed to an examination of various trial tactics that warrant careful consideration. The notes herein merely reflect some of the recurring problem areas that tend to curtail meaningful relief at the appellate level. In no case are the suggested techniques or guidelines, set forth for the consideration of defense attorneys, fully documented by the totality of existing case law. Counsel are urged to carefully reflect upon these matters and any other potential focus of relief for their client at the trial level. Appellate attorneys must rely on a recorded development of the issues during trial. Litigable issues that are unaddressed or waived in original proceedings, in most cases result in either non-recognition, fruitless exposition or harmless error in appellate proceedings.

VIEWING VOIR DIRE AND CHALLENGES

One of the more fertile sources of significant improvement in an accused's chance for acquittal lies within the realm of voir dire examination and the resulting challenges against prospective court members. Unfortunately, many records of trial indicate that defense counsel either ignore the area entirely or fail to take advantage of significant discoveries made in the course of voir dire. All too frequently, glaring procedural omissions and unwise tactical decisions completely frustrate the possibility of a successful appellate attack on a military judge's failure to grant a meritorious challenge for cause.

An accused is entitled to full knowledge of all relevant and material matters which might disqualify a juror in order that he may exercise his right to challenge for cause or peremptorily. Therefore, paragraph 62b, Manual for Courts-Martial, United States, 1969 (Revised edition), provides that "counsel may question the court, or individual members thereof, and the military judge concerning the existence or nonexistence of facts which may disclose a proper ground of challenge for cause." This provision is much more favorable than the concomitant federal rule which requires counsel to submit suggested voir dire questions to the judge, who rules on their propriety and generally asks all questions himself. (See Rule 47(a), Fed. Rules of Civ. Proc.; Rule 24(a), Fed. Rules of Crim. Proc.) The most obvious subjects of probing inquiry are those which would reveal specific or general prejudice or bias against an accused, his witnesses, or his alleged offenses; bias in favor of prosecution witnesses; bias against particular defenses (i.e., entrapment); inability to comprehend and apply particular legal concepts; preconceived notion as to particular type of punishment for a particular crime; racial bias; and command influence. See generally, Holdaway, "Voir Dire--A Neglected Tool of Advocacy." 40 Mil. L. Rev. 1 (1968).

Military courts have decided numerous cases regarding the propriety of specific questions during voir dire. The issue ordinarily posed is whether the military judge abused his discretion in curtailing defense counsel's questioning of prospective court members.^{1/} The latest decision in this long line of cases is United States v. Huntsman, 22 USCMA 100, 46 CMR 100 (1973).

^{1/} United States v. Fort, 16 USCMA 86, 36 CMR 242 (1966); United States v. Sutton, 15 USCMA 531, 36 CMR 29 (1965); United States v. Cleveland, 15 USCMA 213, 35 CMR 185 (1965); (continued)

Under examination in Huntsman, supra, was the propriety of a defense counsel's question on voir dire. The somewhat ambiguous question was "Would you, sir, tend to disbelieve or give less weight to the testimony of a witness who'd been convicted by court-martial for a crime that is considered a felony solely because he had been convicted?" The Court of Military Appeals recognized that the authorities were split over the propriety of such a question, 2/ but nevertheless took a liberal stance and held that under the circumstances of the case, this question regarding the credibility of a prospective witness was proper. The Court also reiterated that the propriety of a voir dire question depends upon the issues, facts, and circumstances involved in the voir dire. Therefore, these factors must be developed and set forth on the record. Only after a judge is fully apprised of these varied factors can any determination be made as to the propriety of the question. The Court of Military Appeals held that "defense counsel should have been permitted to inquire into the potential for bias which defense witness Mobley's 3/ conviction for absence without leave, a uniquely military offense, might have had on the members of the Court." Huntsman, supra at 103. The Court found that the military judge clearly abused his discretion by curtailing defense counsel's voir dire in Huntsman, specifically noting that he made absolutely no inquiry as to why defense counsel was asking the voir dire question.

The Huntsman case points up one of the numerous problems that may arise during the appellate review of a record of trial when the issue of voir dire or challenges presents itself. The first caveat obviously must be that voir dire should never be

Footnote 1 continued/ United States v. Freeman, 15 USCMA 126, 35 CMR 98 (1964); United States v. Lynch, 9 USCMA 523, 26 CMR 303 (1958); United States v. Parker, 6 USCMA 274, 19 CMR 400 (1955); United States v. Kelly, 42 CMR 817 (ACMR 1970).

2/ 99 A.L.R. 2d 1 at 59, See also, Harvin v. United States, A.2d (D.C. Ct. App. 1972); Brown v. United States, 338 F.2d 543 (1964); Sellers v. United States, 271 F.2d 475 (1959).

