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A Journal For Military Defense Counsel

# THE ADVOCATE

## U.S. Army Defense Appellate Division

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Vol. 10, No. 2  
Mar.-Apr. 78

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# THE ADVOCATE

Volume 10, Number 2

March-April 1978

CHIEF, DEFENSE APPELLATE DIVISION

COL Robert B. Clarke

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Cite as: 10 The Advocate [page] (1978)

# TRANSITION

## SEPARATE DEFENSE STRUCTURE TO BE TESTED

For a one year period beginning 15 May 1978, the new U.S. Army Trial Defense Service (USATDS) will be implemented as a test at 16 TRADOC (Training and Doctrine Command) installations. The test is designed to evaluate the desirability of establishing a separate activity in USALSA to provide defense services throughout the Army.

In 1972, a separate defense counsel organization was suggested by the Department of Defense Task Force on the Administration of Military Justice. In response to that report, the Secretary of Defense requested proposals for implementation from the Judge Advocates General of each service. The Army's plan was submitted in May of 1973, but implementation was determined to be infeasible at that time due to the low strength figures for middle management JAGC officers.

During 1977, the improved personnel posture of the JAG Corps permitted a reexamination of the separate defense concept. The Criminal Law Division of The Judge Advocate General's Office, with assistance from the Field Defense Services Office of the Defense Appellate Division, prepared a new proposal for world-wide implementation of the Task Force's recommendation. This plan was submitted to the Chief of Staff of the Army, who, on 18 March 1978, directed that a "one year test be held in a [major command]". TRADOC was selected as the command to test the separate defense structure, to be named the U.S. Army Trial Defense Service.

USATDS will be created as a division of the U.S. Army Legal Services Agency, Falls Church, Virginia. Attorneys in USATDS will be assigned to USALSA, with duty station at a particular installation. A distinctive feature of the organization is that all counsel within USATDS will be supervised and rated by officers within the defense structure.

USATDS will be administered by a Headquarters element of four officers located in the Nassif Building in Falls Church, Virginia. This office will have overall responsibility for supervising defense services within TRADOC. Additionally, it will collect data and evaluate the newly-created test system, so as to assist in the later decision on whether to

implement the concept world-wide. Colonel Robert B. Clarke, currently Chief of Defense Appellate Division, has been selected to head USATDS. As an additional mission, the functions currently being performed by the present Field Defense Services Office (FDS) will be assumed by USATDS.

For the test period, TRADOC installations have been divided into three regions, each with a Regional Defense Counsel (RDC) who will supervise defense services in that area. The RDCs will be stationed at Forts Dix, Benning, and Knox, and will make visits, at least quarterly, to all of the defense offices under their supervision.

At the local level, the Trial Defense Counsel (TDC) will be supervised by a Senior Defense Counsel (SDC). The host post will continue to provide facilities, administration, and clerical support similar to that currently provided. USATDS counsel will provide all services normally performed by defense counsel now. In addition, during periods of reduced workload, USATDS counsel will assist the local SJA with other legal work, e.g., legal assistance, military justice training.

The Editorial Board of The Advocate wishes Colonel Clarke and the members of USATDS the best of luck during the test program. As with all areas of military defense work, The Advocate will be ready to assist USATDS counsel in any way it can.

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#### WELCOME AIR FORCE JAGS

With this issue, The Advocate substantially increases its circulation to the Air Force Judge Advocate General's Corps. Heretofore, we have provided the Air Force with 207 copies for distribution to their defense counsel. We will now send 450 copies of The Advocate to the Office of The Judge Advocate General, Department of the Air Force, for circulation to all defense counsel and staff and base judge advocates. We welcome these additional JAG officers to our readership, and solicit their suggestions, advice, and comments about The Advocate.

Any questions concerning distribution within the Air Force should be directed to the Executive Services Section, OTJAG, Department of the Air Force (Autovon 693-5820).

THE MILITARY AND THE SIX-MEMBER  
COURT--AN INITIAL LOOK AT BALLEW

Captain Larry C. Schafer, JAGC\*

In Ballew v. Georgia,<sup>1/</sup> the Supreme Court ruled that a jury consisting of less than six members is unconstitutional. The basis for the decision is that a jury composed of fewer than six persons is inhibited by its small size in its ability to arrive at a fair determination of guilt or innocence. The simple adoption to the armed forces of this straightforward proposition of law is difficult because the foundation of Ballew, the Sixth Amendment, has traditionally been held inapplicable to the military.<sup>2/</sup> It is arguable, however, that this conclusion should be limited to times of national emergency. However the courts will decide this question, it is not dispositive of the entire issue - for the servicemember's right to a jury trial stems, not from the Sixth Amendment, but from Article 16, Uniform Code of Military Justice. Under either theory, the Sixth Amendment or Article 16, it is suggested that the rationale of Ballew can be applied to the military by invoking the principles of military due process.

The Decision Reviewed

Claude Ballew was the manager of the Paris Art Adult Theatre in Atlanta, Georgia. He was arrested, charged and convicted of the misdemeanor of distributing obscene materials. Since Ballew could have received more than six months confinement, he was constitutionally entitled to a jury trial.<sup>3/</sup> As authorized by Georgia statutory and constitutional provisions,

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1. \_\_\_ U.S. \_\_\_, 22 Cr.L. 3063, 46 U.S.L.W. 4217 (March 21, 1978).

2. See e.g., H. Moyer, Justice in the Military (1972), § 2-585 [hereinafter cited as Moyer], and cases cited therein.

3. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

Ballew was tried by a jury of five persons. His objection at trial to the size of the jury, and motion to impanel a court of twelve jurors, was denied.

The main basis for Ballew's appeal was the 1970 Supreme Court decision in Williams v. Florida,<sup>4/</sup> in which the Court had determined that a panel consisting of six jurors was constitutionally permissible. There the Court specifically declined to rule whether or not a court composed of less than six jurors was constitutional. Thus, the issue was joined: Was a court composed of less than six members constitutionally permissible? In its unanimous, though multi-reasoned, decision in Ballew,<sup>5/</sup> the Supreme Court decided that a five-juror court violated basic concepts of fairness.<sup>6/</sup> The basis for the holding was that the large amount of empirical data generated by the Williams' decision had "suggest[ed] that progressively smaller juries are less likely to foster effective group deliberations."<sup>7/</sup> The Court reasoned that "[a]t some point, this decline in jury size leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts."<sup>8/</sup> The Court offered several possible explanations for this conclusion: (1) The smaller the jury, the less likely were the jurors to remember the important facts; (2) As the size of the jury decreased, the likelihood of the jury making a critical analysis of those facts that they did remember decreased; and (3) The smaller the jury, the more likely were the chances that an individual member's biases and prejudices would usurp the jury deliberations.

The Court also noted that smaller juries tended to convict the innocent significantly more often than larger juries did,

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4. 399 U.S. 78 (1970).

5. Justice Blackman wrote the principal decision. He was joined, in toto, by Justice Stevens and, in part, by Justices Brennan, Stewart and Marshall. Justice White concluded that a court with less than six members did not represent a fair cross-section of the community. The Chief Justice and Justices Powell and Rehnquist concurred, but would not rely so heavily on the empirical data cit by the principal opinion, and would not apply the Sixth Amendment in full to the states.

6. Ballew v. Georgia, supra, at 4219, n. 9.

7. Id. at 4220.

8. Id.

and that smaller juries are more inconsistent than larger juries. Further, the Court explained that, to the detriment of the accused, smaller juries are less likely to result in a hung jury. The Court reasoned that this occurred because, as the size of a jury decreases, the presence of minority views on the jury decreases, thereby "fortell[ing] problems not only with the jury decision-making, but also for the representation of minority groups in the community."<sup>9/</sup> Lastly, while smaller jury verdicts disagreed with larger jury verdicts in only 14% of all cases, the Court declared that this deviation was significant to those many cases in which close factual questions were present. Based upon the foregoing reasoning, the Supreme Court decided that there was "substantial doubt about the reliability and appropriate representation of panels smaller than six."<sup>10/</sup> The Court concluded that, considering the importance of the jury system to the American society, this "doubt" rises to constitutional magnitude.

It is apparent that the Court's decision in Ballew is based upon the Sixth Amendment. What is not so obvious -- but is more important to the military justice system -- is that the reasoning for the decision is analogous to due process principles of fairness.

#### The Sixth Amendment and the Military

Though apparently ripe for re-examination,<sup>11/</sup> the principle that the Sixth Amendment right to a jury trial is not applicable to the servicemember is well-established in case

9. The possibility of obtaining two jurors on the same panel with the same minority viewpoint diminishes substantially with smaller juries. For example, if a minority viewpoint is shared by 10% of a community, then 34% of the twelve-person juries will have two persons with that persuasion, whereas only 11% of the six-member juries will have two members with that viewpoint. Ballew v. Georgia, supra, at 4221.

10. Id. at 4222.

11. In United States v. McCarthy, 2 M.J. 26, 29 (CMA 1976), n.3, the Court of Military Appeals hinted strongly that the applicability of the Sixth Amendment right to a jury trial was a ripe subject for review by stating:

. . . Suffice it to say that court members, handpicked by the convening authority and of which only four of a required five ordinarily must vote to

law.<sup>12/</sup> In arguing the applicability of the Ballew principles to the military, a defense counsel should contend that it is not necessary to re-examine this ancient rule, as Article 16, Uniform Code of Military Justice, gives the accused a statutory right to a trial by a jury. Thus, the central question becomes: to what extent can military due process principles be utilized to apply the constitutional standards of the Sixth Amendment to an Article 16 court?

When resisting the applicability of Ballew to the military, it is expected that the government will try to limit any discussion to the first of these two issues -- the general proposition that the Sixth Amendment does not apply to the military. Defense counsel should therefore be prepared to argue that the Supreme Court cases establishing this principle are limited to their factual and historical backgrounds.

The inapplicability of the Sixth Amendment to the military stems from the civil war case of Ex parte Milligan.<sup>13/</sup> Milligan was an Indiana civilian who was arrested for spying for the Confederacy and tried by a military commission. In noting the differences between the civilian right to a jury

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11. (continued)

convict for a valid conviction to result, are a far cry from the jury scheme which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems . . . Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process.

It is possible that the applicability of the Sixth Amendment right to trial by jury or the applicability of the principles of the Sixth Amendment to the military will be addressed in a recently granted case, United States v. Aho, Docket No. 35,474, petition granted 30 March 1978, which concerns the systematic exclusion of lower enlisted personnel from consideration for serving on courts-martial panels.

