

THE ADVOCATE

A JOURNAL FOR
MILITARY DEFENSE COUNSEL

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EDITORS' NOTE

Dunlap v. Goode: An Unnecessary Choice

In a great majority of the cases received by the Defense Appellate Division, trial defense counsel have failed to make full use of the opportunities afforded them by the decision in United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975). In Goode the Court directed that:

...[A] copy of the written review required by Article 61 or 65(b), UCMJ, 10 USC Section 861 or 865(b), be served on counsel for the accused with an opportunity to correct or challenge any matter he deems erroneous, inadequate or misleading, or on which he otherwise wishes to comment. Proof of such service, together with any such correction, challenge or comment which counsel may make, shall be made a part of the record of proceedings. supra at 370, 50 CMR at 4.

Clearly, defense counsel should insist on a full five days in each and every case in order to most effectively represent their client. Needless to say, maximum profitable use should be made of these five days.

In the exercise of this five day period, counsel should be aware of another problem that may arise. An increasing number of cases are being received at the appellate level within which the mandate of Goode has been violated, circumvented or massaged in order to "comply" with the Dunlap rule. It unfortunately appears that some defense counsel, through a lack of understanding or of will, are surrendering the military due process rights of their clients for little or no reason.

The United States Court of Military Appeals in Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974), stated that:

A presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial. In the language of Burton, "this

presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed." [citations omitted] Id. CMR at 754.

In a footnote to Goode, the Court explicitly noted that:

"Compliance with this requirement will not be sufficient cause to extend the 90-day period in cases subject to the rule established in Dunlap..."

Logic would indicate that a staff judge advocate must serve the trial defense counsel by the 85th day if he is to preserve an opportunity to meet the Dunlap mandate. This leaves the question: "What occurs or should occur when the Goode service is not made until after the 85th day?"

Clearly, both Dunlap and Goode represent the United States Court of Military Appeals' enunciation of minimum standards for military due process. Each mandate presents the accused with a right; in Dunlap, a right to proper convening authority action within 90 days; and in Goode, a right to a five day period prior to action within which his trial defense counsel may correct or challenge any erroneous, misleading or inadequate matter within the review or on which he otherwise wishes to comment.

It should be clear to trial defense counsel that full use should still be made of the 5 day rebuttal/comment period made available by Goode, even if the Dunlap period has nearly run. In an analogous situation, the Army Court of Military Review has held that if an accused asserts his 5 day waiting period prior to trial under Article 35, he neither loses his Burton right nor is accountable for the 5 day delay. See United States v. Howell, 49 CMR 394 (ACMR 1974) and United States v. Pergande, 49 CMR 28 (ACMR 1974). This same rationale applies to the Dunlap-Goode situation and insistence upon the full five days provided by Goode will not foreclose a Dunlap argument.

The trial defense counsel should never yield up his five day right when there is a cognizable comment that he can present to the convening authority. Goode provides five days in order to allow careful examination of the record and, if necessary, a detailed and carefully prepared rebuttal. Goode also allows trial defense counsel to present other matters on which he "otherwise wishes to comment." Goode, supra. A defense counsel's reliance on a fundamental right of military

due process is a proper course of conduct on behalf of the client. See United States v. Pergande, supra. See also Code of Professional Responsibility, Disciplinary Rule 7-101. In this situation the trial defense counsel should definitely use the full five day period to provide a rebuttal and/or a comment. Numerous areas of potential criticism are available within the staff judge advocate review. See The Army Lawyer, DA Pam 27-50-38 at 16 (February 1976) and THE ADVOCATE, Vol. 7 No. 3 at 12. Also, comment upon the case or the client can form the basis of a full use of the 5 day period.

It is difficult to imagine a trial defense surrendering to the rare instance of pressure, either actual or perceived, that may occur in this area. Any instance of pressure, either express or implied, should be documented and brought to the attention of your superiors in the defense chain and the Defense Appellate Division.

Where the trial defense counsel is never served with a copy of the review, counsel should object in writing to the Convening Authority on the failure to comply with the requirements of Goode. It is obvious that the Government should not be permitted to profit from its failure to submit the post-trial review in a more timely fashion. Dunlap and Goode co-exist as protections for the client. Defense counsel should steadfastly resist any efforts to avoid sanction under one mandate by deliberate violation of the other.

* * *

ARTICLE 33 - NEW LIFE FOR SPEEDY TRIAL

Of note recently has been the apparent renewal of interest by the United States Court of Military Appeals in Article 33, UCMJ, as it may affect the law on the accused's right to speedy trial. The potential for enforcement of this long-dormant provision is indicated by the grant of petitions for review in United States v. Powell, No. 31,088, petition granted 6 November 1975 and United States v. Paige, No. 31,634, petition granted 5 March 1976. Advantage should be taken of this renewed interest on the part of COMA. This article will examine the previous judicial treatment of Article 33 violations, and offer some theories as to arguments which may be made by the defense counsel as he seeks to enforce this provision at the trial level.

The United States Court of Military Appeals has, on several occasions, noted the existence of Article 33 violations. Generally speaking, however, the Court has not seen fit to grant the

accused relief where the facts of the case reveal an Article 33 violation, but fail to show a denial of his right to a speedy trial under Article 10. A look at some of the prior case law will highlight the difficulties facing the trial defense counsel as he attempts to secure relief for his client on the basis of an Article 33 violation. Article 33 provides that:

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

While the language is clear, its treatment by the Courts has not been consistent. In United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959), a pre-Burton decision, Judge Ferguson, in setting aside a conviction because the law officer at trial required the accused to show prejudice from the delay in bringing him to trial, stated that "of course, an accused is not automatically entitled to a dismissal of all charges against him. Rather, the law officer must decide, from all the circumstances, whether the prosecution has proceeded with reasonable dispatch." Id at 28 CMR 69. In the more recent case of United States v. Mason, 21 USCMA 389, 45 CMR 163 (1972), the Court, in reversing the Army Court of Military Review and ordering dismissal of the charges, again focused on the violation of both Article 10 and 33. Although pointing out that it did not base its result "on the sole basis of a failure to observe the requirements of Article 33," the Court did discuss the article in great detail. The Court stated:

It is noted that the requirements of Article 33 are patently mandatory and only require interpretation with respect to the meaning of the term "practicable".
45 CMR at 167.

The Court defined the term "practicable" as "capable of being put into practice, done or accomplished."

In the earlier case of United States v. Tibbs, 15 USCMA 350, 35 CMR 322 (1965), the Court stated:

Assuming for the purpose of this appeal that the eight day period starts to run from the moment of confinement, the failure to report to the general court-martial authority on the impracticability of forwarding the charges is not ground for reversing an otherwise valid conviction, if satisfactory reasons actually appear in the record of trial. 35 CMR at 329.

Despite a failure to reverse a conviction, the Court has remained cognizant of the existence of Article 33. In United States v. McKenzie, 14 USCMA 361, 364, 34 CMR 141, 144 (1969) the Court noted that "...Article 33 has been observed more often in the breach than in following its clear terms." Although giving no relief for an Article 33 violation, the Court of Military Appeals couched its reference to the article in terms of an exhortation of the prosecution to conform to the Congressional mandate of Article 33 by suggesting that "the attention of all concerned with the processing of court-martial matters be forcibly drawn to its unambiguous command." Id at 144. This same admonition was reiterated in United States v. Weisenmuller, 17 USCMA 636, 38 CMR 434 (1968).