3/ Huntsman was charged and convicted of one specification of wrongful delivery of LSD. He was prosecuted on the theory that he was an aider and abettor of Mobley, the only defense witness.

conducted just for the sake of asking questions. All questions should have a purpose, and should be fully analyzed prior to trial. In the hands of a well-prepared advocate, voir dire questions may be used to apprise the court members of particular favorable defense theories that are anticipated during the trial, though strictly this is not the primary purpose of voir dire. See Holdaway, "Voir Dire--A Neglected Tool of Advocacy", supra. Further, when counsel has properly investigated the prospective court members and their backgrounds, he will obviously be knowledgeable as to the number and nature of questions which should be asked to unearth a possible challenge for cause. It should be noted at this point that if counsel has not been able to ascertain any background material on the court members, he should contemplate requesting the 201 files of each prospective court member from the convening authority. If the request is denied the motion should be renewed before the military judge during an Article 39a session. 4/ Should the request again be denied at trial, defense counsel should ask specific voir dire questions seeking to determine the unknown background of the respective court members. A second alternative in preparation of effective voir dire is to address specific questions to the government for discovery of the desired background information, prior to trial. 5/

Several considerations often arise during a particular voir dire examination which should be recognized by counsel. Many examinations of court members are conducted before the entire array, including specific questions which are intended to apply to one court member, yet, may in fact color or influence the responses of remaining members. For example, in any case dealing with a serious charge or set of charges, a court member may understandably harbor the feeling that a punitive discharge was required in the event of conviction, despite strong extenuation or mitigation evidence. This court member might more readily admit to such rooted opinion if questioned alone, rather than responding to his feeling after a number of other jurors had

4/ In both United States v. Calley and United States v. Henderson, the defense was permitted access to the court members 201 files.

5/ United States v. Perry, No. 426234 CMR (ACMR 23 Mar 73). In its opinion the Army Court of Military Review specifically recognized the aforementioned alternatives and, indicated that these methods were proper for showing prejudice in the denial of the request for the 201 file.

affirmed their total lack of predisposition to sentencing. It is recognized that certain preliminary questions may be asked with the entire array present. However, the better practice, both procedurally and tactically is to question each court member individually, out of the presence of the other members. Of course, it should be obvious that challenges should always be presented to the military judge out of the hearing of court members. 5a/

A second tactical decision which counsel should weigh is whether to place the court members under oath before voir dire questioning. If such a procedure is desirable in a given case, counsel should present their request to the military judge during an Article 39a session, out of the presence of the members, and ask that the court be sworn immediately after the judge has given his preliminary instructions regarding the purpose of voir dire. This procedure would hopefully prevent the possibility of any court member becoming antagonistic toward the defense because of being required to answer voir dire questions under oath. 6/

Another problem which often confronts counsel results from the military judge's intervention into the voir dire process. Although it is recognized that the military judge must maintain the proper trial atmosphere and insure a fair trial, this does not mean that counsel should not seek to contest a military judge's apparent attempt to rehabilitate one who appears to be a biased court member. 6a/

5a/ It should be noted that while the defense has an absolute right to conduct voir dire out of the hearing of other members, for good reason, (Paragraph 62b, MCM), no such right exists when it comes to actually making the challenges. However, an interest in insuring the fairness of the proceedings would seem to be sufficient to persuade any military judge to exercise his discretion and permit challenges to be made out of the hearing of the court members.

6/ See United States v. Lynch 9 USCMA 523, 26 CMR 303 (1958) wherein a court member was offended by the requirement of taking an oath before the voir dire.

6a/ United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960)

Specifically, counsel can object to the wording of a military judge's questions which are slanted in such a manner as to elicit a "Pavlovian" response from the member and provide a basis to retain him on the court. A court member's initial response to a properly worded question is generally the most revealing one, and counsel should note his objection in light of a judge's attempts at rehabilitation. Objection should be made on the basis that the member has already answered the question, and that further inconsistent answers could only serve to impeach him. Also, if the questions are leading, objection should be made on that basis. Finally, and most importantly, defense objection should be made on the basis that the military judge is compromising his appearance of impartiality, and taking the role as an advocate for the government. 6b/

It is the duty of a judge to remove members who indicate that they have knowledge or beliefs which would render them unfit to serve as jurors. When a judge actively seeks to keep a questionable member through the technique of rehabilitative questioning, he violates that duty. If a judge continues such questioning in the face of objection, he should be requested to recuse himself from ruling on challenges for cause because of his demonstrated partisanship.

An additional problem arises in the case of a military judge's misconception as to the purpose of certain voir dire and confusion as to the status of a particular question regarding a principle of law. If the question is worded in such a manner that the court member realizes that the military judge instructs the court regarding the law and that the propounded question merely asks if the court member will follow the instruction, the question is proper. 7/ Certainly if counsel is prohibited from asking a question that on its face seems proper, an attempt should be made to rephrase the question in order to meet the judge's objection. If such a situation arises, counsel should not hesitate to ask the military judge to articulate his reasons for prohibiting the original question and any related questions, so that the question may be properly rephrased and the trial proceed.

6b/ Cf. United States v. Posey, 21 USCMA 188, 44 CMR 242 (1972); United States v. Dotson, 21 USCMA 79, 44 CMR 133 (1971), and cases cited therein.

7/ United States v. Freeman, 15 USCMA 126, 35 CMR 98 (1964).