12. Ex parte Milligan, 71 U.S. 2 (1866).

13. Id.

trial and the accused's rights during a military commission, the Supreme Court stated that a grand jury indictment was specifically inapplicable to the military. The Court explained that because an indictment is a prerequisite to a jury trial, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, . . . to those persons who were subject to indictment . . ."14/ Such a rule, the Court stated, was necessary due to the military requirements in maintaining discipline. Thus came the conclusion that the Sixth Amendment does not apply to the military.15/

Subsequent to Ex parte Milligan, the basis for the oft-cited rule has not been reexamined. All of those cases in which the rule has been cited occurred during a time of national emergency, and thus, are squarely within the basic Milligan rationale.16/ Arguably, absent the military exigencies present in those cases, the Milligan reasoning should not apply to present day court-martials.17/ Thus, if Milligan

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14. Id. at 123.

15. The basic reasoning of Milligan has been eroded over the years so that one can now persuasively argue that the lack of a grand jury indictment should not be a bar to a jury trial. This argument is based on the holdings in Hurtado v. California, 110 U.S. 576 (1884), and Duncan v. Louisiana, 391 U.S. 145 (1968). When read together, these cases hold that a state may eliminate grand jury proceedings, but still must provide a jury trial in serious cases. In Hurtado, the Supreme Court stated ". . . there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions." Beck v. Washington, 369 U.S. 541, 545 (1962). Nevertheless, the federal Constitution guarantees an accused a right to a jury trial in a state prosecution. Duncan v. Louisiana, supra.

16. See, e.g., Kahn v. Anderson, 255 U.S. 1, 89 (1921) (World War I); Ex parte Quirin, 317 U.S. 1, 45 (1942) (World War II); Whelchel v. McDonald, 340 U.S. 122, 126-127 (1950) (World War II); O'Callahan v. Parker, 395 U.S. 258, 261-262 (1969) (Vietnam).

17. Even assuming that Milligan cannot be limited to times of war, the rationale for the rule can be attacked. The crucial hurdle to be leaped is that since a military accused has no right to a grand jury indictment, he has no right to a trial by jury. However, the present pretrial procedures in the military have been favorably compared to the grand jury

and its progeny are raised to contest the applicability of Ballew to the military, the defense should be prepared to point out that based on the historical evolution of the rule, Miligan should not be applicable to a peacetime Army.

However, as mentioned previously, Ballew can be applied to the military without having to reexamine Ex parte Milligan. The enactment of Article 16, UCMJ, has as a practical matter, given the servicemember a right to trial by jury - even in times of war and even though there is still no right to a formal grand jury indictment. It should be argued then, in the absence of some definitive military necessity, Ballew's establishment of minimum due process standards for fair jury deliberations in civilian trials must be applied to the military.<sup>18/</sup> What, then, is the overwhelming military interest that would prevent courts-martials from requiring at least six members?

In Ballew, the state argued that the increase from five to six-member juries would result in higher costs. The Supreme Court held this contention to be insignificant and unpersuasive. Such an argument should also fail in the military setting. The out-of-pocket costs to the military will not be increased at all by six-member minimum juries, for all the court members receive pay regardless of what tasks they are performing. While the assignment of additional personnel to jury duty will certainly mean that these members will have less time to perform their other military duties, this argument is not persuasive when one considers how few courts-martials actually are tried with juries. For example, between 1 April 1977 and 30 September 1977, 61% of the general courts-martials and 76% of the special courts-martials authorized to impose a bad conduct discharge were tried by military

17. (continued) indictment procedure. See generally Imwinkelried & Zillman, Constitutional Rights and Military Necessity; Reflections on the Society Apart, 51 Notre Dame L.Rev. 396-436 (1976); Poydasheff & Suter, Military Justice? -- Definitely!, 49 Tulane L.Rev. 588-602 (1975). If, as a practical matter, the Fifth Amendment requirement for a grand jury indictment is satisfied by these pretrial procedures, then the right to a jury trial should arguably be applicable to a servicemember.

18. In Ballew, the Court noted that the State of Georgia "present[ed] no persuasive argument that a reduction to five does not offend the Sixth Amendment interests." Ballew v. Georgia, supra, at 4222.

judge alone.<sup>19/</sup> Of the remaining cases that were tried by members, past practices would lead one to conclude that most were tried by panels consisting of at least six jurors.<sup>20/</sup> Thus, Ballew's actual effect on the military, as a whole, will not be significant. But, the importance of the dictates of Ballew are so crucial to the individual servicemember to require it be applied to the military. As the Supreme Court explained, ". . . any further reduction [from six to five] that promotes inaccurate and possibly biased decision making, [and] causes untoward differences in verdicts . . ." <sup>21/</sup> should not be permitted.

### Military Due Process

Another viable method for applying the Ballew principle to the military is to invoke the general doctrine of military due process.<sup>22/</sup> Such an approach would apply the principles from United States v. Crawford<sup>23/</sup> and other cases.<sup>24/</sup> In Crawford, the Court of Military Appeals applied the Sixth Amendment to jury selection procedures in the military, when it held that the systematic exclusion of lower enlisted personnel, if done for no rational basis, was contrary to the Uniform Code of Military Justice. The Court noted that, while the Fifth and Sixth Amendments deny servicemembers the right to indictment for a serious crime:

19. "Trial and Appellate Statistics," The Advocate, Vol. 9 No. 6, Nov-Dec 1977, p. 41.

20. A superficial examination of the records of trial of jury cases pending before the Army Court of Military Review and the Court of Military Appeals reveal few cases that were tried by less than six courtmembers.

21. Ballew v. Georgia, supra, at 4222.

22. Gilley, Using Counsel to Make Military Pretrial Procedures More Effective, 62 Mil.L.Rev. 24, 29 (1973), n.21; see also Military Due Process, 2 Hastings Constitutional Law Quarterly, 547-70 (1975).

23. 15 USCMA 31, 35 CMR 3 (1964).

24. United States v. Jacoby, 11 USCMA 429, 29 CMR 244 (1967); United States v. Culp, 14-199, 33 CMR 411 (1963); see also Moyer, supra, note 2, at §§2-105, 2-803. The Army Court of Military Review has also utilized this principle. In United States v. Matfield, 4 M.J. 843 (ACMR 1978), the court found that the Jencks Act is inapplicable to a co-accused's

. . . [other C]onstitutional protections and rights which the history and text of the Constitution do not plainly deny to military accused are preserved to them in the service . . . .25/

The Court further explained that:

Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts . . . . We should, therefore, consider the challenge to the integrity of the selection process, in the light of the experience and learning of the civilian courts that have dealt with challenges of the various methods of choosing juries. See United States v. Baker, 14 USCMA 311, 34 CMR 91.26/

Like Crawford, the principles set forth in Ballew affect the very integrity of the court's fact-finding ability. The importance of Ballew is not that five members will convict more frequently than the twelve-member jury (although the Court found this proposition to be statistically true), but that smaller juries do not possess sufficient resources to insure fair deliberations. Thus, when a Court is composed of only five members, its basic fact-finding ability is impaired.

This hypothesis should be equally applicable to the military, for the function of a military court-martial -- to determine guilt of innocence -- is identical to that of a civilian jury. Unless one is willing to take the position that it does not matter how many courtmembers are on a military jury because their thought processes are absolutely homogeneous (i.e., given the same facts, each would cast the

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24. (continued) testimony at the co-accused's trial but that military due process required a transcript to be made available to the defense upon request.

25. United States v. Crawford, supra, at 6, citing United States v. Culp, supra.

26. Emphasis added. Id.

same vote), it is apparent that the Ballew rationale should also apply to their deliberations. Just as in civilian juries, the fewer courtmembers there are, the less likely are the jurors to remember the important facts and the less likely they are to make a critical analysis of those facts that they do recall. Additionally, notwithstanding an instruction by the judge, the military rank structure is such as to make it very easy for a senior officer to usurp the independence of a small jury. Consequently, it is arguable that the same defects that required a six-member jury in the civilian sector exist in the military system. The same cure -- Ballew -- should be applied to these defects.

#### A Potpourri of Other Considerations

Even though the tools for grafting the Ballew principles onto the military justice system exist, the pivotal question is whether the underlying facts and circumstances in Ballew are sufficiently analogous to the military system so as to permit the same conclusions of law to be drawn about military courts-martial. Most of these factual differences between civilian and military jurisdictions pose issues that are only of theoretical importance. Nevertheless, counsel must be aware of these issues, and should be prepared to respond to them.

##### A. Unanimity Versus the Two-Thirds Requirement.

The most significant distinction between the civilian and military practice is that the Georgia statute, like most civilian communities, permits a finding of guilty only upon a unanimous verdict. As one vote is all that is necessary for a "hung jury" to result, the more members there are on the court, the better are the defendant's chances of obtaining such a hung jury. Of course, there are no "hung juries" in the military as the two-thirds voting requirement means that every trial results in a clear verdict of acquittal or conviction.<sup>27/</sup> The importance of one minority viewpoint in the military, then, is substantially weakened. As the number of courtmembers increases, so also does the number of votes a servicemember must obtain in order to be acquitted. Therefore, the conclusion of the Supreme Court that the defendant's chances of acquittal increase with a larger jury has little apparent applicability to the military.

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27. Article 52(a)(2), Uniform Code of Military Justice, 10 U.S.C. §852(a)(2). However, there is a possibility in the military of having a hung jury for sentencing purposes. See paragraph 8-9, Military Judges' Guide, DA Pam 27-9, 19 May 1969.

Although this aspect of Ballew is unquestionably different from military practice, it is a difference with little significance. The question presented in Ballew was not whether a jury could find an accused guilty on less than a unanimous verdict. The issue was more fundamental and went to the roots of the fairness of the panel's deliberation. In holding the presence of a unanimity requirement to be irrelevant, the Supreme Court stated:

. . . That a five-person jury may return a unanimous decision does not speak to the questions whether a group engaged in meaningful deliberation, could remember all the important facts and arguments, and truly represented the common sense of the entire community. Despite the presence of the unanimity requirement, then, we cannot conclude that 'the interest of the defendant is . . . well served' by the five person panel. Apodaca v. Oregon, 406 U.S., at 411 (Opinion of White, J.)<sup>28/</sup>

Consequently, government counsel's attempts to factually distinguish Ballew based on the lack of a unanimity requirement in the military was squarely addressed and found to be unpersuasive by the Court.

#### B. The Applicability of Ballew to Special Courts-Martial,

The types of courts-martial to which Ballew is to apply is only an issue if the Ballew principles are being applied to the military via the Sixth Amendment. If the Ballew standards are applied to the military via the provisions of military due process, then the fundamental fairness standards set forth in Ballew apply to all jury trials, regardless of whether they are special or general courts-martial.