If it can be said that the Court is unhappy with the continual violation of the clear mandates of Article 33, yet has thus far failed to grant relief for such violations absent an additional finding of denial of the accused's right to a speedy trial, the meaning of the recent grants of review becomes an important question. Unfortunately, at this time that answer falls within the realm of the speculative. As defense counsel, we can only hope that the forthcoming decision in United States v. Powell, supra, a case argued before USCMA on 9 January 1976, will be instructive.

In Powell, charges were not formally preferred until thirty-seven days after the accused's restriction. The Article 32 investigation and report were not completed and forwarded until some 109 days after the accused was placed in restriction. Trial was not held until a total of 191 days had elapsed. At trial, defense counsel appropriately moved for dismissal of charges arguing denial of speedy trial. The military judge denied the motion. Appellant's conviction was affirmed by the Army Court of Military Review. COMA, however, granted review on both the speedy trial issue, and on Article 33 violation (which was raised for the first time on appeal as an independent ground of relief). In Powell, therefore, there is the traditional combination of the alleged violation of both Article 33 and Article 10. Attempts were made by appellate defense counsel to separate the two violations, and to argue that both were independent grounds for relief. Appellate Government counsel, in their response, argued, first, that no relief was warranted for an Article 33 violation absent a showing

of a denial of speedy trial and, secondly, that dismissal of charges is far too severe a remedy for an Article 33 violation.

It is urged that, pending a decision in United States v. Powell, supra, these two arguments can be effectively rebutted by the trial defense counsel. To insist on a finding of an Article 10 violation as a prerequisite for relief is to effectively read Article 33 out of the UCMJ. If there is a violation of Article 10, dismissal is the remedy. If grounds for dismissal already exist, there is no need to concern oneself with Article 33. Congress enacted this provision as an integral part of the protection of the accused's right to a speedy trial. In the legislative hearings, in response to a question about protection against inordinate delays, Mr. Larkin, assistant general counsel in the Office of The Secretary of Defense at the time of the drafting of the Uniform Code of Military Justice, made the following statement:

Mr. Larkin. I also draw your attention to Article 33, which attempts to make a flexible time limit, where we set an 8-day time period is provided, wherein the article requires the commanding officer in general court-martial cases to forward the charges he has received against a man to the next higher echelon.

We put in there "if practicable" to take care of the exigencies which may not make it practicable but if he does not do it as you see he must report the reasons why he does not.

So I think the combination of 33 and 98 ^{1/} is pretty good assurance that the case will be speedily processed. [Hearings before Subcommittee of House Armed Services Committee, 81st Congress, 1st Session, on HR 2498, page 908].

It is clear, therefore, that Article 33 was intended by Congress to play an important role independent of the Article 10 protection. To hold, as have the Courts thus far, that one can violate Article 33 with impunity so long as he stops short of an Article 10 violation is to completely frustrate both the intent

^{1/}(footnote added) Article 98 subjects one who unnecessarily delays the disposition of a case to court-martial.

and the mandate of Congress. Defense counsel should forcefully make this argument to the military judge. As possible case support for this proposition, reference should be made to the grant of review in United States v. Paige, supra. In that case there is an alleged Article 33 violation, but no Article 10 violation; yet review was granted. While a grant of review obviously has little ultimate precedential value, United States v. Paige, supra, and United States v. Powell, supra, indicate that the USCMA is re-evaluating its requirement of a showing of an Article 10 violation before affording relief due to an Article 33 violation.

In response to an anticipated government argument that dismissal is an inappropriate remedy (in the course of which it is likely to be pointed out that, whereas Article 10 provided for dismissal as a remedy for its non-compliance, Article 33 makes no reference whatsoever to a remedy, 2/) defense counsel can argue that Congress did not enact this provision to see it violated. That would be an exercise in futility. If Article 33 is to have any efficacy, some relief must be afforded in cases of non-compliance. That relief, in the absence of a clear directive from Congress, must be fashioned by the judiciary. It should be noted that the language of the Article is unambiguous and, more importantly, easily complied with. See United States v. McKenzie, supra, and United States v. Weisenmuller, supra. If the charges and investigatory papers cannot be forwarded within eight days, all the commanding officer need do is report in writing why this was impracticable. This is such a simple task that the continued failure to do so can only be seen as flagrant disregard of the UCMJ. Efforts should be made to make the military judge aware of the need to prevent such an attitude from developing.

Moreover, it should also be noted that, in the matter of post-trial delay, Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974), set forth dismissal as the remedy for failure to afford the accused speedy post-trial disposition of his charges, even though there was no explicit provision in the Code warranting dismissal as a remedy. The same remedy could be imposed for non-compliance with Article 33. If it became known that failure to comply with Article 33 would result in dismissal, it can safely be said that commanders would discover how easy compliance is, and more importantly to accused, the cases would be processed that much more expeditiously.

It is clear, however, that little can be said about Article 33's impact upon the accused's right to a speedy trial

^{2/}Such an argument was made in United States v. Powell, supra.

until USCMA's decision in United States v. Powell, supra. As defense counsel, however, it is imperative that advantage be taken of the Court of Military Appeals' renewed interest. The determination of whether an Article 33 violation has occurred is relatively simple. Certain questions must be answered. Has the accused been held for a general court-martial? Has he been ordered into arrest ^{3/} or confinement? If so, on what date? Were the charges and investigatory reports forwarded to the general court-martial convening authority within eight days of the accused's arrest or confinement? Lastly, if not, was there a written explanation given the convening authority? The answers to these questions are readily ascertainable by reference to the charge sheet or by interviewing the commanding officer.

Armed with this knowledge, the defense counsel can determine whether or not a violation has occurred and move for enforcement of Article 33 as an independent ground for dismissal of charges against the accused. This relatively simple procedure will preserve the Article 33 right for the accused on his appeal. Pending disposition of Powell and Paige, a trial defense counsel should do no less for the client.

* * *

ARTICLE 33 - A DIFFERENT APPROACH

As noted in the above article, Article 33 has historically been viewed in conjunction with Article 10 as one element in the determination of the reasonableness of the entire period of delay during pretrial confinement. Although forcefully condemned by appellate courts, Article 33 is nevertheless violated with impunity by those responsible for the pretrial processing of court-martial charges. Such utter disregard must inevitably give way to a recognition that Congress did not create a right without a remedy. Perhaps a separate remedy has been slow in appearing because the remedy of dismissal applied in cases of Article 10 violations appears extreme for a violation of Article 33. For that reason a different remedy is proposed herein which would give the courts a less drastic, but nonetheless beneficial means of enforcing Article 33.