Several remaining problems deserve mention. If counsel is probing the court members for hidden racial prejudice, when he has a basis for doing so, care should be exercised. 7a/ The questions should be carefully worded and carefully thought out. Though these questions may not always establish grounds for challenge, they could alert a court member that he appears to harbor prejudice, and hopefully cause him to "bend over backward" for the accused. At the same time it is important to avoid alienating one who may be an otherwise sympathetic court member. When and if counsel knows that a particular member is unfit to sit as court member, evidence should be introduced to support the contention. Such evidence may certainly include witnesses who are knowledgeable regarding the member.

Additionally, keep in mind that the number of court members ultimately selected to participate on the court is also important. For example, the best number, percentage wise, to have on a general court-martial seems to be five. When five members make up the court, the government must convince four members of an accused's guilt. Conversely the defense need only instill reasonable doubt in two members. Thus, the percentage is better for the defense. If there are six members the government must still convince four members, but the defense must instill reasonable doubt in three members. For these reasons the defense may consider using a peremptory challenge to reduce the number of members on the court and thereby obtain a slight numerical advantage.

Finally, assuming that the aforementioned problem areas are satisfactorily avoided and counsel has arguably established a challenge for cause, often and for no apparent reason, no challenge is issued against the tainted member. Even though this may be another tactical decision by defense counsel, i.e., to illustrate for a particular member, his bias, then hoping he would not react in accordance with his stated views - it is an extremely dangerous tactic, and leaves appellate courts wondering about the purpose of establishing the court member's bias without asserting any challenge. Obviously, if no challenge either for cause or

7a/ See Ham v. South Carolina, ___ US ___, 93 S. CT. 848 (1973).

7b/ In cases where ten or eleven members are sitting, however, the emphasis might well be placed upon keeping the same number as appointed, in order to compel the government to convince more members of its position, while the defense would be required to convince four members. This four man total remains constant regardless of whether the court is composed of nine, ten or eleven members. A numerical advantage may be gained, by preemptorily challenging one member of a nine man court.

peremptory challenge is made, the issue of the court member's fitness to set on the court is forever waived. 8/

Another problem arises within this same context. If the voir dire has established a challenge for cause but such challenge is denied by the military judge, and counsel then peremptorily challenges the court member, has the challenge for cause been preserved for appellate review? The Army Court of Military Review has deemed the denial to be devoid of prejudice. 9/ Though the reasoning is not logically persuasive regarding this lack of prejudice to an accused, the possibility of such a holding by appellate courts should be anticipated at the trial level, and corrective action should be taken. One response is to request additional peremptory challenges. If denied this request, defense counsel should definitely state for the record in out-of-court hearing that because of the military judge's ruling denying the challenge for cause, counsel was forced to use the accused's sole and precious peremptory challenge to remove the member who was initially challenged for cause. Counsel should then indicate how he would have used the peremptory challenge differently if the challenge for cause had been properly granted. Thus the record will be clear that the peremptory challenge has been needlessly forfeited as a direct result of the judge's denial of an arguably meritorious challenge for cause. 10/

8/ United States v. Dyche, 8 USCMA 430, 24 CMR 240 (1957)

9/ See United States v. Brakefield, 43 CMR 828 (1971)
In Brakefield the ACMR discussed the lack of prejudice to an accused who peremptorily challenges a member when the challenge for cause is denied. The Court specifically noted contrary opinion on this issue. See United States v. Watkins 20 CMR 750 (AFBR 1955)

10/ Another tactic to preserve the error would be to refuse to challenge the tainted member preemptorily. This decision, however, is fraught with danger. It may mean the difference between acquittal and conviction at trial. Also, at the appellate level, the disinclination to remove the member peremptorily would be indicative to the Court of the relative lack of merit the defense believed the challenge to have, and secondly would almost surely persuade the Court to invoke the doctrine of waiver in all but the most flagrant situations amounting to a denial of due process. See United States v. Dyche, 8 USCMA 430, 24 CMR 240 (1957)

In summary, the proper use of voir dire and challenges is a valuable offensive weapon that trial defense counsel can use in an effort to provide an accused a fair and impartial trial. Prior planning along the lines suggested herein should enable counsel to obtain a more favorable court; or preserve any errors that may have occurred enroute during this preliminary portion of the court-martial.

CONTROVERTING PROBABLE CAUSE

The Court of Military Appeals recently granted a Petition for Grant of Review in a case involving the so-called "controverting probable cause" issue, a matter of which defense counsel should always be aware in search and seizure cases. In United States v. Salatino, Docket No. 26,796 pet. granted 3 May 1973 the defense called the informant as a witness at trial in order to counter the government's evidence that he had seen the accused stashing drugs in the interior of the accused's own car. The witness testified that he had so informed the authorities, including the company commander, but that he had been "purposely mistaken" and in effect had lied in order to secure clemency in his own pending drug case. The individual in the car was not the accused, the informer testified, but a person whom the informant did not know. Apparently the military judge considered the testimony as applicable only to the merits of the case, not as an attack on the probable cause to support the search. The defense did not specifically address itself to the search issue on that basis, however, the Court of Military Appeals has obviously decided to consider the issue, raised for the first time on appeal.