The defense position here is essentially the same as that which was proposed earlier when discussing the Ballew standards and the military - an accused does not have to depend upon the Sixth Amendment to acquire a right to jury trial. His right to a jury trial arises automatically from Article 16, UCMJ, whenever the case is referred to a special or general court-martial. Defense counsel should then argue

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28. Ballew v. Georgia, supra, at 4222.

that once an accused has a right to a jury, regardless of whether this right is given to him under either Article 16 or the Sixth Amendment, the issue becomes that of the fundamental ability of the courtmembers to conduct full and fair deliberations.<sup>29/</sup> This ability does not vary simply because a case is referred to an inferior court. Therefore, the right to fundamental due process should be applicable to the courtmembers' deliberations, even in a special courts-martial, whether or not it is empowered to impose a bad conduct discharge.<sup>30/</sup>

If the government's argument that the Ballew standards do not apply to special courts-martial is based on the Sixth Amendment, then it does not address the above-discussed due process argument. Duncan v. Louisiana<sup>31/</sup> and Baldwin v. New York<sup>32/</sup> hold that the Sixth Amendment guarantees a jury trial to those persons charged with committing serious offenses, i.e., if the maximum imposable sentence to confinement is more than six months. In so arguing, the government would be conceding that Ballew is applicable to most general courts-martials,<sup>33/</sup> and not applicable to any summary courts-martials.

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29. The same argument should apply in guilty plea cases where an accused has a jury for sentencing because the issue is framed in terms of the inherent lack of ability of the court members to fairly perform their duties when the jury consist of less than six members.

30. While not of controlling significance, there is a fundamental difference between the Army practice and the Air Force and Navy practice. All cases referred to special courts-martials in the Air Force and Navy are authorized to impose a bad conduct discharge. In the Army, the convening authority must designate whether a court has the authority to impose such a discharge. This is done on a case-by case basis.

31. 391 U.S. 145 (1968).

32. 399 U.S. 66 (1970),.

33. Although not a common practice, it is conceivable that any offense, however minor, could be tried by general court-martial. The more common situation is where an accused is charged with aggravated assault, but only convicted of a simple assault. Under this circumstance, the accused would have had a right to a jury trial even though the maximum sentence to confinement was not more than six months.

However, the government could then argue that because an accused can not receive more than six months confinement in a special courts-martial, the Ballew standards do not apply. This six-months maximum is correct, and equally applicable to a bad conduct discharge special courts-martial because a bad conduct discharge can not be commuted to increase the period of confinement over six months.<sup>34/</sup>

The defense might argue that a bad conduct discharge is considered to be a more severe punishment than confinement for one year,<sup>35/</sup> and thus the Ballew Sixth Amendment standards would apply. However, punishment equivalency is not the test for determining when the jury trial standards arise. The test in Baldwin and Duncan is unequivocal: Does the amount of imposable confinement exceed six months?<sup>36/</sup> The answer in all special courts-martials must be "no." Thus, reasons the government, notwithstanding the fact that the accused may have an Article 16 right to a jury trial, the Sixth Amendment standards do not apply to special courts-martial. By travelling this road, the government has now come full circle without reaching any conclusions. The government's argument only addresses the question of whether the accused has a Sixth Amendment right to a jury trial in a special courts-martial. It fails to recognize that this hurdle has been overcome by Article 16, and that the true issue is whether or not the fairness standards of Ballew can be applied to the military, by military due process. The government's argument is, therefore, unresponsive to the central issue of military due process.

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34. Jones v. Ignatius, 18 USCMA 7, 39 CMR 7 (1968).

35. United States v. Johnson, 12 USCMA 640, 31 CMR 226 (1962).

36. While the test may be unequivocal, the Supreme Court did not address a situation whete a bad conduct discharge was imposable. It is obvious that the imposition of a BCD and six months confinement is more severe than six months confinement. Notwithstanding Baldwin, the Ninth Circuit Court of Appeals held in United States v. Sanchez-Meza, 547 F.2d 461 (19th Cir. 1976), that since conspiracy was characterized as a serious offense when the Constitution was written, it is a major offense today even though the maximum imposable sentence to confinement does not exceed six months. Defense counsel can use this case to argue that the Baldwin "test" is not to be so narrowly construed.

### C. Enlisted Members.

Another "false" issue concerns the possibility of an eligible accused waiving his right to a trial by a jury representing a fair cross-section of the community by not requesting that enlisted members be detailed to court. Again, the emphasis in Ballew is on the quality and integrity of the deliberations and not the types of persons on the jury. Therefore, this waiver argument does not appear to be convincing.

### Conclusion

The importance of Ballew to the military is not that the Sixth Amendment guarantees a right to a jury of at least six members. The key in Ballew is that a jury must be sufficiently large enough to permit it to function fairly, and that a six member court has been determined to be the minimum number required to insure full and fair deliberations. As in Crawford, the Court of Military Appeals could and should employ military due process as a mechanism to adopt the fundamental fairness principles of Ballew, without having to reexamine the applicability of the Sixth Amendment to the military. Alternatively, the Court of Military Appeals could limit the Supreme Court cases, which hold the Sixth Amendment right to a jury trial inapplicable to the military, to instances which occur only in times of war. In any event, the effect would be the same - military juries would be required to have at least six members.

Until this issue is resolved, trial defense counsel should be wary of "inviting error" by not raising it at trial. In Crawford, the Court of Military Appeals overlooked the appellant's waiver only because the issue had been raised in two other cases and would eventually reach the court.<sup>37/</sup> Until the applicability of the Ballew principles to the military justice system is resolved by the military appellate courts, trial defense counsel are advised to consider submitting to the convening authority a pretrial request that courts be composed of more than five unchallenged members. If denied, counsel should consider challenging at trial the referral of the case to a court with less than six members as a violation of military due process.

While the difference between a five-member court and a six-member court is rather insignificant to the convening authority, it is of prime concern to an accused. For example, from 1 October 1976 to 30 September 1977, Army accused at general courts-martials were convicted in 90% of the military

37. United States v. Crawford, supra at 5-6.

judge alone trials, whereas 77% were convicted by courtmembers.<sup>38/</sup> While generalizations are dangerous, an accused with a close case would appear to have a better chance of acquittal with courtmembers. Assuming the validity of the Supreme Court's empirical data, his chances of acquittal are further increased if he can obtain a panel consisting of at least six members. Thus, if a pretrial determination is made that the case is best tried by courtmembers, trial defense counsel appear to have little to lose, and much to gain, by requesting additional members.

38. "Trial and Appellate Statistics," The Advocate, Vol. 9 No. 6, Nov - Dec 1977, at 42.

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#### HOLMES NEW TRIAL TACTICS EDITOR

On 31 March 1978, Cpt David L. Holmes replaced Cpt David W. Boucher as Trial Tactics Editor of The Advocate. Cpt Boucher, a member of the Field Defense Services Office, has worked on The Advocate since January 1977. He has been a prime force in insuring that the concerns and comments of trial defense counsel are passed on to the Editorial Board, and that we address them. Dave is completing his tour of duty in DAD, and will be reassigned to Charlottesville this summer for attendance at the Advanced Course. We wish him the best.

Cpt Holmes has been an appellate attorney in DAD since August, 1977. Prior to his assignment here, Dave served at Fort Bragg for over three years as trial counsel, defense counsel, Chief of Defense, and Chief of Administrative Law.

## GOVERNMENT FUNDING OF DEFENSE INVESTIGATIONS

Captain Charles F. Schmit, JAGC\*

In theory, the adversary system reaches the truth because both parties are comparable in legal and investigative resources and, therefore, have equal opportunity to discover and present evidence at trial. Too often, however, theory is not reality, and a defendant faces trial with the knowledge that his limited defense resources are pitted against the seemingly inexhaustible resources of the government.

The military accused's defense arsenal has been bolstered in the area of compulsory process of witnesses <sup>1/</sup>, but the related right of governmental aid for defense investigations remains unclear. The following is a discussion and analysis of this right, and its possible application to the court-martial system.

### The Source of the Defense Right

The right to investigative assistance has its underpinnings in the accused's right to counsel as guaranteed by the Sixth Amendment of the Constitution. The U. S. Supreme Court has firmly established the right to counsel, making it clear that poverty will not be permitted to jeopardize the right to a fair trial. Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in capital cases); Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel in federal felony cases); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel applicable to the states); Argersinger v. Hamlin, 407 U.S. 205 (1972) (right to counsel for misdemeanors and petty offenses). The right to counsel is obviously meaningless, however, if an indigent's lack of funds prevents his counsel from obtaining needed investigative services.

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\* Captain Schmit is an appellate defense attorney in DAD. Previously he served as a defense counsel and Chief of Legal Assistance at Fort Lewis, Washington. Captain Schmit holds a B.A. from Grove City College and a J.D. from Dickinson School of Law, and attended the 70th Basic Class.

<sup>1/</sup> United States v. Carpenter, 24 USCMA 210, 51 CMR 507, 1 M.J. 384 (1976).

Courts which have recognized this problem have generally concluded that effective assistance of counsel cannot be afforded an accused unless he is also able to obtain important witnesses or investigative services. These courts have found such services to be required by the Sixth Amendment. Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974); People v. India, 32 N.Y.2d 230, 298 N.Ed.2d 65, 344 N.Y.S2d 882 (1973); State v. Green, 55 N.J. 13, 258 A.2d 889 (1969); People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645, 222 N.E.2d 801 (concurring and dissenting opinions) (1966); United States v. Germany, 32 FRD 343, 32 FRD 421 (dissent) (M.D. Ala 1963).

At least sixteen other jurisdictions have legislation providing varying degrees of pretrial investigative services for indigent defendants. <sup>2/</sup>

Congress has also recognized inequities in the federal system by enacting 18 U.S.C. §3006A(e), a provision of the Criminal Justice Act of 1970. This statute provides investigative services to indigent defendants in Federal district courts.

#### The Military and Defense Investigations

The same reasons which prompted relief in the state and Federal courts also exist in the military. Not only are defense counsel similarly handicapped by a lack of funds for pretrial investigation, but the very matter they seek to <sup>3/</sup> investigate is subject to the approval of opposing counsel. Such shortcomings emphasize a greater need for defense investigative aid in the military. <sup>4/</sup>

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<sup>2/</sup> See National Legal Aid and Defender Association, Guidelines for Legal Defense Systems in the United States, at 264-267 (1976), for a comprehensive list and analysis of the state statutes providing investigative services.

<sup>3/</sup> Manual for Courts-Martial, United States, 1969, (Revised edition), para. 115a.

<sup>4/</sup> It should be noted that this need for increased investigative aid has been apparent to the Army for some time. As a partial solution, the Judge Advocate General's School is establishing both a correspondence and resident training course for paralegals. Additionally, for a number of years, each defense counsel in Europe has had the assistance of a full-time lawyer's assistant.