In a case argued recently before the Army Court of Military Review, United States v. Leggs, an innovative trial defense counsel proposed a new approach to the difficult problem of finding a

^{3/} See United States v. Williams 16 USCMA 589, 37 CMR 209 (1967) and United States v. Smith, 17 USCMA 427, 38 CMR 225 (1968) wherein restriction was held to be equivalent to arrest for speedy trial purposes.

remedy for violation of Article 33. The accused was held in pretrial confinement a total of 73 days before the charges, together with the investigation report and allied papers, reached the general court-martial convening authority. No written explanation was forwarded in justification of the failure to comply with the 8 day rule.

During an Article 39(a) session, defense counsel moved for dismissal of the charges because of a violation of Article 33. However, rather than basing his motion upon the strict speedy trial aspect of Article 33, the thrust of his argument was that a violation of Article 33 was also a violation of Article 32. This position finds support in the Court of Military Appeals decision in United States v. Marshall, 22 USCMA 431, 47 CMR 409 (1973), wherein the Court of Military Appeals stated:

This 8-day reference evidences a congressional expectation that the Article 32 investigation and actions associated with it should normally be accomplished within 8 days, with an escape clause if the complicated nature of the investigation makes such speed impractical. 22 USCMA at 434, 47 CMR at 412.

Although the normal remedy for an Article 32 violation, because of the continuing nature of the defect, is to adjourn the proceedings to permit compliance with Article 32, after a violation of Article 33 compliance with Article 32 would be impossible. The remedy proposed by trial defense counsel in Leggs was not a complete dismissal of all charges, but rather foreclosure of trial of the case by general court-martial, or, at a minimum, a limitation of the maximum punishment imposable to that authorized in a trial by BCD special court-martial.

It is felt that the remedy proposed by the defense counsel at trial is both legally sound and workable. It has long been held that although Article 32 is nonjurisdictional in nature, [United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955)], and that defects in the investigation do not result in reversal in the absence of substantial prejudice to the accused [United States v. Mickel, 9 USCMA 324, 26 CMR 104 (1958)]; nonetheless, upon timely objection prior to trial on the merits, Article 32 is strictly enforced. United States v. Donaldson, 23 USCMA 293, 49 CMR 542 (1975); United States v. Maness, 23 USCMA 41, 48 CMR 512 (1974); United States v. Courtier, 20 USCMA 278, 43 CMR 118 (1971); United States v. Mickel, *supra*. It is unquestioned that the Article 32 investigation is intended for the benefit of the accused, and is a substantial right which should be accorded to the accused. United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955). As was mentioned earlier, it was Congress' intent that

the Article 32 investigation be conducted within the eight days contemplated by Article 33, or that at least there be written justification of a failure to comply. This joinder of Article 32 and Article 33 has its basis in the fact that Article 33 was not intended solely for the purpose of speeding the entire pretrial processing of the case, but also was intended to provide the accused with an early opportunity to discover the evidence against him, and to allow him an opportunity to present any evidence that would warrant a dismissal of the charges at the earliest possible time.

Congress has determined that Article 33's procedural protections are required only in cases of trial by general court-martial. It is at that level that the accused stands to lose the most, and is, therefore, in need of more procedural safeguards. If the accused is denied these safeguards by a failure to follow the clear mandate of Congress, trial defense counsel should argue that the Government forfeits its right to try the accused in the forum in which these safeguards were deemed a prerequisite.

A close analysis of the language of Article 33 itself is supportive of the remedy of disallowing trial by general court-martial. Article 33 provides that:

"When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay." (Emphasis supplied).

The above-quoted language applies the 8 day rule only to those cases where the accused is held for trial by general court-martial. Impliedly, a failure to follow the mandatory language would constitute a waiver by the prosecution of its option of trial of the accused by general court-martial.

It should be noted, however, that viewed as a pretrial right, Article 32 must be specifically objected to at trial. United States v. Donaldson, supra. United States v. Dusenberry, 23 USCMA 287, 49 CMR 536 (1975). However, a recent Court of Military Appeals decision indicates that even with a plea of guilty, a violation of this pretrial right, if objected to, may be preserved on appeal. United States v. Engle, ___ USCMA ___, ___ CMR ___ (CMA No. 30,660, 9 April 1976).

This treatment of Article 33 as a pretrial processing motion should not detract from the traditional view of Article 33 as a speedy trial provision in conjunction with Article 10, but should be viewed as supplying an alternative remedy when appropriate. Article 33 properly plays a dual role, and both roles should be judicially enforced. While the courts have been reluctant in the past to enforce the speedy trial remedy for a violation of Article 33, there may be a greater willingness to enforce its application to Article 32 in supplying the accused an early discovery vehicle in serious (i.e. general court-martial) cases. In an appropriate case a motion could be made to dismiss all charges because of a violation of Article 33 or, in the alternative, request that the military judge either dismiss the charges without prejudice to the Government's right to re-refer the case to a special court-martial, or that he limit the maximum imposable punishment to that imposable by a BCD special court-martial.

* * *

THE EXPANDING ROLE OF A DEFENSE COUNSEL ON
DEFENDING A SEARCH CASE OVERSEAS

Several significant recent decisions have been rendered by both the United States Court of Military Appeals and the Army Court of Military Review in the area of the law of search and seizure to be applied in overseas courts-martial. All of these cases were tried in Europe, but the standards enunciated should be equally applicable in other overseas areas. Each case creates stricter standards to be employed to protect the individual defendant and, at the same time, expands the duties of the defense counsel to develop particular grounds for his objection at trial, and to "make his record."

The United States Court of Military Appeals on 12 March 1976 issued a decision upon reconsideration of its prior opinion in United States v. Jordan, 23 USCMA 525, 50 CMR 664 (1975). In the second Jordan decision, the Court, after a lengthy examination of the purpose underlying the exclusionary rule, determined that after 12 March 1976:

"whenever American officials are present at the scene of a foreign search or, even though not present, provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the Fourth Amendment as applied in the military community before the fruits of the search may be admitted into evidence in a trial by court-martial".
MS. op. 7

In doing so, the Court has expanded the rationale recently advanced in United States v. Schnell, 23 USCMA 464, 50 CMR 483 (1975), and repudiated the earlier standard advanced in United States v. Deleo, 5 USCMA 148, 17 CMR 148 (1954). The repudiation of the "silver platter" doctrine clearly inures to the benefit of the defense and, at the same time, requires more careful investigation by defense counsel as to whether any American presence or assistance was involved in the particular search. Obviously, more thorough questioning of both foreign and American officials as to the basis of the police action is required. Counsel will need to question each foreign official involved as to the basis of the search, be it an informant, a phone call, or any other form of communication from an American military source, in order to properly evaluate if the first factor in Jordan is triggered. If such can be discovered, the stricter Fourth Amendment standard applies as opposed to the law of the particular foreign country.