In a similar case also presently pending before the Court of Military Appeals, the Court of Military Review decided that on the facts of the case the military judge did not err in not considering the informant's in-court testimony as controverting the probable cause, in light of the allegedly incredible nature of the testimony he gave at trial. United States v. Carlisle, No. 426862 CMR (ACMR 8 February 1973). The informant testified in the Carlisle case that he first planted drugs on the accused, then informed the authorities that the accused had drugs in his possession and had just sold some to the informant. The Court concluded that the military judge properly refused to consider the information as vitiating the probable cause underlying the search of the accused's person.

Counsel should be aware of the possibility that either an informant or a police officer may have lied, exaggerated, or erred during his interview with the military "magistrate." In

such cases, counsel should bring out the facts at trial, with a view toward destroying the government's position that probable cause existed to authorize the search. Surely, there can be no true "probable cause" if the information received by the authorizing official has been falsified. As the Court noted in Carlisle, the resultant seizure occurs because the police have gone to the right place, but for the wrong reason.

There are several theories upon which the concept of controverting probable cause may be sustained, including a basic equity doctrine, as well as the necessity for deterring improper police practices. The Court of Military Appeals has reviewed the facts behind the authorization to search, in order to determine whether the name of a confidential informant should be disclosed. United States v. Ness, 13 USCMA 18, 23, 24, 32 CMR 18, 23, 24 (1962). Likewise, the Court has indicated in United States v. Sam, 22 USCMA 124, 127, 46 CMR 124, 127 (1973) that on occasion it must "review a commander's probable cause determination by giving attention to the impact of his use of erroneous facts at the time of his authorization to search". However, the Salatino case is the first case in which the issue has been presented squarely for the court's attention. The United States Supreme Court has denied certiorari at least twice on this issue, and federal and state courts are split as to whether an accused may "go behind the affidavit" to attack the information used for search authorization. The pertinent cases and an analysis of the theories involved are found in three excellent law review articles: Comment, Controverting Probable Cause in Facially Sufficient Affidavits, 63 J. Crim. L.C. & P.S. 41 (1972); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev 825, (1971); Note, Testing the Factual Basis for a Search Warrant, 67 Colum. L. Rev 1529 (1967). Counsel should read those articles and the cases cited therein in order to gain an appreciation of the potential for success in motions to suppress evidence brought on that basis. THE ADVOCATE will deal with this subject in detail after the decision in the Salatino case.

THE COMMANDING OFFICER: POLICEMAN OR MAGISTRATE?

It is well-settled in military law that a commanding officer may properly authorize a search based upon probable cause. 1/

1/ Paragraph 152, Manual for Courts-Martial, United States, 1969, (Revised edition).

In so doing, the commander stands in the position of a magistrate and must perform his search-authorizing function as an "independent judicial officer." 2/ This concept is well-expressed by Mr. Justice Jackson, writing for the Supreme Court in Johnson v. United States, 3/ a case in which the Court held that probable cause to search could be determined only by inferences drawn from facts presented to a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime?" 4/ That requirement was reaffirmed in Coolidge v. New Hampshire, 5/ in which the Court struck down a search warrant issued by the state attorney general who was the chief prosecutor and investigating officer. It held that by virtue of his statutory position the official "was not the neutral and detached magistrate required by the Constitution ..." 6/

In light of these authorities, defense counsel faced with a commander-authorized search should always consider whether the authorizing officer is the "independent judicial officer" envisaged by the Court of Military Appeals in Hartsook and its progeny, or the "neutral and detached magistrate" required by the Supreme Court in Coolidge and Johnson. The inquiry is particularly important where the commander authorizes the search and conducts it himself, acting both as the magistrate and the sheriff in the same case.

The Court of Military Appeals has long recognized that commanders as a class may determine probable cause. 7/ However, circumstances of a given case may reveal that the commander could not, or did not in fact, exercise his authorization powers with the requisite degree of neutrality. In this regard, Mr. Justice Powell wrote for the Court in Shadwick v. City of Tampa 8/ that "...[A]n issuing magistrate must meet two tests.

2/ United States v. Hartsook, 15 USCMA 291, 294, 35 CMR 263, 266 (1965); United States v. Battista, 14 USCMA 70, 33 CMR 282, (1963); United States v. Davenport, 11 USCMA 152, 33 CMR 364 (1963); United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962)

3/ 333 U.S. 10 (1948)

4/ Id. at 13-14

5/ 403 US 443 (1971); See Note, 3 THE ADVOCATE, No. 5 at 122 (June-July 1971)

6/ Id. at 453

7/ See, e.g., United States v. Hartsook, supra n.2

8/ 407 U.S. 345 (1972)

He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." 9/

In the military context, a lack of neutrality is most often discernible in searches of barracks, vehicles or individuals designed to uncover possession of narcotics or marihuana. Defense counsel should be alert to the situation in which the zealous commander has personally utilized informants or personally conducted searches on occasions prior to the discovery of the contraband which the government seeks to admit as evidence at trial. Certainly no one would deny the obligation of the commander to seek out and apprehend unit members who violate the law. However, the attitudes and desires of commander must be distinguished from their actions when those actions become actual criminal investigations. One would hardly expect an "independent judicial officer" to continually use informants and personally direct or conduct searches, any more than one would expect a state attorney general to be able impartially to determine probable cause in a case which his office investigates.