In addition to the constitutional argument as expressed in Mason v. Arizona, supra, there exists statutory authority which, by implication, supports a military accused's right to investigative services. Article 46, Uniform Code of Military Justice, constitutes the codal authority in this area. There can be no doubt that when enacting this statute, Congress carefully considered the scope and consciously sought to place the defense and prosecution on an equal footing concerning discovery rights.<sup>5/</sup> When Article 46 and its legislative history are read in conjunction with paragraph 115a and paragraph 58(d) (which provides that the right to prepare for trial and to secure necessary witnesses is fundamental), the extensive trial preparation rights of an accused becomes apparent.

The Court of Military Appeals has addressed the question of defense investigative funds in Hutson v. United States, 19 USCMA 437, 42 CMR 39 (1970). There the Court denied a petition for extraordinary relief which requested the appointment of two defense investigators. The Court refused to analogize 18 U.S.C. §3006A(e) to the military, noting that this provision was limited in application to the Federal district courts and stating that, if a military accused was to obtain similar relief, it must emanate from Congress and not the judiciary.

Admittedly this provides strong argument against investigative aid for the defense, but an analysis of Hutson in light of more recent decisions indicates a resurgent viability of this defense right in the military. The Court of Military Appeals has never addressed the constitutional argument posed by Mason v. Arizona, supra, etc. It remains to be seen whether the Court of Military Appeals, with different judges, will reach a similar result when confronted with an argument couched in constitutional terms. Nor is it certain that the present Court will find a lack of congressional intent in their reading of Article 46 and the various paragraphs of the Manual. While 18 U.S.C. 3006A(e) cannot be strictly applied to the military, the congressional intent behind this provision can arguably be extended to Article 46.

A more recent decision by the Court of Military Appeals gives indication of the Court's receptiveness to government funding of defense investigations. Halfacre v. Chambers,

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<sup>5/</sup> Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, at 997, 1057, 2498.

Misc. Docket No. 76-29 (unpublished journal entry) (13 July 1976) involved an accused who was charged with possession of opium found in merchandise purchased during a five day shore liberty in Pakistan. At trial the accused sought transportation from Japan, the situs of trial, to Pakistan at government expense for the purpose of gathering evidence for his defense. The military judge denied the accused's request for transportation but granted a continuance to enable the accused to obtain leave.

In a petition for extraordinary relief, the accused requested that the Court of Military Appeals stay the proceedings and provide transportation for both accused and counsel. In opposing this petition, the Government relied upon Hutson and maintained that only through congressional enactment could a military defendant be entitled to investigative aid. In response, the accused argued the existence of statutory authority through Article 46 and analogized Rule 17(b), Federal Rules of Criminal Procedure (the right of indigent defendants to have the government pay witness fees for a subpoenaed witness) to the military. The accused further argued that denial of the request to discover evidence amounted to a denial of military due process.<sup>6/</sup> The Court agreed with the accused, ordering the Government to provide the necessary transportation for the accused and his counsel.<sup>7/</sup> Read together with United States v. Carpenter, supra, and United States v. Ledbetter, 2 M.J. 37 (1976), Halfacre arguably signifies an expansion of an accused's defense resources, to include the right to government funding for pretrial investigations.

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<sup>6/</sup> Petitioner cited the following cases in support of his argument. United States v. Aycok, 15 USCMA 158, 35 CMR 130 (1964); United States v. Sweeney, 14 USCMA 599, 34 CMR 379 (1964); United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951), United States v. Robinson, 12 CMR 860 (ABR 1953).

<sup>7/</sup> In his reply to the Government's opposition brief, petitioner stressed not only the constitutional and codal authority for relief, but also the extreme inequity of the Navy officially transporting petitioner to Pakistan and subsequently trying him for offenses in a locale far from the alleged crime scene. Petitioner cited United States v. Largan, 330 F. Supp. 296 (S.D.N.Y. 1971), a federal district decision with similar facts. Because the order in Halfacre lacked any rationale it is unclear whether the Court's decision is limited to the unique facts in Halfacre or expresses the Court's general view where a military defendant seeks necessary investigative aid.

## Raising the Issue At Trial

It must be stressed that military defendants will not automatically be provided assistance upon request. Courts which have found this right have all required that the defense counsel make as complete a showing of necessity as possible. United States v. Schultz, 431 F.2d 907 (8th Cir. 1970); Christian v. United States, 398 F.2d 517 (10th Cir. 1968). Most courts have applied the "clear and convincing" standard of proof as applied in 18 U.S.C. §3006A(e). Mason v. Arizona, supra; United States v. Harris, 542 F.2d 1283 (7th Cir. 1976); United States v. Washabaugh, 442 F.2d 1127 (C.A. Cal 1971). However, it appears that the defense's showing need not prove that the investigation will be successful, but only that further exploration may prove beneficial in the development of a defense. United States v. Schultz, supra, at 911.

In requesting investigative assistance at trial, it follows that the defense must be prepared to make a specific showing of need. It is imperative that the following be made a matter of record:

1. Introduce a written request showing compliance with paragraph 115, MCM, and the fact that counsel has approached the convening authority without success. (It is assumed that the defense counsel has earlier made the request known to the trial counsel, staff judge advocate, and convening authority, and it has been denied).
2. Detail for the court the avenues of investigation already attempted by the defense and why they were unsuccessful or inadequate. Failure to exhaust all reasonable means of investigation by counsel has been a frequent basis for denial. United States v. Mundt, 508 F.2d 904 (C.A. Colo 1974).

Much of the investigative assistance which the defense may seek is capable of being performed by CID, and counsel will undoubtedly face the question of whether this is a reasonable avenue of investigation which must be explored. In matters which can appropriately be handled by CID, counsel

should consider requesting assistance in writing directly through CID channels. However, in many cases it is unlikely that the assistance of a government agent will be in the best interests of the accused. In such a situation, it should be argued that the defense right requires independent assistance; therefore, the use of CID would not be considered as a reasonable means of investigation. In such a case, it should be made clear at trial that CID assistance was considered and precisely why this aid was deemed inappropriate.

3. Inform the court, with specificity, of the nature of the investigative assistance requested and of the nature of the information which the defense believes will be discovered and its usefulness to the accused's case.

It should be evident that this last requirement presents a "Catch-22" situation in which counsel is required to state how the requested investigation will benefit his client when that information in many cases can only be obtained through the investigation itself. This problem has been recognized by courts which have suggested that the trial judge liberally grant such a motion. Unfortunately, an examination of these cases indicate that this dicta is not often followed. Mason v. Arizona, supra, United States v. Schultz, supra. Because of this, counsel should consider requesting special findings, focusing on the defense's satisfaction of points 2 or 3 above.

#### Conclusion

The posture of military law remains uncertain in the area of government funding for defense investigation, and will remain so until the Court of Military Appeals clarifies the inconsistencies brought about by its rulings in Hutson and Halfacre. This uncertainty should not, however, prevent defense counsel from aggressively requesting this assistance from both the convening authority and the trial court, when the defense of his client requires it.

## EFFECTIVELY USING "OFFERS OF PROOF"

Captain Raoul L. Carroll, JAGC\*

An offer of proof is a recitation by counsel of what is expected to be proved by a given witness or document with the intent of securing the admission of the evidence at trial. Offers of proof serve two major purposes. First, they generally assist judges and prevent them from making rulings in a vacuous manner, and therefore preclude the necessity for having a full hearing on every contested evidentiary issue at trial. More importantly, an offer of proof informs the appellate courts of the precise testimony the accused was prevented from placing before the trial court, and thus enables the appellate courts to reach an intelligent conclusion as to whether the accused was prejudiced by the exclusion. United States v. McConnell, 1 CMR 320 (ABR 1951), petition denied 1 CMR 99 (1951).

Defense counsel should be aware of the proper use of this trial tactic; it is too frequently under-utilized. They should be mindful of the important role an offer of proof can play in both the trial and the appellate process. The intention of this article is to provide trial defense counsel with a means for assuring that an offer of proof made by counsel appears in the record with clarity and lucidity. Additionally, some alternative uses for offers of proof are suggested for inclusion in a defense reservoir of trial techniques.

In federal criminal practice an accused has the right to make an offer of proof when the judge refuses to admit certain evidence which the defense feels is material and necessary. Elder v. United States, 202 F.2d 465 (9th Cir. 1953), cert. denied 345 U.S. 999, 73 S.Ct. 1143, 97 L.Ed. 1405 (1953); United States v. Smith, 3 USCMA 680, 14 CMR 98 (1954); 53 Am. Jur., Trial §§99, 100. Such an action by the judge usually follows an objection by opposing counsel and occurs because the propriety of its admission is not readily apparent to the trial judge. It is at this point that the offer of proof should be used. The proponent of the evidence should then make the offer of proof, stating what he expects to prove or show by its admission.

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## Offers of Proof at Trial

The burden of making a sufficient offer of proof is on the proponent of the evidence. United States v. Graalum, 19 CMR 667 (AFBR 1955), petition denied 19 CMR 413 (1955). Since one must assume that counsel does not ask questions which he believe are not proper, it often happens that an objection to a question posed by counsel catches most attorneys by surprise. Thereafter, whether counsel's offer of proof appears in the record as a garbled mishmash, or a precise and lucid statement of the testimony he hopes to elicit from the witness, depends largely on his ability to anticipate objections. Having anticipated the objection before trial, counsel should then prepare an offer of proof intended to obtain a favorable ruling from the court. Normally mere conversation between the defense counsel and the court, or argument by defense counsel, does not constitute an offer of proof. The offer of proof must set forth in detail the substance of the expected testimony. D'Aquino v. United States 192 F.2d 338 (9th Cir. 1951), cert. denied 343 U.S. 935, 72 S.Ct. 772, 96 L.Ed. 1343 (1952). Therefore, the key to making a substantive offer of proof is having a thorough knowledge of the witnesses's testimony and the legal theory upon which the testimony is admissible. Although not essential, the better practice is for both to be prepared in writing in advance, especially the theory of admissibility, and attached to the record as appellate exhibits.

Nor is this requirement limited to defense witnesses. It has long been recognized that whenever a defense witness is prevented from answering a question upon direct examination, it is the duty of the defense counsel to offer to prove the substance of the witness' expected testimony. McConnell, supra. Defense counsel has the same obligation when he is prevented from properly cross-examining a government witness. An example, in this regard, occurs when the defense desires to cross-examine a government witness in order to introduce evidence of bias or prejudice. Often the relevant area of examination is not pertinent to the factual issue, but is a proper subject for cross-examination for impeachment purposes. Unless the trial judge perceives immediately what is being attempted, counsel can expect the court to sustain an objection on relevancy grounds. An offer of proof should then be used to inform the court of the purpose and scope of defense counsel's cross-examination, and of the propriety of the questions.