Further, even assuming no American participation, presence, or assistance can be found, Jordan provides the defense counsel with two additional bases for objection; each of which creates an additional obligation for the defense counsel. First, the Court adopted the dicta in United States v. Price, 17 USCMA 566, 38 CMR 364 (1968), to now require that a purely foreign search (as redefined in the first portion of the decision) must, in the face of defense objection, still be valid under the applicable law of the sovereign in question as a prerequisite for its admission into evidence. Ms. op. 8. Counsel clearly must specifically object on this particular ground, and be prepared, either through cross-examination of the government's expert on the applicable law of the host country, or through use of a recognized treatise or a defense expert, or both, to be able to demonstrate that the search was illegal under the standards of the host country. In addition, the Court held that the trial judge must satisfy himself that the foreign search does "not shock the conscience of the court" prior to admitting the evidence. Ms. op. 8. Counsel at this juncture must carefully and thoroughly demonstrate whatever gross disparities and/or "conscience shocking" differences between the standards of the host country and the Fourth Amendment may exist. Hopefully, preparation on the other two aspects of the Jordan decision will equip counsel with all the necessary material upon which to base this final argument, and "make the record" for the appellate court, if necessary. (Utilization of an Article 38c brief may be particularly useful in this instance).

The Army Court of Military Review in a recent series of decisions has reaffirmed the principles enunciated in United States v. Mitchell, 44 CMR 649 (ACMR 1971), affirmed upon

certification 21 USCMA 340, 45 CMR 114 (1972), that the existence of the USAREUR supplement to AR 190-22 places a stricter requirement upon the conducting of overseas searches than that imposed by paragraph 152 of the Manual. The Court of Review has determined that the Mitchell decision compelled the conclusion that, as the Army had chosen to implement this regulation and its supplements, then it must strictly adhere to each requirement of the regulation. See United States v. Juen and Panke, 51 CMR 149 (ACMR 1975). The Court has also ruled that searches authorized by someone other than those specifically designated in the regulation (i.e. commander of the support unit or activity, community or assistant community leader for the area where the property is located, or the commander exercising special court-martial jurisdiction over the individual in question) or a properly designated delegate, are invalid despite compliance with the more general guidelines of paragraph 152, Manual, supra or AR 190-22. United States v. Steed, 51 CMR ____ (ACMR 28 November 1975). Similarly, failure to coordinate the off-post search with the local police, as required by the USAREUR regulation, has led the Court to hold the search and seizure illegal. United States v. Carlton, 51 CMR ____ (ACMR 13 February 1976). At the present, other provisions of the supplement are being tested at the appellate level; counsel, therefore, should familiarize themselves thoroughly with the particular supplement controlling their overseas area. In all likelihood, each will be tied to the treaty between the host country and the United States, and each will generally track the same language as the supplement presently employed in Europe and discussed in the above cases.

It is imperative that counsel expressly and specifically note the basis for his objection, whether it be one of three factors in Jordan, or one of the various provisions of the local supplement to AR 190-22. Absent a specific objection (as opposed to a general motion to suppress the items seized), the appellate court may well conclude that the more specific basis urged for the first time on appeal is waived. See United States v. Wade, 51 CMR 205 (ACMR 1975).

As a final note, counsel should always evaluate the exact scope and ultimate impact of the tainted search. Objections to items subsequently seized, statements made by the defendant, and the like, may well be the proper subjects for exclusion under the doctrine of "fruit of the poisonous tree." While the Court has thus far allowed appellate counsel to raise this particular point for the first time on appeal, it is far better to litigate it at the trial forum. United States v. Carlton; United States v. Steed, both supra.

* * *

PLEADING GUILTY AND NEGOTIATING A PRETRIAL AGREEMENT

A defense counsel's recommendation that his client plead guilty and negotiate a pretrial agreement may, in the appropriate case, serve the best interests of his client. The defense counsel must, however, insure that the trial is not rendered an empty ritual (United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968)) and continue to represent the client's best interests. United States v. Welker, 8 USCMA 647, 25 CMR 151 (1958); United States v. Allen, 8 USCMA 504, 25 CMR 8 (1957). What is proposed in the following pages is a set of procedures that can be reliably employed by defense counsel with a view toward insuring that: (a) the client will have received the benefit of his bargain and will have taken the first step towards rehabilitation; (b) sufficient safeguards have been employed to insure that the client pleading guilty is in fact guilty; and (c) the client will not have bargained away any of his guaranteed rights in his pretrial agreement.

I. The Decision To Plead Guilty

The decision whether to plead guilty or contest a charged offense is probably the most important single decision in any court-martial case. When a defendant pleads guilty, he not only makes a judicial admission but he also relieves the government of their burden of proof - a burden which the prosecution may not satisfy when faced with the pressure of a vigorous defense. Ultimately, the definitive decision on how to plead must be left to the client's wishes. Defense counsel, however, must give the client the benefit of his professional advice on this decision. Paragraph 48g, Manual for Courts-Martial, United States, 1969 (Revised edition), hereinafter Manual.

A. Duty to Investigate

Defense counsel should endeavor to obtain full knowledge of all the facts of the case before advising his client. Paragraph 48g, Manual. The knowledge necessary for evaluation of the client's case can be obtained only through diligent, thorough research and investigation. Defense counsel's failure to adequately investigate prior to going to trial constitutes ineffective assistance of counsel. See United States v. Zuis, 49 CMR 150 (ACMR 1974) (defense counsel, inter alia, failed to investigate); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962) (defense counsel failed to investigate potential defenses); Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962) (defense counsel made only superficial investigation).

B. Duty to Consult

The defense counsel should confer with his client early and regularly. "The client himself is usually the lawyer's primary source of information necessary for an effective defense." Section 3.2(a) of ABA Standards Relating To The Defense Function. (Approved Draft 1971).

Defense counsel's failure to adequately consult with the client will often provoke the client's scorn and may ripen into a charge of ineffective assistance of counsel. The client will quite naturally lack confidence and trust in the attorney who recommends a plea of guilty without first explaining the effect of such a plea and the reasons why such a plea is appropriate in his case. The courts are skeptical of the counsel's competence when he sees his client only once, and then for only a few minutes before pleading him guilty. See United States v. Zuis, supra; Turner v. State, 303 F.2d 507 (4th Cir. 1962) (attorney first consulted with client five minutes prior to trial); Venable v. Neil, 463 F.2d 1167 (6th Cir. 1972) (attorney spent only ten minutes with the defendant).

C. Duty to Advise The Client

The defense counsel must advise his client fully and accurately. The client should be advised of his constitutional rights, the tactical choices available to him and the law applicable to his case.

Checklist of Preliminary Advice To Client

In order to insure that the client's decision regarding his plea is knowing and voluntary, defense counsel must explain to him the following:

1. The right to plead guilty, not guilty, or not guilty but guilty to a lesser included offense.
Paragraph 70a, Manual.
2. The meaning and effect of a plea of guilty.
Paragraph 70a, Manual.
 - a. The plea of guilty, if accepted, confesses his guilt and relieves the prosecutor of the burden of proving his guilt. Paragraph 70b, Manual.

- b. The plea of guilty is a judicial admission of every element, act, and omission alleged in the specification. Paragraph 70b, Manual.
 - c. The plea of guilty, if accepted, subjects the client to the maximum imposable sentence. Paragraph 70b, Manual.
 - d. The plea of guilty, if accepted, waives all defects which are neither jurisdictional nor amount to a denial of due process. United States v. Schalck, 14 USCMA 371, 34 CMR 151 (1964).
 - e. The plea of guilty, if accepted, waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by witnesses against him. United States v. Care, 18 USCMA 535, 40 CMR 247 (1969).
3. The right to plead not guilty even though the client believes he is guilty. Paragraph 3-1, DA Pam 27-9, May 1969 (Military Judge's Guide).
 4. The right to introduce evidence after entering a plea. Paragraph 70a, Manual.
 5. The right to testify or to remain silent. Id.
 6. The right to make an unsworn statement and to introduce evidence as to matters in extenuation and mitigation after findings are announced. Id.
 7. The right to assert any proper defense or objection. Id.