In a recent case one panel of the Court of Military Review declined to find that a certain battalion commander was not a "neutral and detached magistrate." In United States v. Carlisle, 10/ the Court was faced with an officer who had used the particular informant previously, and who had earlier conducted a fruitless exploratory barracks search with a marihuana dog, based upon a tip from that informant. The Court noted that the officer's testimony "displayed a mature, temperate attitude toward investigating and suppressing drug use." 11/ rejecting the defense contention that the commander was engaged in ferreting out crime as a policeman when he authorized the search of the accused's person based upon the informant's representation that the accused possessed some sort of pills.

Despite the holding in Carlisle, trial defense counsel should not hesitate to explore in depth the attitudes and activities of the commander who authorizes the search of his client

9/ Id. at 348, 349

10/ No. 426862, ___CMR___ (ACMR 8 February 1973), pet. pending.

11/ Id., Ms. Op. at 2

or his client's property. Commanders are often actively engaged in the search procedures used in their units, far beyond the independent judicial activity expected of an authorizing official. It is hard to conceive of a commanding officer as a neutral magistrate when he consistently holds contraband-seeking searches, personally uses informants or engages in other search techniques which are the hallmark of police investigation. In most cases there is no reason why the commander cannot present his information to the local military judge 12/ or the next higher commander in order to obtain the proper search authorization. Thus, counsel should raise this issue where it appears viable, and should not hesitate to probe for weaknesses in the government's position when the search is sought to be justified by the authorization of a supposedly neutral commander. Indeed, one need not even reach the merits of the probable cause issue if the authorizing officer is not independent, neutral and detached from the business of actual criminal investigation.

THE NECESSITY OF RAISING TIMELY OBJECTIONS AT TRIAL

Defense waiver of valid errors at the trial level, by failure to object, has been a constant problem on appellate review. A number of doctrines have been developed to ameliorate unfair results. Such doctrines, however, should not lull defense counsel into falsely believing that waiver is dead. Quite recently, at least one panel of the United States Court of Military Review has served notice of its unwillingness to assume the role of parens patriae for appellants who had the misfortune of being represented at trial by counsel who "sat on their hands," when they should have been objecting. In United States v. Bucholtz, No. 428837, CMR (ACMR 29 March 1973, aff'd on reconsideration 19 April 1973) the Court relied upon an obscure Navy Board of Review case, United States v. Choleva, 33 CMR 599 (NBR 1962) (later ignored in United States v. Limbaro, 39 CMR 866 (NBR 1968), and ruled that the appellant was entitled to no sentencing relief for obviously multiplicitous charges, because the issue of multiplicity was not raised "in limine". By applying the doctrine of waiver, the Court ignored numerous holdings by the Court of Military Appeals, and its own previous

12/ See Chapter 14, Army Regulation 27-10, "Military Justice," Change 9, 19 July 1972

decisions. 1/ Although Bucholtz was a guilty plea case, the Court chose to place the burden of ascertaining the correct maximum punishment on the shoulders of the trial defense counsel, refusing to recognize the sua sponte duty of the military judge to advise the accused of the proper maximum. 2/ Bucholtz is probably bad law, which other panels of the Court have recently refused to follow. United States v. Nelson, No. 429318 (ACMR 23 May 1973). However, the decision now stands as law for at least one panel of the Army Court of Military Review and warns that failure of trial defense counsel to point out multiplicity of charges for sentencing 3/ purposes may serve to deprive their clients of meaningful reassessment of their sentences on appeal.

The tendency to resurrect the doctrine of waiver is not limited limited to the area of multiplicity. In United States v. Brassell and Pinkney, No. 429183, CMR (ACMR 25 April 1973), appellate defense counsel pointed out improper cross-

1/ United States v. Stein, 20 USCMA 518, 43 CMR 358 (1971); United States v. Schwartz, 19 USCMA 431, 42 CMR 33 (1970); United States v. Pearson, 19 USCMA 379, 41 CMR 379 (1970); United States v. Murphy, 18 USCMA 571, 40 CMR 283 (1969); United States v. Payne, 12 USCMA 455, 31 CMR 41 (1961); United States v. Welch, 9 USCMA 255, 26 CMR=35 (1958); United States v. Simpson, 42 CMR 683 (ACMR 1970); United States v. Kavic, 41 CMR 694 (1970).

2/ United States v. Turner, 18 USCMA 55, 39 CMR 55 (1968); Cf. United States v. Posnick, 8 USCMA 201, 24 CMR 11 (1957).