Of course, an offer of proof is not evidence and therefore cannot be so considered by the court as such. United

States v. Flowers, 9 CMR 513 (ABR 1953); United States v. Thompson, 11 USCMA 252, 29 CMR 68 (1960). However, a trial judge may accept as true the facts contained in an offer of proof, and predicate the court's ruling thereon. United States v. Eull, 34 CMR 668 (ABR 1964).

After the offer is made, if the defense is still unsuccessful, the record is preserved for consideration at the appellate level. The offer of proof becomes even more crucial at this stage, because it provides the appellate court with the facts, as presented by counsel, upon which to base its ruling. A good example occurred in United States v. Hill, 9 USCMA 659, 26 CMR 439 (1958). In that case, the defense counsel did not make an offer of proof when the law officer precluded certain cross-examination questions. The appellate court was then free to interpret the purpose for counsel's questions, and thus find a reason for them which counsel may not have intended. This interpretation by the court formed the basis for ruling against the defense.

There are other areas wherein defense counsel may have use for an offer of proof. Such an issue arises when the defense requests a material witness. When the convening authority denies the accused's request for a material defense witness, the ruling may be challenged in court. If the defense chooses to do this, a carefully prepared written offer of proof should be presented giving a substantive summation of the requested witness's testimony. Again, the defense should cite authority both for granting the request and for admitting the testimony. This action should greatly enhance the chances for a favorable court ruling.

Additionally, offers of proof may be used to resist any government attempt to limit the scope of the defense's case. Consider, for example, the situation where the government has filed notice of a motion in limine. With this motion, the government will be trying to mitigate the effectiveness of the defense's case by securing a court ruling limiting the scope of the defense's examination of one or more of their witnesses. If the government is successful in this endeavor, the defense may be precluded from presenting evidence believed to be relevant. Rather than trying to get the court to reconsider its ruling later, an effective offer of proof might persuade the court to withhold its ruling on the government's motion, without the necessity of going through a full hearing on the issue. Subsequent to the presentation of the government's

case, the defense would then be in a better position to convince the court of the necessity for hearing the entire testimony of the defense witness.

### Appellate Review

The failure of a defense counsel to make an offer of proof, where appropriate, may prevent the presentation of a meritorious error to an appellate court. This sad fact occurs because a conviction cannot be disapproved on the basis of sheer speculation as to the content of a witness's expected testimony. McConnell, supra. Moreover, the appellate courts have held that where the accused is represented by legally qualified counsel, the failure to make an offer of proof allows the assumption that the trial court ruling sustaining the government objection was proper. United States v. Weatherford, 1 CMR 379 (ABR 1957).

Defense counsel should not hesitate to use an offer of proof when necessary and proper, for the defense has the right to make the offer. It is reversible error for a trial judge to prevent a defense counsel from making an offer of proof. United States v. Burton, 22 CMR 427 (ABR 1956); United States v. Diaz, 24 CMR 423 (ABR 1957). Additionally, courts have held that defense counsel should be allowed the widest latitude in presenting offers of proof, for proceedings of this nature are principally for the benefit of appellate authorities. Burton, supra. Therefore, one can conclude that the right to make the offer of proof represents an opportunity of which defense counsel should take full advantage.

An appellate court probably will not make a definitive decision on an issue before it solely on the basis of an offer of proof. However, defense counsel can reasonably expect an appellate court to remand the case back to a trial court with directions that evidence be taken on the issue, or that the convening authority dispose of the case in some manner other than by court-martial. United States v. Boney, 45 CMR 714 (ACMR 1972).

Liberal and prudent use of offers of proof will improve the effectiveness of counsel's in-court representation as well as enhancing their clients chances for a successful appeal. In short, offers of proof are a valuable tool, one which is too frequently underestimated and too often underutilized.

## SPECIAL FINDINGS REVISITED

The Volume 7, Number 3 issue (September-December 1975) of The Advocate featured an article entitled "Special Findings: The Overlooked Tool." The Article points out the benefits available to the defense when properly prepared requests for special findings are used in judge alone trials. Since the article appeared, we have received numerous requests for examples of special findings.

Article 51(d), UCMJ, and paragraph 74i, MCM, provide the basis for special findings in the military. See also United States v. Falin, 43 CMR 702 (ACMR 1971) and Chapter 12, Department of the Army Pamphlet 27-9, Military Judges' Guide (May 1969). Special findings can only be requested from a military judge sitting as a court without members. United States v. Robertson, 41 CMR 457 (ACMR 1969). Following such a request, the military judge must make special findings. Article 51(d), UCMJ. Though not certain, it appears that motions made to a military judge, out of the presence of the court members, does not qualify for special findings. But see Rule 12(e), Federal Rules of Criminal Procedure. 1/ Special findings by a military judge can be requested at any time, by either counsel. As a useful trial tactic, one receives the greatest benefit of special findings by carefully and specifically drafting the request to fit the facts and the law of each case.

The example which follows was successfully used by a trial defense counsel while litigating a jurisdiction motion. Note that the prepared questions are specific, and that the answer to each will lock onto the record the military judge's reason for the ruling. This is important, for specific factual questions and answers allow the appellate counsel to carry forward motions unsuccessfully raised at trial. Additionally, special findings prevent the government from basing their argument on a completely different legal theory on appeal from that applied by the judge at trial. See United States v. Raymo, 23 USCMA 408, 50 CMR 290 (1975).

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1. Rule 12(e) provides that ". . . where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

The best reason for the special findings, however, is not for the appeal, but for the actual trial itself. Special findings give the defense counsel a unique opportunity to force the judge to focus on the defense point of view while the evidence is being presented. If written correctly and given to the judge ahead of time, the special findings request will help the judge be more alert to individual pieces of evidence as they appear in the courtroom.

The following is offered as an example of how special findings can be written. It is not presented here as an "approved solution" to the jurisdiction issue or any other. As with all other legal tools available to counsel, he or she must decide independently whether or not a request for special findings is appropriate in any particular case.

NICHOLAS P. RETSON  
Field Defense Services Office  
Defense Appellate Division

\* \* \*

U N I T E D S T A T E S            )       REQUEST FOR SPECIAL FINDINGS  
                                  )       )  
                                  )       )  
                                  )       )  
Private First Class JOHN E.       )       )  
SMITH, 123-45-6789,               )       )  
United States Army                )       )

1. Under the provisions of Article 51d, Uniform Code of Military Justice, the following request for Special Findings is submitted to the military judge in conjunction with the accused's motion for dismissal of all Specifications and the Charge, for lack of jurisdiction. O'Callahan v. Parker, 395 U.S. 258 (1969); Relford v. Commandant, 401 U.S. 355 (1971); United States v. McCarthy, 2 MJ 26 (CMA 1976); United States v. Alef, 3 MJ 414 (CMA 1977).

2. As to Specifications 1 and 2 (16 April 1976) ---

- a. The following set of questions apply the criteria of Relford, supra:
- (1) Was the accused properly away from Fort Blank when the alleged sale/transfer occurred?
  - (2) Did the sale/transfer of the marijuana occur away from a military installation?
  - (3) (a) Where did the accused physically transfer/sell the marijuana to Specialist Four Jim Jones?  
  
(b) Is the answer to 2.a.(3)(a) a place under military control?
  - (4) Is the place listed in answer 2.a.(3)(a) within the territorial limits of the United States and not in an occupied zone of a foreign country?
  - (5) Did the commission of the alleged offense occur during peacetime?
  - (6) (a) Was there any direct connection between the accused's military duties and the alleged crime?  
  
(b) If the answer to 2.a.(6)(a) is "yes," what is that connection?
  - (7) (a) At the time of the alleged offense, was Specialist Four Jones engaged in the performance of any duty relating to the military other than acting as an undercover agent?  
  
(b) If the answer to 2.a.(7)(a) is "yes," what were those duties?
  - (8) Does there exist in (state) a civilian court in which transfer/sale of marijuana can be prosecuted?
  - (9) (a) Did the conduct of the accused at the time of the commission of the alleged offense flout military authority?

- (b) If the answer to 2.a.(9)(a) is "yes," in what manner did he do so?
- (10) (a) What did the accused believe that Specialist Four Jones was going to do with the marijuana after the alleged transfer/sale?
- (b) Does the use to which Specialist Four Jones was going to put the marijuana pose any direct threat to a military post?
- (c) If the answer to 2.a.(10)(b) was "yes," what is that threat?
- (11) Did the alleged transfer/sale of marijuana violate any military property?
- (12) Is a transfer/sale of marijuana an offense uniquely prosecuted in military courts alone?
- b. The following questions apply the additional criteria of McCarthy, supra:
  - (1) (a) Did the formation of the criminal intent for the offense occur on-post?
  - (b) Did the formation of the criminal intent occur while the accused was on-duty?
  - (2) (a) Was there a substantial connection between the accused's military duties and the crime?
  - (b) If the answer to 2.b.(2)(a) was "yes," what was the substantial connection?
  - (3) (a) When was the agreement made between the accused and Specialist Four Jones to sell/transfer marijuana?
  - (b) Was Specialist Four Jones engaged in the performance of military duties (other than as an undercover agent) at the time the agreement to transfer/sell marijuana was reached?
  - (c) If the answer to 2.b.(3)(b) was "yes," did the accused know that Specialist Four Jones was so engaged?

- (4) (a) What did Specialist Four Jones tell the accused he was going to do with the marijuana?
- (b) Was there a direct threat posed to military personnel (other than Specialist Four Jones and Private First Class Johnson), by the transfer/sale of marijuana to Specialist Four Jones in (city, state)?
- (c) If the answer to 2.b.(4)(b) was "yes," what was that threat?
- (d) Was there a direct threat to the military community by the sale/transfer of marijuana in (city, state) to Specialist Four Jones?
- (e) If the answer to 2.b.(4)(d) was "yes," what was that threat?
- c. (1) Does this court-martial have jurisdiction over the off-post sale/transfer of marijuana alleged in Specifications 1 and 2?
- (2) If the answer to question 2.c.(1) is "yes," what is the basis of that jurisdiction?

\* \* \* \* \*

(continued from page 113)

required waiver. Of course, it may not always be appropriate to object to the admission of Article 15s on Booker grounds. However, when that decision is made, a simple "No objection" would be preferable to an unsolicited statement by the defense counsel that may, in the end, be contrary to his client's interests.