The foregoing explanations should be made regardless of the intentions of the accused as to testifying or as to how he will plead. Paragraph 48g, Manual.

D. Checklist of Factors Affecting the Decision to Plead Guilty

After obtaining full knowledge of the facts and law of the case, defense counsel should consider several factors in deciding whether to recommend that the client plead guilty. These include:

1. A strong prosecution case and the absence of a good defense, legal or factual. The decision to plead guilty obviously depends in large part on the client's chances of being convicted at trial upon a not guilty plea. Before deciding to recommend that the client consider a plea of guilty, defense counsel must first satisfy himself that the client's guilt on each specification and charge could be proved at trial beyond a reasonable doubt. In appraising the relative strength of the case for the prosecution and for the defense, counsel must consider:
 - a. The legal merit of the prosecutor's theory, and the convincing power of his legally admissible evidence to prove the facts on which that theory rests.
 - b. The likely availability of the prosecution's evidence at the time of trial.
 - c. Factors which may tend to impeach or discredit the prosecutor's witnesses or evidence (e.g. a witness' criminal record or prior inconsistent statements).
 - d. The legal merit of each possible defense theory, and the convincing power of the evidence to support it.

- e. The likely availability of the defense evidence at time of trial.
 - f. Factors which may tend to impeach or discredit defense witnesses or evidence.
2. The client's belief in his own guilt. Military judges will not accept a guilty plea unless an accused admits that he is pleading guilty because he is in fact guilty. Paragraph 70b(3), Manual. Consequently, unless the client is willing to renounce any claim of innocence in open court, he cannot plead guilty.
3. Circumstances that will tend to prejudice the trier of fact against the client, including:
- a. The nature of the offense (narcotics offenses, violent sex crimes, and crimes against children may be particularly abhorrent to court members and, to a lesser extent, military judges).
 - b. The sympathetic or abrasive character of the complainant, the client, and/or witnesses for the prosecution and defense.
 - c. Whether the client has a prior criminal record (if he does and he testifies it may be used against him and prejudice the trier of fact on findings).
4. The absence of debatable or dubious legal points relating to substantive or evidentiary matters on which the military judge might commit reversible error.
5. The absence of likely reversible error in pre-arraignment proceedings which defense counsel can "save" for appeal.
6. Consequences of conviction. No intelligent plea decision can be made without full understanding of the impact upon the client of each type of punishment imposable, e.g., discharge, confinement, reduction, and forfeitures.

7. The presence of a military judge who gives substantial consideration for a guilty plea in sentencing.
8. The presence of a relatively inexperienced trial counsel who may "bungle" the government's case when faced with the pressure of a vigorous defense.
9. Prospects for a favorable pretrial agreement.

Only if evaluation of the foregoing factors indicate that a plea of guilty is appropriate should defense counsel discuss with his client the question of a possible guilty plea. Otherwise, defense counsel is not fully prepared to tell the client what all of the advantages and disadvantages of a guilty plea will be.

E. Coercive Impact of Counsel's Advice as a Basis For Invalidating Defendant's Plea

Although obligated to advise his client, the defense lawyer cannot coerce a plea from the defendant. Appellate courts will set aside a conviction based on a guilty plea where the evidence shows that the lawyer overwhelmed the defendant with his advice and thereby deprived him of his right to choose. See United States v. Davis, 47 CMR 831 (NCOMR 1973) (defense counsel pressured defendant to plead guilty) and United States v. Zuis, supra. The defense counsel must, thus, be careful to offer his advice in a noncoercive manner. Peete v. Rose, 381 F. Supp. 1167 (W.D. Tenn. 1974) (lawyer's advice, while correct, was so strongly worded as to constitute a threat; defendant entitled to withdraw plea and to have new trial).

II. Negotiation Procedures

Standards of professional conduct generally require that defense counsel obtain the client's informed consent and permission before negotiating with the prosecution. Section 6.1(c) at 248 ABA Standards Relating to the Defense Function (Approved Draft 1971). If it is the desire of the client that defense counsel attempt to procure an agreement with the convening authority, the defense counsel is obliged to see that the client's wishes are conveyed to the convening authority. Paragraph 64g, DA Pam 27-10, August 1969. Normally, the client's desires will be made known to the staff judge advocate who will take appropriate action and notify the defense counsel of the convening authority's decision. Paragraph 64g, DA Pam 27-10, August 1969.

A. When Negotiation Should Begin

Generally, it is recommended that negotiation begin after the convening authority has made the judicial decision to refer a case to trial and has chosen the level of court-martial. See Della Maria, Negotiating and Drafting the Pretrial Agreement, 25 JAG. J. 117, 119. This procedure provides several advantages. First, the client knows exactly what he is faced with at this point in the proceedings. Second, the defense counsel is afforded sufficient time to fulfill his duty to investigate the case and explore possible defenses before offering to negotiate. Third, the defense counsel may still negotiate short of offering to plead guilty by offering extenuating or mitigating evidence to the convening authority before reference to trial in an attempt to reduce the charges or the level of court-martial or even to obtain administrative disposition. Fourth, if the defense counsel is concerned with "overcharging", he may, at an Article 39(a) session, test the reference to trial of the charges in question as being multiplicitious or contrary to Article 34. And fifth, this procedure provides the defense counsel with the opportunity to further clarify his bargaining position by resolving various collateral issues such as the admissibility of evidence at pretrial 39(a) sessions.

This recommended procedure may be compared with the situation where defense counsel attempts to bargain at earlier stages in the case, before adequate investigation and preparation. Such a practice poses the threat that the defense may surrender advantages needlessly, i.e., charges that would never have been referred for trial for lack of sufficient evidence. Negotiation prior to referral, however, does offer one important advantage. That advantage is that it is probably easier to negotiate the level of court-martial prior to referral. If defense counsel feels that he can obtain the substantial benefit of having the case referred to a lower level of court-martial, negotiation prior to referral is certainly warranted. There is the threat, however, that the case would have been referred to the lower level even without the offer to plead guilty. Consequently, before making such an offer the defense counsel should be convinced that the case would not be referred to the lower level sine qua non the offer to plead guilty.

B. Prosecution Offers to Negotiate are Suspect

Generally, when the prosecution seeks to negotiate a plea it is due to the fact that they have a weak case. Consequently, if the prosecution offers to negotiate, defense counsel should be on notice that there may be a defect in the government's case. Cases where the prosecution cannot prove the client's guilt beyond a reasonable doubt are inappropriate for negotiation and defense counsel should advise the client to reject any tempting concessions offered by the prosecution.