3/ It should be noted that the Army Court of Military Review has not applied waiver in cases where there was multiplicity for charging rather than sentencing. See United States v. Walters, No. 428613 CMR (ACMR 23 Mar 1973) where the Court ordered that assault charges which were lesser included in robbery charges, also alleged, be dismissed. See also United States v. Wright, S8250 (ACMR 25 April 1973) where the Court dismissed some multiplicitious charges and noted: "when overcharging reaches the point of unreasonable vindictiveness, as here, the charges should be thinned out even though they are not technically multiplicitious," citing United States v. Peak, 44 CMR 658 (CGCMR 1971).

examination and argument by the trial counsel. Although the subject of discharges had not arisen on direct examination, on cross-examination the prosecutor gained admission from the appellants that they had previously unsuccessfully applied for Chapter 10 discharges of an "undesirable" nature. Later, during his sentencing argument, the trial counsel capitalized upon these admissions, using them as a springboard to argue that the appellants did not desire to be retained in the Army. ^{4/} The Court stated: "The pertinent cross-examination was not in amplification of any evidence that either appellant previously gave or in rebuttal to any claim the defense raised. Trial counsel's taking the initiative to delve into Chapter 10 requests by appellants is similar in import to the prohibited similar delving into the existence of a pretrial agreement with the convening authority, see United States v. Massie, 45 CMR 717 (ACMR), pet. denied, 45 CMR 928 (1972), or into concessions made in connection with a prior, rejected plea of guilty, see United States v. Daniels, 11 USCMA 52, 28 CMR 276 (1959). A rule which attaches the possibility of future detriments to an accused's entering into negotiations about the disposition of charges is not a good rule for administering criminal law. Further, the way a convening authority views the seriousness of a case is not to be put before the sentencers by trial counsel, United States v. Crutcher, 11 USCMA 483, 29 CMR 299 (1960), and inferences along these lines may be drawn from denial of an accused's request for discharge under Chapter 10.

Even though error occurred, we grant no relief because of it. Trial defense counsel sat passively when he should have been objecting. Ordinarily, failure to object at trial does away with any necessity for military appellate courts to take cognizance of an error."

The cases discussed suggest that the Army Court of Military Review may invoke "waiver even in circumstances far beyond its traditional meaning as "the intentional or voluntary relinquishment of a known right" Black's Law Dictionary (Fourth Ed). Cf. Johnson v. Zerbst. 304, U.S. 458 (1937). Implicit in these opinions is the suggestion that trial defense counsel are expected

^{4/} While objections to argument may be made after close of the statement rather than interrupting opposing counsel, important objections should not be postponed until the completion of argument when it may be too late. When the issues permit, objections should be made out of the hearing of the Court members at an Article 39a session, thereby avoiding possible prejudice if the objections are denied.

to display an especially high standard of competency in protecting the record for appeal, under pain of forfeiting their clients' rights to raise those issues in the appellate forum. Collaterally, the future direction of the Court may be to treat failure by trial defense counsel to object to obvious defects in the trial proceedings, contrary to their clients' best interests, as ineffective representation of counsel. Consequently, to avoid adverse results counsel should follow this rule-of-thumb: Don't waive it, Object? 5/

5/ Just prior to publication of this issue of THE ADVOCATE, the Army Court of Military Review in United States v. Sloan, 428524 (23 May 1973) again invoked the waiver doctrine to dispose of a denial of speedy trial motion raised for the first time on the appellate level. Noting violations of both Article 10 and 33, UCMJ and pre-trial confinement for 125 days, the Court stated:

"All that a defendant need do is assert the existence of an issue, cite the basis for their motion, and then the burden falls upon the Government to justify any delay. This does not appear to be an unreasonable requirement - that is - if an accused desires to complain of the failure of the Government to proceed with diligence -- as a minimum, he should complain." (M/S Opinion, United States v. Sloan, p. 7-8.)

It should be noted also, that the tenor of this opinion as a whole does not detract from the substance of the following note - the Court looked with disfavor upon the delay, however, and invoked the "raise it or waive it" rule because the record failed to reveal "manifest injustice."

SPEEDY TRIAL RESURRECTED?

Two recent decisions of the Army Court of Military Review may have breathed new life into the guidelines originally promulgated in United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971). In United States v. Boyd No. 427609 (ACMR 27 Feb 73) the Court dismissed all charges for a five-month delay in the accused's trial on original and additional charges. Of particular concern was a sixty-six day period consumed by the Article 32 investigation attributed primarily to completion and mailing of laboratory analysis from Fort Gordon, Georgia (on a marijuana possession charge) and the investigating officer's desire to obtain personal testimony of a witness, to which the defense had previously agreed to stipulate. Notably, defense counsel in this case had formally requested in writing that the government expedite both the Article 32 investigation and the trial date.

Of equal significance was the 138 day pre-trial delay (107 in confinement, 31 under restriction) in United States v. Stevenson No 428961 (ACMR 19 Mar 73). Again the primary government villain in the delay was the Article 32 investigating officer who had the file for sixty-eight days prior to his final report, a period of time during which "he evidenced more concern with the preparation and perfection of additional charges rather than with his duty to inquire into the charges which had already been preferred."