SOME SAMPLE INSTRUCTIONS: PART 2

Editors Note: In the last issue of The Advocate (Volume 10, Number 1, January-February 1978), we began a series of suggested sample instructions. The purpose of this series is to assist trial defense counsel with the development of their own requested instructions. We offer no opinion as to the appropriateness of any specific language in any particular situation, but simply hope that these sample instructions can be used by trial defense counsel when preparing their own instructions for trial.

In this issue: Reasonable Doubt  
Accessory/Principal/Aider and Abetter -  
"Mere Presence"  
Knowledge

\* \* \*

Reasonable Doubt

In all criminal cases the state is called upon to prove that the crime charged has been committed and that the defendant committed it.

It is your sworn duty to commence the investigation of this case with the presumption that the defendants are innocent of the crime with which they are charged; and it is equally your duty to enter upon the consideration of each fact and circumstance in evidence having in your minds at all times the presumption that the defendants are innocent. This presumption is not an idle form, but it is a fundamental and important part of your consideration of the evidence, unless it shall have been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond every reasonable doubt that the defendants are guilty.

Reference: State v. Morrison, 52 Idaho 99,  
11 P.2d 619 (1932)  
State v. Dong Sing, 35 Idaho 616,  
208 P.860, 863 (1922)

\* \* \* \* \*

If, upon a fair and impartial consideration of all the evidence in the case, the jury find that there are two reasonable theories supported by the testimony in the case, and that one of such theories is consistent with the theory

that the defendants are guilty as charged in the indictment, and the other is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury, to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants "Not guilty."

Reference: People v. Garbaciak, 306 Ill. 254,  
137 NE 832 (1922)

\* \* \* \* \*

The defendant is presumed to be innocent. This presumption is with the defendant at the outset of the trial and continues with him through all its stages, unless and until evidence is introduced proving his guilt beyond reasonable doubt.

Suspicion is not evidence; and if all the evidence only raises a strong suspicion of guilt, the defendant must be acquitted.

The defendant is of right entitled to the benefit of every reasonable doubt. Every presumption of honesty, uprightness, good character, and lawful conduct must be taken to be in the defendant's favor.

Reference: Commonwealth v. Anderson, 245 Mass  
177, 139 NE 436, 440 (1923)

\* \* \* \* \*

You cannot convict the defendant upon mere suspicion or conjecture. It makes no difference as to how suspicious the circumstances may be as to the defendant's guilt, if you are not satisfied in your own minds beyond a reasonable doubt that the defendant knowingly owned, controlled, or possessed as charged, then you should promptly find him "not guilty."

Reference: Reynolds v. State, 136 Miss 329,  
101 S 485 (1924)

\* \* \* \* \*

It is your duty to scrutinize the evidence with the utmost care and caution; bring to that duty the reason and prudence which you would exercise in the most important affairs of life, in fact, all the judgment, caution, and discrimination that you possess; and then, unless you can say from that standpoint that you are satisfied of defendant's guilt beyond a reasonable doubt, you should acquit him, for, while a juror has a reasonable doubt of the guilt of the

defendant in a criminal case, he cannot, without great violence to his conscience and sense of right, agree upon a verdict of conviction.

Reference: Tendrup v. State, 193 Wisc 483,  
214 NW 356 (1927)

\* \* \* \* \*

Now, to the charge of \_\_\_\_\_ the defendant pleads not guilty, and that puts the burden on the government, as in all criminal cases, to satisfy the (jury) (courtmembers) from the evidence beyond a reasonable doubt that the defendant is guilty of the charge and specification. If the state does not meet that burden of proof then the defendant could not be convicted of any crime. The state is required to prove also to your satisfaction from the evidence beyond a reasonable doubt that the defendant is guilty of one or the other of these charges. Every defendant is presumed to be innocent until his conviction is proven by the evidence - I mean until the crime he is charged with is proved by the evidence beyond a reasonable doubt and to a moral certainty.

The court charges the jury that, if the jury, upon considering all the evidence, have a reasonable doubt about the defendant's guilt, arising out of any part of the evidence, they should find him not guilty.

The court charges the jury that if there is one single fact proved to the satisfaction of the jury which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit him.

Throughout the trial the defendant is presumed to be innocent. This presumption of innocence accompanies defendant throughout the trial and until the evidence against him is so strong and convincing that every member of the jury is convinced to a moral certainty and beyond all reasonable doubt that he is guilty as charged. Unless the evidence is this strong against defendant, he should not be convicted.

The court charges the jury that if after considering all the evidence in the case, that tending to show guilt, together with that tendency to show innocence, there should spring up involuntarily in the minds of the jury from any part of evidence, a probability of the innocence of the defendant, the jury must acquit.

The court charges the jury that the defendant enters into this trial with a presumption of innocence, and this is a fact in the case, which must be considered with all the evidence, and should not be disregarded.

The court charges the jury that if there is, from the evidence, a reasonable probability of defendant's innocence, the jury should acquit the defendant.

Reference: White v. State, 123 S2d 179, 184-85  
(Ala App 1960)

\* \* \* \* \*

If the facts which are established in this case to a moral certainty can be reconciled with any theory of the innocence of the respondent, then it is your duty as jurors to adopt that theory and acquit him.

Reference: People v. Knoll, 258 Mich 89, 242  
NW 222, 226 (1932)

\* \* \* \* \*

No man can be convicted of crime in this jurisdiction until his guilt is established beyond a reasonable doubt. A reasonable doubt is what the words imply, a doubt founded in reason, a doubt for which would cause you to hesitate in the ordinary affairs of life. It is not a flimsy, fanciful, fictitious doubt which you could raise about anything and everything. It means a reasonable doubt. If, when all is said and done, you have such a doubt about the guilt of the accused, it is your duty to acquit him.

Reference: People v. Davis, 171 Mich 241, 137  
NW 61 (1912)

\* \* \* \* \*

You are instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with defendant's innocence, you should do so, and in that case acquit the defendant.

Reference: Topleski v. State, 130 Wis 244, 109  
NW 1037 (1906)

Note: See United States v. Molin,  
244 F Supp 1015 (D. Mass. 1965) for  
Judge Wayzanski's instruction on  
reasonable doubt.

\* \* \* \* \*

Accessory/Principal/Aider and Abettor - "Mere Presence"

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.

Reference: Pinkney v. United States, 380 F.2d 882 (5th Cir. 1967), cert. denied 390 U.S. 908 (1968)  
King v. United States, 402 F.2d 289 (10th Cir. 1968) and United States v. Garguilo, 310 F.2d 249, 253-4 (2nd Cir. 1962) entitles the defendant to an instruction of this type on request, but, it must be requested.  
United States v. Milby, 400 F.2d 702 (6th Cir. 1968)  
Nipp v. United States, 422 F.2d 509 (10th Cir. 1970) cert. denied 399 U.S. 913 (1970). Mere association instruction in conspiracy case.  
Instruction taken from Federal Jury Practice and Instructions by Devitt and Blackman (West Publishing Company, 1970)  
United States v. Holt, 427 F.2d 1114 (8th Cir. 1970)  
United States v. Bryant, 461 F.2d 912 (6th Cir. 1972)  
United States v. Barber, 495 F.2d 327 (9th Cir. 1974) and  
United States v. Eskridge, 456 F.2d 1202 (9th Cir. 1972), cert. denied 408 U.S. 926, cert. denied 409 U.S. 883 (1972) for discussion of the instruction in aiding and abetting cases.

\* \* \* \* \*

The mere presence of a man when a crime is being committed by another man does not make him guilty. It is when he is present aiding, abetting, and encouraging the other man to commit it that he is guilty.

Reference: Acker v. State, 19 Ala App 592, 955 663 (1924)

\* \* \* \* \*

The mere presence of the defendant at the time and place of the crime alleged to have been committed by the defendant's companions would not of itself render the defendant guilty under this principle of law. But if from the facts and circumstances surrounding defendant's presence there at that time, and from his demeanor and conduct you are convinced beyond a reasonable doubt that his presence did encourage either or any one of his companions to commit either or any one of the felonies alleged to have been committed by either or any of them, then in that event the defendant would be guilty and may be punished as the principal.

Reference: Schaffer v. State, 202 Ind 318, 173  
NE 229, 231 (1930)

\* \* \* \* \*

If any one of the defendants did assault, beat, bruise, and injure A., and either or any of the other defendants were present aiding, encouraging, or inciting this assault, the latter were aiders and abettors and liable as principals, but that mere presence at such an assault did not render one liable who had done no act to countenance or approve what had been done by those unlawfully engaged.

Reference: Mayfield v. State, 142 Wis 661, 125  
NW 15, 17 (1910)

\* \* \* \* \*

#### Knowledge

Actual knowledge (that S was a deserter from the armed forces at the time he lived in the defendant's house) is an essential element of the offense charged. You may not find the defendant guilty unless you find beyond reasonable doubt that he knew (that S was a deserter from the armed forces). It is not sufficient to show that the defendant may have suspected or thought that S was such a deserter.

The fact of knowledge, however, may be established by direct or circumstantial evidence just as any other fact in the case.

Reference: Breeze v. United States, 398 F.2d  
178, 197-98 (10th Cir. 1968)  
Reisman v. United States, 409 F.2d  
789 (9th Cir. 1969)

\* \* \* \* \*

## RECENT OPINIONS/GRANTS OF INTEREST

### FEDERAL OPINIONS

#### DISMISSAL FROM FEDERAL EMPLOYMENT IS NOT JUSTIFIED BY MARIJUANA CONVICTION

Young v. Hampton, \_\_\_ F.2d \_\_\_, 46 U.S.L.W. 2340 (7th Cir. 1977).

Young, age 53, had 17 years of combined military and civilian service with the U.S. Government. His work record was at all times satisfactory. He was arrested at his civilian residence, charged, and subsequently convicted of possession of marijuana and several other controlled drugs. He was sentenced to 90 days confinement and five years probation. Although Young's work record as a Department of the Army civilian employee was substantially the same after the conviction as before, Young was dismissed from the civil service because of this conviction. Young objected to his dismissal and filed suit in Federal court. The Seventh Circuit Court of Appeals reinstated Young to his job, finding that there was no evidence that his misconduct impaired "the efficiency of the service," and that retention of Young would not adversely affect the operation of his office.

While the case concerns the dismissal of a civilian employee based on a Federal statute, imaginative defense counsel can analogize the facts of this case to their military accused. One can argue that the heavy additional punishment of a dismissal from employment (i.e., the Army) is warranted only when there is evidence of a nexus between the accused's off-duty conduct and his military duties. This is particularly important when an accused, like Young, can call witnesses who will attest to his satisfactory or outstanding performance of duties before and after the apprehension. Counsel should also consider arguing that society's interest in assuring that those persons committing similar offenses should be punished similarly by imposing punishment other than a punitive discharge. Lastly, Young v. Hampton may be used effectively in administrative elimination proceedings to argue in support of a client's desire to stay on active duty.