C. Conditions Precedent to Effective Negotiation

Thorough investigation must precede any serious negotiation. Defense counsel should have a comprehensive working knowledge of:

1. The identity of every lesser offense included within the offense charged against the client; and the maximum sentence imposable for each.
2. The identity of every other offense that might be charged against the defendant on the basis of the facts of the case, or on the basis of some of those facts; and the maximum sentence imposable for each.
3. The client's previous criminal and service record, including military and civilian convictions, Article 15's, and any suspended sentences which may still be vacated.
4. The present or potential financial resources of the client to make restitution to the complainant, in an appropriate case.
5. The client's ability and willingness to cooperate with the government by testifying in other cases.
6. The client's ability and willingness to confess guilt of uncleared offenses.
7. Any more or less formally articulated policies or procedures of the convening authority regarding plea negotiation.

8. Previous similar cases in which plea negotiations favorable to the defense have been worked out (argument from precedent may be very effective).
9. Previous sentences adjudged by military judges and court members in factually similar cases where the defendant pled not guilty. This information should be obtainable from the staff judge advocate's CMO and CMCO files. Defense counsel should strive for a bargain whereby the client will receive a sentence substantially less than that imposed in factually similar cases where the defendant pled not guilty. If previous sentences of a particular judge or panel of court members can be reviewed, this may be especially helpful.

D. Three Stages of Actual Negotiation

1. Alternative proposals.

Armed with the information derived from satisfying the "conditions precedent", the defense counsel should be prepared to propose various alternative agreements. Generally, the proposal will request the convening authority to do one or more of the following: (1) approve no greater sentence than that contained in the agreement; (2) reduce the charges to some lesser offense; and/or (3) dismiss some of the charges. The alternative proposals and arguments should be reduced to writing and arguments prepared on the merits of each.

2. Presentation of written proposals to the convening authority.

Generally, the written proposals will be presented to the convening authority through the staff judge advocate. Defense counsel should insist that all proposals to plead guilty, even those to which the staff judge advocate does not agree, should be presented to the convening authority for final determination. In a particularly complicated case where the defendant presents an unusually favorable visual and verbal impression defense counsel should consider requesting a

personal conference with the convening authority in order to best present the client and his proposal.

Ordinarily, it is undesirable for the client to be present during the actual negotiation. Although statements made during plea discussions by counsel cannot be used against the accused if he goes to trial, admissions made directly by the client might be admissible against him. Section 6.2 at 249, ABA Standards Relating to The Defense Function (Approved Draft 1971). If the client is present, either because he insists or because defense counsel considers it advantageous, he should be cautioned by counsel against making any statements that have not been carefully explored in advance. Because plea discussions are usually held without the client being present, defense counsel should communicate fully to his client the progress of the discussions. Section 6.2 at 249, ABA Standards Relating to The Defense Function (Approved Draft 1971). A common complaint of defendants on appeal is that their defense counsel failed to keep them informed. While this is usually a consequence of the lawyer's preoccupation with performing the more essential tasks rather than indifference, defense counsel must remember that the case is the client's case and he is entitled to know of the progress of the negotiations.

3. Drafting pretrial agreement.

After the bargain has been struck, it should be reduced to writing in final form, incorporating all areas of understanding. United States v. Brady, 17 USCMA 614, 38 CMR 412 (1968). The parties should then sign the agreement personally.

III. Avoiding the Pitfalls of Pretrial Agreements

Successful pretrial agreements enhance an accused's chances for rehabilitation by avoiding the contest of trial and shortening his conflict with society.

A. Three Basic Principles

Adherence to three basic principles will help ensure successful agreements: (1) the agreement must express all of the intentions and terms of the parties in clear and concise language; (2) the agreement must provide certainty in the event of various contingencies that may arise at trial; (3) the agreement must not require the client to waive any of his guaranteed rights.

1. Clear and concise terms

Defense counsel must use extreme care to ensure that the agreement explicitly expresses the parties intentions. United States v. Moore, 19 USCMA 274, 41 CMR 274 (1970). The terms must be clear and concise so that the military judge can fully explain them to the defendant and frame appropriate inquiries into the providence of the plea. [See Chief Judge Fletcher's concurring opinion in United States v. Elmore, 24 USCMA 81, 51 CMR 254 (1976) providing, inter alia, that such an inquiry is required as part of the Care (18 USCMA 535, 40 CMR 247 (1969)) inquiry].

2. Providing for contingencies

Failure to provide for the various contingencies that may arise at trial may result in the client losing the benefit of his bargain or the application of a rule of construction the effect of which may be detrimental to the client. Most contingencies can be anticipated and provided for by considering the following factors:

- a. The great majority of contingencies may be eliminated by having proposed agreements cover each of the four types of court-martial punishments - discharge, restraint or confinement, reduction, and forfeitures.
- b. Defense counsel should attempt to negotiate an agreement with the convening authority whereby the convening authority agrees (1) to consider the

agreed sentence as separate and divisible limitations on each category of punishment, and (2) not to change the nature of the sentence adjudged pursuant to paragraph 88c of the Manual until after reducing it in accordance with the pretrial agreement. Such a provision has the effect of limiting the approved sentence in each category of punishment to the agreed sentence or the adjudged sentence whichever is less. See United States v. Monett, 16 USCMA 247, 36 CMR 335 (1966) and United States v. Brice, 17 USCMA 336, 38 CMR 134 (1967), where no such provisions were included in the agreement. This is consistent with the client's usual understanding and expectation of the agreement.

- c. Defense counsel should anticipate the possibility of the military judge rejecting the plea as to the charged offense but accepting it as to a lesser included offense. If such a situation may arise it might be advisable for the agreement to provide for alternative sentences; one to be applied if the plea to the charged offense is accepted and the other, a lesser sentence, to be applied if the plea is accepted as to a lesser offense.
- d. In the situation where there are multiple charges, defense counsel should anticipate the possibility of the military judge rejecting the plea as to some of the charges and accepting it as to others. As discussed above it might be advisable for the agreement to provide various alternative sentences with the application of a particular alternative depending on which pleas are accepted.

3. Consideration in addition to client's plea of guilty

Defense counsel will serve the best interests of their clients by ensuring that none of the client's guaranteed rights are bargained away as consideration for a pretrial agreement. The general rule is that

the client's consideration is limited to his plea. United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968). An accused cannot be required as part of the consideration for a pretrial agreement to:

- a. Waive the presentation of motions such as lack of jurisdiction, double jeopardy, denial of speedy trial, or denial of due process; United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968) (speedy trial and due process motions); United States v. Banner, 22 CMR 510 (ABR 1956) (lack of jurisdiction due to discharge); United States v. Troglin, 21 USCMA 183, 44 CMR 237 (1972) (double jeopardy and speedy trial);
- b. Waive the presentation of extenuation and mitigation evidence; United States v. Callahan, 22 CMR 443 (ABR 1956);
- c. Waive any other guaranteed right. United States v. Darring, 9 USCMA 651, 26 CMR 431 (1958) (provision waiving counsel before board of review and agreeing not to petition USCMA); United States v. Showalter, 39 CMR 377 (ABR 1968) (provision waiving credit for post-trial confinement on rehearing); United States v. Cartham, 33 CMR 531 (ABR 1963) (conditioning agreement upon advancing trial date, prejudicing defense witness presentation).