These two decisions bring to light another trial tactic that appears to take place with undue frequency., - the lengthy stipulated chronology of events. Initially, it is recognized that a chronology can be a handy tool when used to succinctly clarify uncontested pre-trial procedural matters. All too often, however, counsel and the accused may stipulate away a viable bar to trial by unelaborated agreements which attribute periods of delay to investigation, preparation of pre-trial advice, and awaiting laboratory reports. It must be remembered that upon motion to dismiss for denial of an accused's right to a speedy trial, a burden is imposed upon the government to justify their reasons for delay. In numerous cases careless and inefficient processing of charges is masked by stipulation. Probing cross-examination of persons responsible for pre-trial procedures, to include commanding officers, investigating officers, and any other responsible parties may often reveal incompetence or a lack of appropriate concern for the seriousness and urgency of courts-martial processing. These factors may be as important to your client as an attempt to show prejudice engendered by delay.

Two other factors deserve mention. First, many jurisdictions now have local regulations establishing prescribed periods of time in which the processing of courts-martial is required to be completed. Violation of these time limitations alone is probably not sufficient to carry the motion in favor of the defense, however, they will pose an important consideration. Introduce copies of these regulations as an appellate exhibit! Secondly, judicious, but more frequent use should be made of the demand for immediate trial. Again, such requests should be directed to the responsible officials in writing. Copies and any responses thereto should be submitted as appellate exhibits.

The United States Court of Military Appeals has agreed to hear three cases involving the issue of speedy trial within the past month. United States v. Stevenson, No. 26,931, cert. granted 18 Apr 73 (138 day delay): United States v. Marshall, No. 26,821, pet. granted 1 May 73 (122 day delay): United States v. Gray, No. 26,814, pet. granted, 1 May 1973 (122 day delay).

It is hoped that a clarification of that Court's uneven treatment of speedy trial cases during the 1971 - 1972 term will be forthcoming. THE ADVOCATE will discuss the treatment of these issues upon decision.

TRIAL DEFENSE COUNSEL'S DUTY TO PROTECT HIS CLIENT
AGAINST UNREASONABLE POST-TRIAL DELAY

THE ADVOCATE has often emphasized the continuing duty of the trial defense counsel to represent his client's interests even after sentence has been adjudged. 1/ This duty is particularly important in cases which will not be reviewed by the Court of Military Review, and during the hiatus between trial and forwarding of the record of trial for appeal of those cases which will be reviewed. Since Article 70, Uniform Code of Military Justice provides for appointment of appellate defense counsel only after a case has been received for appeal, trial defense counsel may well be the only attorney to whom a client may turn for the preservation of his post-trial, pre-appeal rights.

One of the most frustrating problems facing appellate defense counsel is the effect of a post-trial delay upon the client's appellate rights. Often the client will have served the entire confinement portion of a sentence before the record is received for review. In these instances, further sentence relief may be rendered meaningless. Moreover, there are often errors in the records in such cases which should be presented to the appellate courts for speedy resolution so that the client's liberty may be achieved at the earliest possible opportunity.

Trial defense counsel should be particularly sensitive to the possibility of unreasonable delays in the review process. These normally occur between the date of trial and the convening authority's action. During that period the client is usually in confinement awaiting action on his case, which may be months away due to the government's negligence or inefficiency in handling the review of the record. Counsel should also beware of the possibility that someone in the reviewing process may seek to insure that the accused has served a portion of confinement before forwarding the case for further appellate review, thus insuring punishment of a client whose case may well be reversed on appeal.

Until recently, unreasonable post-trial delays were attacked at the appellate level, with counsel urging dismissal of the charges because of the delay, especially where the case contained other errors meriting relief. 2/ The Court of Military Appeals

1/ See, e.g., Post-Findings Duties of Trial Defense Counsel, THE ADVOCATE, No. 4 at 89 (April-May 1971); Advising Your Client About the Disciplinary Barracks, 1 THE ADVOCATE, No. 6 at 4 (August 1969); Appellate Procedure in the Army, 1 THE ADVOCATE, No. 5 at 4 (July 1969); Post-Trial Duties of the Defense Counsel, (continued).

has indicated in United States v. Timmons, 3/ however, that dismissal is not assured as a remedy. In Timmons the Court refused to disturb what it termed an otherwise valid conviction solely because of unreasonable post-trial delay, even though it found other errors in the record of trial. The remedy was correction of the other errors by the Court of Military Review, rather than the sought-after dismissal. This procedure has been followed by the Court of Military Review.^{4/} Thus, based upon the result in Timmons, the appellate remedy for post-trial delay is at best uncertain, and at worst nonexistent. The Court of Military Appeals might still be willing to reverse and dismiss charges in isolated cases involving particularly heinous violations of the accused's rights.