TRIAL COUNSEL'S ARGUMENT

United States v. Morris, \_\_\_ F.2d \_\_\_, 22 Cr. L. 2504  
(5th Cir. 1978).

In this case, the Fifth Circuit Court of Appeals again ruled on the appropriateness of a prosecutor's closing argument. Here, the prosecutor stated that, in addition to one witness' testimony,

. . . there is the testimony from the Government officers who have no interest in this case other than seeing that they are upholding their sworn duty to see that the laws are not violated and that individuals such as Mrs. Morris who violate these Federal laws are brought to justice.

The Court expressed disbelief that a prosecutor would make such a statement in light of its prior admonishments in United States v. Herrera, 531 F.2d 788,789-90 (5th Cir. 1976); United States v. Martinez, 466 F.2d 679,683 (5th Cir. 1972); United States v. Lamerson, 457 F.2d 371,372 (5th Cir. 1972). The Court held that this statement impinged upon the jury's function in determining guilt. "By giving opinion, an attorney may increase the apparent probative force of his evidence by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position. If, for example, an attorney states in his summation that he believes a witness has lied, his statement suggests that he has private information supporting his belief." 22 Cr.L. at 2505. The Court concluded, however, that since the judge gave a curative instruction in this case, the error did not require reversal.

Similar language used by the prosecutor in this case has been observed in many military courts-martial. Trial defense counsel should consider objecting to this type of argument based on this case and DR 7-106(c), ABA Code of Professional Responsibility. See also, "Objecting to Trial Counsel Argument," The Advocate, Vol. 8, No. 1, p. 2.

COURT OF MILITARY REVIEW OPINIONS

JURISDICTION IN PERSONAM - STANDARD OF PROOF

United States v. Jessie, \_\_\_ MJ \_\_\_ (ACMR 22 March 1978).

The appellant contended that the Army lacked in personam jurisdiction as a result of a recruiter's advice to conceal his prior federal convictions upon enlistment. In resolving the factual issue, the Army Court of Military Review held that this question is an interlocutory matter to be determined by the military judge. Further, the Court concluded that in deciding the facts necessary to the resolution of this legal question, the judge should apply the "preponderance of the evidence" standard. The Court did emphasize that there are two exceptions to this rule: mental responsibility and, in purely military-type offenses, factual issues as to the accused's status as a soldier. See, United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952).

JURISDICTION - SUBJECT MATTER

United States v. Johnson, CM 433891 (ACMR 28 February 1978)  
(unpublished)

An on-post CID informant called the accused's off-post residence and told him that he wanted to buy some cocaine. Some discussions as to price and quantity occurred. Later, the accused called the informant back at his on-post quarters and told him to come to the accused's off-post residence to pick up the cocaine. The informant complied and the transaction took place. The informant, a specialist four and the accused, a staff sergeant, had known each other for three years. Ruling that these facts were insufficient to establish military jurisdiction, the Army Court of Military Review set aside the findings and sentence and ordered the charges dismissed. The Court's holding was based on United States v. Alef, 3 MJ 414 (CMA 1977). A dissenting opinion stressed that the sale was made by a noncommissioned officer to a lower ranking soldier and that the formation of the agreement occurred on post (but see, United States v. Williams, 4 MJ 336 (CMA 1978), and United States v. Williams, 2 MJ 1041 (ACMR 1976)). The dissent further concluded that there was a threat to the military reservation because the accused and the informant lived on post and used drugs (but see, United States v. Eggleston, 2 MJ 1066 (ACMR 1976), vacated 4 MJ 88 (CMA 1977)).

United States v. Acord, CM 436574 (ACMR 3 March 1978)  
(unpublished).

A private, known to the accused through their association in a military unit, took three informants to the accused's residence located 18 miles from the military post. The three purchased drugs from the accused and one of them indicated to the accused that the substances would be taken back to the post for resale. The purchase was made during non-duty hours. Utilizing the Relford criteria, and balancing those criteria which support military jurisdiction against those which do not, the Army Court of Military Review found no jurisdiction. As none of the Relford criteria clearly supported military jurisdiction, the Court concluded that any military interest present could be adequately vindicated in the local civil courts. In an interesting footnote, the Court stated that there was no direct threat to the military post (even though one of the informants said the drugs would be taken there for resale) in that any sale of prohibited drugs possesses a potential threat that the substances will ultimately be received by soldiers assigned to the military base.

WITNESSES - BOLSTERING

United States v. Williams, SPCM 13043 (ACMR 17 March 1978)  
(unpublished).

The appellant was convicted of failing to obey an order of a superior commissioned officer (two specifications) and willfully disobeying a superior commissioned officer (two specifications). At trial, the only government witness was a lieutenant whose orders were allegedly disobeyed. The defense presented the testimony of four enlisted men who contradicted the lieutenant in varying degrees. In rebuttal, and over defense objections, the government called a major and two captains who were allowed to testify as to the lieutenant's reputation for truth and veracity. In allowing this testimony, the judge ruled that the lieutenant's credibility had been attacked by the contradictory testimony of the defense witnesses.

In finding the judge's ruling to be erroneous, the Court noted that "once an attempt has been made to diminish a witness' credibility by attacking his veracity, the party which called the witness may then attempt to offset the impeaching evidence and rehabilitate the witness." Only after the lieutenant's credibility was attacked by showing him to be

untruthful was the government entitled to present bolstering testimony. Since the enlisted members only presented contradictory testimony, the government was not entitled to bolster the lieutenant's testimony.

The Court held the error to be prejudicial in that "[w]hile a witness' membership in a general class does not ipso facto render him more or less credible, common experience teaches us that in certain situations there is a tendency to accord more weight to such testimony than would be accorded the testimony of other witnesses." (footnotes omitted). Therefore, the Court concluded that the testimony of the three officers was likely to have had an undue and prejudicial effect upon the court members' verdict. Consequently, three of the four findings were set aside and a rehearing was authorized.

#### STATE DECISIONS

##### CONFESSIONS - RIGHT TO COUNSEL

Watson v. State, \_\_\_ Md \_\_\_, \_\_\_ A.2d \_\_\_, 23 Cr. L. 2006 (February 10, 1978).

The Maryland Court of Appeals has upheld the conviction of a man who confessed after failing a polygraph examination. A police detective indicated to the accused's defense counsel that the detective had some doubts about the accused's guilt and suggested that he take a polygraph. In the presence of both the detective and the client, the defense counsel advised the client to make no statements beyond those asked during the polygraph examination. The detective also agreed to ask no other questions but those asked during the examination.

After the accused was notified that he failed the examination, the detective unsuccessfully attempted to contact the defense counsel. After a proper rights warning, the accused made an inculpatory statement. The Court of Appeals, finding no tricks or other coercive interrogative tactics such as the "Christian burial speech" in Brewer v. Williams, 430 U.S. 387 (1977), ruled that the accused willingly made the statement.

The dissent found an adequate waiver lacking because the accused confessed after being confronted with his failure on the polygraph.

This decision illustrates one of the dangers of a polygraph testing system which is controlled by the police, as is the case in the military. Trial defense counsel who wish to avoid a situation like that which occurred here should consider being physically present when the client takes the test. Counsel should also consider getting a similar understanding from the CID agents involved and the accused that there will be absolutely no discussions between any government agent and the accused outside the presence of counsel. This agreement should even extend to a prohibition against the agents informing the client of the results of the polygraph test, for it is at this moment when most incriminative statements occur.

ETHICS - ATTORNEY'S RESPONSIBILITY  
TO PROVIDE POLICE WITH REAL EVIDENCE

Morrell v. State, \_\_\_ P.2d \_\_\_, 46 U.S.L.W. 2506 (1978).

The accused loaned his car to a friend, who discovered a written plan for a burglary that the accused had been charged with committing. The friend turned the "plan" over to the defense counsel. The attorney, pursuant to an Ethics Opinion from the Alaska Bar Association, advised the defendant's friend on the law of concealment of evidence. The friend took the evidence back, and with the cooperation of the attorney, the evidence was given to the police and offered into evidence against the defendant at trial.

Relying on admittedly sparse authority, the Alaska Supreme Court held that the attorney - an officer of the court - was obligated to see that the evidence reached the prosecution. Additionally, because the evidence came into the attorney's possession from a non-client third party who was not acting as the client's agent, the attorney could not have relied on the attorney-client privilege to refuse to testify at the defendant's trial as to his acquisition of the evidence from the friend. Although the attorney relied upon the Bar Association's ethics opinion, the Court also noted that an attorney

who received real and incriminating evidence against his client, and then secreted it in a place not accessible to the police officers, would have violated the state concealment of evidence statute.

#### MARIJUANA STATUTE UNCONSTITUTIONALLY SEVERE

State v. Leigh, \_\_\_ Fla. Supp. \_\_\_, 22 Cr. L. 2407 (January 18, 1978).

On 18 January 1978, the Florida Circuit Court, Eleventh Circuit (Dade County), held that the state statute on marijuana was unconstitutional as applied to private possession, and that the statute, which provides for up to five years imprisonment, violates both state and federal prohibitions against cruel and unusual punishment.

In reaching its decision, it was apparent that the Court was particularly impressed with the testimony of Dr. J. Thomas Ungerleider, Assistant Professor of Psychiatry at the UCLA Medical Center. Dr. Ungerleider, a member of the National Commission on Marijuana and Drug Abuse, testified that this Commission came to the unanimous conclusion that marijuana presented no threat to the public health, safety, or welfare. He stated that it does not cause amotivational syndrome, psychosis, criminal, or violent behavior. He further noted that 200 people a year die from aspirin while nobody has ever died from smoking marijuana.

The Court also considered President Carter's message of 2 August 1977 to Congress: "Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself . . ."

The Court further relied on Coker v. Georgia, 433 U.S. 584 (1977) which held ". . . a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence, is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." The Court in Leigh ruled that the Florida five year statute failed on both grounds.

Since the Army also has a five year maximum punishment for marijuana possession, this case could conceivably be quite important. While it is doubtful that military judges will declare the Army's prohibition against marijuana unconstitutional, they may well be persuaded to give a lesser sentence by the same arguments that the Florida court considered relevant.

### COURT OF MILITARY APPEALS GRANTS

#### COMPOSITION OF THE COURT

United States v. Aho, Docket No. 35,474, petition granted 30 March 1978.

Copies of letters from the staff judge advocate to brigade commanders asked for the names of eligible enlisted court members. The criteria set forth by the staff judge advocate limited the list of those eligible to enlisted personnel in the grades of E-8 and E-9. Upon receiving this information, the staff judge advocate hand picked a few E-7's and E-6's to submit to the convening authority. Examination of convening orders in the command indicated that the convening authority had never selected anyone to be a court member who was not on the staff judge advocate's list.