A possible exception to the general rule that consideration is limited to the guilty plea is in the area of agreements to testify in other cases. A defendant's promise in a pretrial agreement to testify does not invalidate the agreement. United States v. Safford, 40 CMR 529 (ABR), reversed on other grounds, 19 USCMA 33, 41 CMR 33 (1969). In performing his duty to represent the best interests of his client, defense counsel may explore the client's willingness to make such an agreement.

B. Duty to Continue to Vigorously Defend Client

Courts have made it clear that once defense counsel has negotiated an agreement, counsel must continue to vigorously represent the client and present the most favorable sentencing evidence in extenuation and mitigation. See,

e.g., United States v. Welker, 8 USCMA 647, 25 CMR 151 (1958); United States v. Allen, 8 USCMA 504, 25 CMR 8 (1957). Appellate courts may require a sentence rehearing, if defense counsel lessens his diligence in representing his client. See, e.g., United States v. Broy, 14 USCMA 419, 34 CMR 199 (1964); United States v. Hamilton, 14 USCMA 117, 33 CMR 329 (1963).

C. Suspended sentences.

Pretrial agreements providing for the suspension of all or part of the sentence must not provide for suspension period which is unreasonably long. Paragraph 88e(1), Manual. Suspensions may not extend beyond the period of the current enlistment or period of service. Para. 88e(1), Manual. The suspension may extend beyond the length of confinement. United States v. Varnado, 7 USCMA 109, 21 CMR 235 (1956). The agreement should provide for automatic remission upon completion of the period. Paragraph 88e(2)(a), Manual. Although provisions setting forth terms of probation during the period of suspension have been upheld (United States v. Lallande, 46 CMR 170 (1973); United States v. Joyce, 46 CMR 180 (1973)), defense counsel should resist such provisions and limit the client's consideration to his guilty plea. If the convening authority insists on having the agreement set forth probation terms, the agreement should clearly set forth the defendant's entitlement to a vacation proceeding pursuant to Article 72 of the Uniform Code of Military Justice, paragraph 76b of the Manual, and DA Message 1972/12992.

D. Stipulation of facts.

The convening authority may require, in conjunction with a pretrial agreement, a stipulation of facts establishing the elements of the offenses. See, e.g., United States v. Gerlach, 16 USCMA 383, 37 CMR 3 (1966). He may not, however, require a stipulation that relates the facts more unfavorably than necessary. See, United States v. Shields, 40 CMR 546 (ABR 1969). Defense counsel should not stipulate to matters in aggravation and thereby alleviate the prosecution's need to call witnesses during the pre-sentencing phase of the trial.

If the prosecution desires to show aggravating aspects of the defendant's offense, they should be put to the burden of calling witnesses who would be subject to cross-examination. In order to avoid an unfair stipulation dictated by the prosecutor, the defense counsel should draft and include a proposed stipulation as part of the offer to plead guilty. Even if the draft is not ultimately accepted, it will likely provide the basis for compromise and the final stipulation will ordinarily be more favorable to the accused than one initiated by the trial counsel.

E. Convening authority's control over trial procedure.

Defense counsel should resist any provision which allows the convening authority to control the timing of motions or hamper the defense counsel in representing his client. United States v. Holland, 23 USCMA 442, 50 CMR 461 (1975) and other cases reversed therein; but see also United States v. Elmore, supra.

Conclusion

The defense counsel must remember that performance of the function in plea negotiations requires the same detailed knowledge of pertinent criminal law and procedure that is needed for effective representation in contested cases; without these, counsel cannot evaluate the relative advantages of pleading guilty or going to trial. The foregoing procedures are intended to aid the defense counsel when the relative advantages to plead guilty outweigh the advantages of going to trial and the client decides to plead guilty.

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FEDERAL CASES

ATTEMPTS

United States v. Oviedo, 18 Cr. L. 2411 (C.A. 5, 1/12/76).

New criminal attempt test: the objective acts performed mark the accused's acts as criminal in nature, without reliance

on the accompanying mens rea. Acts must be unique, not commonplace. Using this test, the defendant's conviction was reversed where he believed he was selling heroin when in fact it was a heroin-related uncontrolled substance.

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS

People v. Gunne, 18 Cr. L. 2441 (Mich. Ct. App. 10/27/75, released 1/23/76).

Where witness invokes Fifth Amendment privilege against self-incrimination in response to prosecutor's foundational questions, it is impossible to lay a proper foundation and therefore prior inconsistent statements cannot be shown.

IMPEACHMENT BY PRIOR CONVICTIONS

Government of the Virgin Islands v. Toto, 18 Cr. L. 2483 (C.A. 3, 1/29/76).

Evidence of a crime punishable by less than one year's imprisonment is admissible for impeachment purposes only if it involved dishonesty or a false statement. See, the new Federal Rules of Evidence, Rule 609(a).

ENTRAPMENT - IMPROPER CROSS-EXAMINATION

United States v. Cunningham, 18 Cr. L. 2491 (C.A. 6, 2/9/76).

In attempting to prove predisposition, the government is entitled to a relaxation of the rules of evidence to develop a searching inquiry (Sorrells v. United States, 287 U.S. 435 at 451) into the accused's reputation and prior misconduct.- The contents of the reports elicited here were mere suspicions of informers whose reliability was not shown, were not relevant in some instances and otherwise were unreliable innuendo. Prejudice results where the defendant's sole defense was entrapment.

* * *

COMA OPINIONS

AWOL - PRESUMPTIONS AND INFERENCES.

United States v. Mahan, 30,394, 13 Feb. 76.

Issue: did the government sufficiently establish the inception date of the absence to trigger the presumption of continued absence until the proven termination date.

The government's theory was that the lack of an entry in the morning reports established absence because there is a presumption that the Army complied with its own regulation which required the organization to make an accession entry in its morning report whenever an individual reported for duty. The Court rejects this reasoning.

Presumptions in the criminal law must not offend the Due Process Clause, and therefore a presumption must be tested by the reasonable doubt standard. The government's burden of proof cannot be relaxed simply by changing its mode of proof.

Since appellant established a failure on the part of the government to follow AR 630-10, the negative evidence became valueless as a means of establishing the ultimate fact sought to be proved, and it could not be said beyond a reasonable doubt that the appellant was AWOL by a mere absence of his name from the morning report records.

ARTICLE 62(a), UCMJ; PARAGRAPH 67f, MANUAL.

United States v. Rowel, 30,832, 20 Feb. 76.

The convening authority sent appellant's case back to the military judge after the case had been dismissed on speedy trial grounds. The military judge adhered to his prior ruling and was reversed by the convening authority.

Citing United States v. Ware, No. 30,468, 24 USCMA 102, 51 CMR 275 (1976), the Court reiterates that Article 62(a) authorizes only a reconsideration and not reversal of the trial judge's ruling, specifically voiding that portion of paragraph 67f.

Concurring, Chief Judge Fletcher opines that Congress must now provide the government with a means of appeal from an adverse ruling of the trial judge.

SEARCH AND SEIZURE

United States v. Carter, 30,181, 20 Feb. 76.