Despite Timmons, however, there is hope that the accused's appellate rights can be protected while he is in jail and his record of trial languishes in the hands of a court reporter or staff judge advocate. In Rhoades v. Haynes,^{5/} the Court of Military Appeals granted a Petition for Extraordinary Relief filed by a civilian trial defense counsel who alleged that the appellate process had been stymied by an unreasonable post-trial delay. Finding a "prima facie case of inordinate delay" (four months between trial and authentication) the Court ordered the convening authority to file a copy of his action with the Court within a two-week period. Significantly, the Court indicated in Timmons that the extraordinary writ remedy is the way in which

Footnote 1 continued/ 1 THE ADVOCATE, No. 1 at 4 (March 1969).

2/ See United States v. Samuels, No. 424596 (ACMR 28 April 1971); United States v. Rambow, No. 422878 (ACMR 17 December 1970), finding a "flagrant disregard" of the accused's appellate rights. Cf. United States v. Richmond, 11 USCMA 142, 28 CMR 366 (1960).

3/ 22 USCMA 226, 46 CMR 226 (April 13, 1973).

4/ United States v. Wright, S-8250, ___ CMR ___ (ACMR 25 April 1973).

5. 22 USCMA 189, 46 CMR 189 (March 16, 1973).

the Court would "terminate the delay itself, upon timely request for relief." Thus, it is clear that trial defense counsel have the obligation to monitor the post-trial progress of their cases and to seek appropriate relief if necessary. This duty is implicit in Standard 8.2(b) of the American Bar Association Standards Relating to the Defense Function, incorporated into military practice by Appendix H, DA Pam 27-9, "Military Judges' Guide," Change 4, 9 January 1973.

In order to obtain relief from an oppressive post-trial, pre-action delay, counsel should initially have the accused make a written demand for timely action. It should be directed to the convening authority, through the staff judge advocate. If a reasonable response is not received in timely fashion, or if action is not taken within what counsel considers to be an appropriate period under the circumstances, counsel should file a Petition for Extraordinary Relief on the client's behalf, with the Court of Military Appeals. Of course, counsel must use a common-sense approach to the length of time involved, and it would seem that a month's delay between trial and convening authority action would be reasonable in almost any case. However, after thirty days have passed, defense counsel should monitor the post-trial progress of the case, and should make the necessary demand if the period of post-trial delay becomes unreasonable. In determining what is unreasonable, counsel should consider the number of trial days, the length of the record, the length of the adjudged sentence, possible complications in preparing the post-trial review, and the existence of legal or factual errors meriting appellate consideration.

Counsel should be particularly wary of excuses offered by the government that there are too few court reporters, that the office is overworked or that other government-controlled factors have caused the delay. Remember that the government (.i.e., staff judge advocate, trial counsel, etc.) has the obligation in all events to review records and forward them for appeal within a reasonable time. If the government needs more attorneys, court reporters or other "processing" personnel, it should hire them; that is the government's obligation, and counsel should not be deterred from seeking relief based solely on "workload" claims. Significantly, such excuses in post-trial delay cases have not been upheld. 6/

6/ See United States v. Thomas, S-8156 (ACMR 11 October 1972); United States v. Bracmort, No. 428663 (ACMR 12 April 1973).

In cases which are not within the potential jurisdiction of the Court of Military Appeals ^{7/} counsel should seek relief through complaints brought under Article 138, Uniform Code of Military Justice, alleging a violation of the accused's appellate rights by reason of unreasonable post-trial delay. Counsel should also be aware of the provisions of Article 98, UCMJ providing a criminal sanction against those who unnecessarily delay disposition of an accused's case. The wording of Article 98(1) implies that even a negligent delay may be punishable under the Code, and the Court in Timmons, supra recognized that this remedy is "one means of insuring against unnecessary delay in the disposition of a case." However, as a practical matter, defense counsel should exercise caution in preferring charges against those responsible for appellate delays, and should insure that all other remedies have failed. Finally, counsel contemplating preferment of charges should see to it that an offense is provable under Article 98 before proceeding.

Assistance in preparing pleadings to the Court of Military Appeals and advice on the issue of post-trial delay may be obtained from the Chief, Defense Appellate Division. Hopefully, by energetic insistence on speedy post-trial processing, the trial defense counsel will be able to protect his client's appellate rights, the breach of which might otherwise be without remedy.

7/ See Article 67, Uniform Code of Military Justice

CAUTION!

In a recent issue (Vol 4, No. 4 at 81) THE ADVOCATE addressed the problem of discussing matters "off the record" with the military judge, either within or without the accused's presence. Despite that warning, appellate defense attorneys have noted an increasing number of cases in which "off the record" conferences have been held to discuss requested instructions, with the parties going "on the record" to either re-enact the out-of-court procedure or merely to announce the resulting agreed upon instructions. Counsel should avoid these conferences, and should insist that all matters touching on the substance of the case be discussed "on the record." Counsel should insure that their views on the judge's instructions are preserved for scrutiny by the appellate courts. Failure to fully record discussions on instructions may obscure the true scope of a military judge's instructional errors and, additionally, may permit the United States to argue that defense counsel waived issues or failed to request necessary special or clarifying instructions.