The more specific issue presented to the Court of Military Appeals is whether or not the court was properly constituted in that lower enlisted personnel were automatically excluded from consideration as court members. A similar issue is also pending before the Court in United States v. Maker, Docket No. 33,137, petition granted 22 November 1976.

A broader issue is also presented in this case - that is an attack on the composition of the court based on Sixth Amendment grounds. The appellant contends that the prior Supreme Court case law holding the Sixth Amendment inapplicable to the military is distinguishable, in that those cases are based on military necessity in time of war. Since the United States is not presently at war, the appellant reasons that there is no overriding necessity imposed on the military community requiring suspension of the Sixth Amendment right to trial by jury.

## "SIDE-BAR"

or

### Points to Ponder

1. Chain of Custody Forms - A "War" of Footnotes. Historically, the Government has relied on chain of custody forms to prove proper custodial maintenance and transfer of evidence. Although United States v. Nault, 4 MJ 318 (CMA 1978) involved a case in which no chain of custody form was admitted in evidence, the Court of Military Appeals addressed the admissibility of such forms. Footnote 7 of the opinion written by Chief Judge Fletcher states that the Court will be unwilling to allow the admission of custody forms because they are made with a view toward prosecution. Paragraph 144d, Manual for Courts-Martial, United States, 1969 (Revised edition).

In a footnote of its own from United States v. Watkins, MJ \_\_\_\_, CM 436141 (ACMR 19 April 1978), the Army Court of Military Review has indirectly asked the Court of Military Appeals to reconsider footnote 7 of Nault. Until the issue is addressed in the body of a decision by the Court of Military Appeals, it is anticipated that the Court of Military Review will continue to display its displeasure with COMA's "holding" in chain of custody cases.

Despite this ambiguity, Nault does establish that the government must prove the chain of custody by competent witness testimony before the admission of fungible evidence, i.e. property not uniquely identifiable. Additionally, it is clear that the government need not produce every link in the chain if witnesses prior to and subsequent to the missing link can testify as to the unaltered or untampered nature of the evidence.

The holding of Nault, the dicta in the footnote, and the current attack upon the admissibility of laboratory reports will require greater efforts on the part of the government to prove its case; to this end, the Criminal Law Division of OTJAG has recommended that trial counsel be familiar with Section B-3, Appendix vii, Department of Army Pamphlet 22-10, The Trial Counsel and the Defense Counsel. Defense attorneys should also familiarize themselves with this pamphlet, as well as the decisions in Nault and Watkins.

2. Goode Comments and The Substitute Counsel. The Defense Appellate Division has received a record of trial in which a defense counsel in the Goode (United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975)) response to the SJA review, made comments which could be considered as a compliment to the SJA on the thoroughness of the review. In his response the counsel said, "It is my opinion that the staff judge advocate has thoroughly and competently discussed all issues raised by trial defense counsel; therefore, I do not wish to comment upon the Review of the Staff Judge Advocate."

While it is gratifying to see an SJA prepare a fair and proper post-trial review, it is important to remember that it is his duty to do so. Comments by the defense conceding the thoroughness and competence of the review are unnecessary and simply not required by Goode. Of interest in this particular case is that the defense counsel was appointed as substitute counsel for post-trial purposes only. In such cases when the sole function of the defense counsel is to represent a client after trial, it should be done with the same diligence as would be the case before and during trial.

3. Does COMA Have Jurisdiction Over Article 15s? That is precisely the issue pending before the Court of Military Appeals in Barnett v. Scott, Misc. Docket No. 77-80, and Stewart v. Stevens, Misc. Docket No. 77-134. This question, which could have far-reaching impact on the military justice system, has been raised in two separate extraordinary relief petitions. Both cases are from petitioners who are members of the U.S. Navy, and involve allegations of substantial irregularities in Article 15s that were administered to a number of sailors. The Article 15s arose from two separate incidents of alleged off-post marijuana use by sailors assigned to nuclear submarines. The cases were combined for review by COMA.

Obviously recognizing the importance of this issue, the Court invited amicus briefs from the government and defense appellate divisions of all services. Petitioner's contention is that the supervisory authority of COMA over the military justice system, as expounded in McPhail v. United States, 1 MJ 457 (CMA 1976), must be available to protect the constitutional and statutory rights of all servicemembers. Such authority, it is argued, extends to non-judicial punishment proceedings. On the other hand, the government contends that Article 67, UCMJ, does not confer jurisdiction over Article 15s to the Court of Military Appeals, and that McPhail is wrongly decided. Oral argument was held on 19 April 1978.

4. Hearsay and The Right To Confrontation. The Court of Military Appeals has signalled its apparent intent to deal with an accused's confrontation guarantees in United States v. Santiago-Rivera, Docket No. 34,242, petition granted 5 July 1977. The issue pending therein is whether the government can, consistent with the Sixth Amendment, meet its burden of proof as to the identity of a narcotic drug with only the chemist's lab report.

Appellant has raised two issues. The first is that the report, as hearsay, does not come within one of the recognized exceptions to the hearsay rule because no foundation was laid and because the report was prepared for the purpose of prosecution. The second issue, and the one with the potentially wider impact, is that even if the lab report qualifies as an exception to the hearsay rule, it is still incompetent hearsay because its admission violates the appellant's Sixth Amendment right to confront the witnesses against him.

Trial defense counsel should be aware that the second argument can be used to challenge all hearsay exceptions. For example, an AWOL charge, in which the government proves its case exclusively with the introduction into evidence of DA Forms 4187 and 2475-2, seems particularly ripe for this attack.

The basic rationale behind the objection is that the right to confrontation is not the same as the hearsay rule, and that what the Sixth Amendment requires is cross-examination - either at the time the hearsay declaration is made or when it is offered at trial. California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 489 (1970). Defense should argue that the introduction of forms into evidence does not permit that cross-examination. Unfortunately, subsequent Supreme Court decisions have muddied the position established in Green, supra. E.g., Dutton v. Evans, 400 U.S. 74 (1970). Thus, there is little present case law to support this contention.

Despite this uncertain situation, defense counsel can propose a possible solution to this apparent conflict of the hearsay rule exceptions and the Sixth Amendment. That proposal is to construe the Sixth Amendment as requiring, with rare exception, the government to produce every available witness, including the hearsay declarants. Only in this manner would the accused then have his right to confront and cross-examine the witness against him. The government would, however, be permitted an exception to this rule. If the prosecution could

show actual unavailability of the hearsay declarant (e.g. dead, not subject to subpoena, etc.) then the government would be allowed to use the out-of-court statement subject to the traditional hearsay rules. While this proposal has not yet been adopted, counsel should argue that it is a reasonable protection for the accused's Sixth Amendment right - and should be approved by the courts.

5. Errors in the Post-Trial Review. In United States v. Barnes, 3 MJ 406 (CMA 1977), Chief Judge Fletcher stated that, in the post-trial review, the SJA must include a "delineation of the elements of the offenses and the relationship of the evidence presented at trial to those elements." This procedure is mandated "in order [to] satisfactorily . . . provide the convening authority with sufficient guidelines so that he may make an informed decision . . ." This is another in a long line of requirements delineated by the Court to assure that the convening authority is properly informed before he takes final action on an accused's case.

Trial defense counsel should be aware of the Barnes case and, therefore, insure that the post-trial review adequately discusses all of the important facts and theories that the defense presented at trial. Counsel should be wary of letting the SJA give "bald conclusions as to sufficiency of the evidence without reason and legal guidelines." Barnes, supra. Such diligence by the defense attorney can only help to put the client's case in the best light possible. Counsel are reminded that almost all errors or omissions in the post-trial review which are not challenged by the trial defense counsel can not later be raised at the appellate level - they are waived.

6. "Booker" Objections. A record of trial had recently arrived at DAD in which a defense counsel did not object on Booker grounds (3 MJ 443 (CMA 1977)) to the introduction into evidence of an Article 15. While this lack of objection is not particularly significant, the counsel's action when doing so is noteworthy. After failing to object, the attorney volunteered the following statement: "Your Honor, insofar as the Article 15 is concerned, I would just state that I have made a Booker inquiry of my client."

Counsel are reminded that the Booker decision places no responsibility on trial defense counsel to affirmatively establish any waiver of rights prior to the admission of Article 15s. As a result, it is recommended that defense counsel not voluntarily assist the government in the establishment of the  
(concluded on page 95)

# "ON THE RECORD"

or

Quotable Quotes from Actual  
Records of Trial Received in DAD

\*\*\*\*\*

DC during closing argument:

The realm of a reasonable man is a very broad one. It does not mean that one is held to do the most logical thing or the best thing. For example, many reasonable men voted for Richard Nixon for President.

\*\*\*\*\*

(Answers by defendant during sentencing)

Q: Was there anything physical denied while you were in confinement?

A: Yes.

Q: What?

A: My wife.

Q: Anything else?

A: My liberty, you know, and drugs; I was a drug user.

\*\*\*\*\*

Asked if he could recall a conversation between Specialist \_\_\_\_\_ and Major \_\_\_\_\_ the witness responded:

Yes, sir. At that time Specialist \_\_\_\_\_ and Major \_\_\_\_\_ were in his office, sir, and so Specialist \_\_\_\_\_ restated that what I informed Major \_\_\_\_\_ that he stated -- he restated to Major \_\_\_\_\_ he heard that stated that and Major \_\_\_\_\_ told him that -- that he had ...

\*\*\*\*\*

Q: You're trying to tell us you were trying to pick a fight, is that right?

A: Yes.

Q: Do you sneak up from a guy's rear to pick fights?

A: Well, sometimes it comes in handy.

\*\*\*\*\*

ICD: Your Honor, I'm going to have to go to PT in the morning, unless I can specifically get excused.

MJ: Well, I thought that was Mondays and Thursdays.

IDC: Your Honor, I am in the remedial group and I have to go five times a week.

\*\*\*\*\*

IDC: How many of you have had that experience? [sitting on courts-martial]

MBR: (Maj \_\_\_\_): I didn't sit on one. I was a defense counsel and it resulted in an acquittal if that's...

MJ: Are you bragging?

\*\*\*\*\*

Q: And how would you rate Sgt \_\_\_\_\_ in comparison to the other Sergeant E-5's, that you have in this platoon?

A: From one to ten, probably zero.

\*\*\*\*\*

TC: I now show you what has been marked Prosecution Exhibit 9 for identification and ask you if you recognize that?

W: Yes.

TC: What is it?

W: It's me.

\*\*\*\*\*