Observing a stapled paper bag on a coat rack in a mail terminal, a sergeant opened it and observed stolen mail matter. He resealed it, contacted the CID, then confronted appellant and asked to examine the contents. The appellant complied and also made incriminating statements thereafter.

Held: the evidence and statements must be suppressed. The bag was lawfully in an unsecured area, and there was an absence of an authorization to search by one possessing the requisite authority.

SEARCH AND SEIZURE

United States v. Kinane, 30, 114, 20 Feb. 76.

Appellant, suspected of stealing I.D. cards, was told (appellant's testimony) or asked (CID testimony) to empty his pockets. The cards were discovered. Subsequently, marijuana was uncovered and incriminating statements made. Being neither a consent nor a necessity search, the Court addressed the issue of whether it was a search incident to a lawful apprehension.

The arrest took place after the ID cards were uncovered. While the Supreme Court has allowed minimal intrusions prior to custodial arrests, Cupp v. Murphy, 412 U.S. 291 (1973), the search here exceeded that standard.

SPEEDY TRIAL

United States v. Johnson, 30,917, 27 Feb. 76.

The government argued that a 104 day delay to trial fell outside the Burton 90 day rule because of defense delay. An Article 32 investigation was to be held jointly with two co-accused. Appellant's defense counsel requested a delay since he was to go on leave. This request was denied, so he indicated he would return from leave to take part in the hearing if the other two defense counsel and trial counsel could agree on a date.

It developed that counsel for the other two accused requested delays. Held: where the government joins accused, pretrial delay must be examined as to each accused separately and here the delay cannot be attributed to appellant.

HEARSAY - BUSINESS ENTRIES

United States v. Wilson, 29,921, 27 Feb. 76.

In an attempt to authenticate a pawn ticket as a business entry, the prosecutor called a military police investigator who had worked on a pawnshop investigation detail for about 4 months at the time of the incident. He had extensive contact with the pawnshop in

question and testified they followed established procedures in completing pawn tickets. Held: the MP was not an employee and did not possess the requisite and intimate familiarity with shop procedure to authenticate a particular pawn ticket as having been made in the regular course of business.

JURISDICTION - OVERSEAS EXCEPTION TO O'CALLAHAN

United States v. Black, 30,071, 12 Mar 76.

A conspiracy to transfer heroin originated overseas, but the overt act took place in the U.S. This fact pattern did not meet the two-pronged overseas exception test: (1) the offense is committed overseas and (2) the offense was not in violation of American civil penal statutes in effect in the foreign country so as to be cognizable in a civil court in the U.S. The conspiracy was not completed until the overt act was committed in the U.S. Insufficient service connection in the U.S. under Relford was presented. Court rejects notion of government gaining jurisdiction through status of victim, where the "victim" takes affirmative steps to gain that status.

ILLEGAL PRETRIAL CONFINEMENT

United States v. Larner, 30,361, 26 Mar 76

The Navy CMR recognized 56 days of illegal pretrial confinement and reassessed appellant's 10 year adjudged sentence to 9 years, 10 months. This reassessment actually increased appellant's punishment due to the Navy's graduated schedule of "good time". Therefore, the only proper remedy to give full credit is an administrative credit scheme to take into account the good conduct regulations.

Chief Judge Fletcher's concurrence points out that the Navy's good time credit runs afoul of the Fifth Amendment when a decrease in the adjudged sentence can lead to increased confinement.

MULTIPLICITY

United States v. Hughes, 30,121, 19 Mar 76

The Court sets out definite guidelines in the area of simultaneous drug possessions and multiplicity. The gravamen of the

offense is possession, not concealment; therefore, the drugs' containers are not determinative. The time and place of acquisition is also irrelevant. The controlling test is when the accused is charged with and proven to have been in actual possession. Strongly condemning the use of multiplicitous charging as a vehicle to encourage stiffer sentences, the Court orders a reassessment.

RIGHT TO COUNSEL

United States v. McOmber, 30,816, 2 Apr 76

Once an accused obtains an attorney, and criminal investigators are aware of that fact, the authorities are required to give the attorney the opportunity to be present at all subsequent interviews. Any statement obtained in violation of this rule will be suppressed. This rule encompasses questions of right to counsel, and whether the accused wishes to remain silent. Decided on a statutory basis, rather than Sixth Amendment precepts, the Court opines that Article 27 would be frustrated given any other holding. No longer will there be a test for prejudice, which led to abuses by criminal investigators.

TRIAL COUNSEL ARGUMENT ON SENTENCE - DETERRENCE

United States v. Mosely & Sweisford, 30,003, 19 Mar 76

The trial counsel urged the court members that, in determining a sentence, they consider "its deterrent effect." Such "general deterrence" is already included within the maximum imposable punishment prescribed by law, and may not be invoked as a separate aggravating circumstance to justify a sentence beyond that needed to adequately punish the accused.

* * *

CMR DECISIONS

United States v. Briggs, 11220, 13 Feb 76

In dicta, the court cautions avoidance of the practice of having the appropriateness of the issuance of a search warrant determined by a military judge who is rated by the issuer. The court refuses to find prejudice per se. This type of situation may call for a challenge for cause against a military trial judge.

CONVENING AUTHORITY DISQUALIFICATION

United States v. Crump, 433432, 25 Feb 76

The convening authority in question arranged for another convening authority to grant immunity to a prosecution witness to enable him to testify at appellant's trial. Use immunity was granted here. Contrary to the government's contentions, disqualification may arise out of use or transactional immunity and there was enough involvement by this convening authority, even though he did not grant immunity, to disqualify him from taking action.

SEARCH AND SEIZURE

United States v. Withers, 433281, 25 Feb 76

Company commander's authorization to search appellant's vehicle was illegal. The vehicle was located outside the commander's area of responsibility. The Court, following Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971), could not find any exigent circumstances to uphold the search. Proper authorities could have been contacted to make the search. In dicta, the Court surfaced the question of whether a commander can be a "neutral and detached" magistrate.

ILLEGAL PRETRIAL CONFINEMENT

United States v. Fitzgerald, 433547, 5 Mar 76

Appellant was subjected to 80 days of illegal pretrial confinement. Some of the conditions imposed during pretrial confinement were not justifiable because appellant was a suicide risk. For example, appellant was not allowed to sit on his bunk during normal duty hours. During those same hours he was not allowed to read anything other than the Bible. The court found the military judge's instruction as to the Article 13 violation to be inadequate because he failed to highlight the significance of such a violation of appellant's rights. The sentence was reassessed.

DUNLAP

United States v. Young, 433933, 27 Feb 76

For purposes of Dunlap, a clemency request by trial defense counsel is not defense delay.

The authentication delay here could have been avoided by having someone other than the unavailable military judge authenticate the record of trial. The government failed to show diligence and the charges are dismissed.

SPEEDY TRIAL - BURTON

United States v. Contreras, 10835, 12 Mar 76

The accused made four demands for immediate trial during his 87 day confinement. When the defense requests a speedy disposition of the charges, the government must respond to the request and either proceed immediately or show adequate cause for any further delay. Charges dismissed.

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