

T H E A D V O C A T E

A Bi-Monthly Newsletter for Military Defense Counsel

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

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SIDPERS - The Army's New Personnel Accounting System, and
Its Effect upon Military Justice.

Section I. SIDPERS; Reasons For Change; Operation.

1-1. SIDPERS (Standard Installation Division Personnel System) is an automated, integrated personnel system designed to provide personnel data support at the corps, division, installation, brigade, battalion and unit levels. SIDPERS replaces the Personnel Management and Accounting Card Processor System (PERMACAPS) and the Military Personnel Management Subsystem (MPMS) of the Base Operating Information System (BASOPS) that are currently operational. SIDPERS is being implemented Army-wide, effective 1 September 1974. DA Forms 1 and 188 will no longer be used.

SIDPERS performs four major functions:

- a. Strength accounting.
- b. Organizational and personnel record keeping.
- c. Information exchange with other automated systems.
- d. Command and staff reporting designed for use by the functional manager, personnel manager and data analysts.

1-2. Reasons. The two subsystems of BASOPS referred to in paragraph 1-1 were developed independently, resulting in different equipment, training and functional requirements. This had limited systems flexibility and caused increased operational costs. In addition, the lack of a coding structure common to all data processing systems prevented the direct exchange of data between existing data processing systems. The effect has been increased workload and errors in reporting and recapturing personnel information.

SIDPERS is the Army's solution to the above problems and has the following objectives:

- a. Improve the personnel information available to the soldier.
- b. Provide sufficient management information to the commander to enable him to manage his personnel effectively.
- c. Improve the automated support of personnel and administrative functions at the operating level.
- d. Allow the exchange of information between this system and other existing automated information systems.
- e. Improve the accuracy of personnel data.

f. Provide a standardized personnel system which can be easily adapted to changing requirements.

In practical terms, SIDPERS is designed to save DF-typing time for personnel actions. The new DA Form 4187, for example, requires only straight language entries. There will be no more decisions about whether to enter a slash, period, dash or space; no questions about capital and lower case, or whether or not to skip a line, and far fewer entry blocks to worry about at the unit level. There will be no necessity for typing entries, and change forms may be prepared at any time.

1-3. Forms. DA Form 4187 (Personnel Action), is a preprinted carbon interleaved, four-part form (see attached). Sections I, III, IV and V are for use Army-wide. Section II (Duty Status Change) is used only by units supported by SIDPERS. DA Form 4187 is designed for:

- a. Reporting duty status changes of service members which involve pay entitlement.
- b. Use in military courts-martial proceedings or in adjudication of claims based on the duty status of the claimant.
- c. Use by service members in accordance with DA Pam. 600-8 when requesting a personnel action.

The second important SIDPERS form is DA Form 2475-2 (Personnel Data Card) (attached). It is a historical and legal document pertaining to an individual during the period of assignment/attachment with a specific unit. SIDPERS Change Reports for all personnel are entered on the reverse side of the form thus creating a chronological list of all personnel actions concerning the individual soldier.

1-4. Operation. Once a duty status change occurs, the unit clerk will fill out a DA Form 4187 and enter the specific duty status change in Section II. For example:

SECTION II - DUTY STATUS CHANGE

The above member's duty status is changed from present for duty to AWOL effective 0700 hours, 10 Nov. 1974.

The clerk will also make an appropriate entry on the reverse side of the serviceman's DA Form 2475-2. Both forms will then be taken to the unit commander (or "authorized representative", see IV, below) for certification. The certifying official

must insure that the information has been recorded on SIDPERS Change Report (DA Form 3728) for submission to the central computer and properly entered on DA Forms 4187 and 2475-2.

The four copies of DA Form 4187 are distributed as follows:

- a. Copy #1 is the original copy and is forwarded to the servicing Military Personnel Office (MILPO) for inclusion in the individual's Military Personnel Records Jacket (MPRJ).
- b. Copy #2 is forwarded to the Finance and Accounting Office.
- c. Copy #3 is retained by the unit for 1 year and then destroyed.
- d. Copy #4 is given to the individual, if appropriate.

The individual's DA Form 2475-2 will be kept in the unit records for 1 year following reassignment and then sent to the Army's permanent storage facilities. An exception to this procedure is the DFR entry. When a person is dropped from the rolls for unauthorized absence, his DA Form 2475-2 is sent to the Military Personnel Office for inclusion in his MPRJ. A duplicate copy remains for unit use. If/When the individual returns, the original DA 2475-2 is sent back to the unit.

SECTION II. Applicability to Military Law.

2-1. Official Records. DA Forms 2475-2 and 4187 must qualify as official records to be admissible in a court-martial to prove an unauthorized absence. The basic principles for the admissibility of official records require:

- a. a writing made as a record of a fact or event;
- b. by a person within the scope of his official duties;
- c. those duties include a duty to know the truth of the fact or event or to ascertain through appropriate and trustworthy channels of information;
- d. a duty to record the fact or event; and
- e. the person who had these duties performed them properly. Paragraph 144b, Manual for Courts-Martial, United States, 1969 (Revised edition).

DA Forms 2475-1 and 4187, like morning reports, will be official records and thus admissible as exceptions to the hearsay rule. United States v. Masusock, 1 USCMA 32,

1 CMR 32 (1951). The key principles in the recordation of morning reports and the new SIDPERS forms require that they be kept and prepared in substantial conformity with United States Army regulations (United States v. Parlier, 1 USCMA 433, 4 CMR 25 (1952)) and be made in the performance of a legally imposed duty to record the event of AWOL and its dates. United States v. McNamara, 7 USCMA 575, 23 CMR 39 (1957).

2-2. Presumption of Continuous Unauthorized Absence. When the dates of the inception of an unauthorized absence and of a later return to military control are shown by the SIDPERS forms, it may be inferred that a continuous unauthorized absence existed for the whole period. Paragraph 164a, Manual for Courts-Martial, United States, 1969 (Revised edition; United States v. Creamer, 1 USCMA 267, 3 CMR 1 (1952)). Since different SIDPERS forms may be used to show an inception and a termination date, situations may arise where one form is admissible and the other is not, thus supporting a conviction for an unauthorized absence of one day at most. United States v. Lovell, 7 USCMA 445, 22 CMR 235 (1956).

2-3. Made Principally With a View Toward Prosecution. SIDPERS Forms 2475-2 and 4187 probably will not be rendered inadmissible as made principally with a view toward prosecution. (But see IV, below). These forms are made principally for the purpose of reflecting day-to-day events as they affect strength in personnel and other administrative matters not within the limitation. Paragraph 144d, Manual for Courts-Martial, United States, 1969 (Revised edition).

SECTION III. Use of SIDPERS in Court-Martial Proceedings.

3-1. Evidence. DA Forms 2475-2 and 4187 will be the primary evidentiary documents in AWOL and desertion cases. Which form is used, where trial counsel will obtain the form, and the method of authentication are prescribed by Army Regulation 680-1, C.7, dated 18 June 1974 and controlled by the "official documents" and "best evidence" provisions of the Manual, supra. (See paragraph 143). As such, trial counsel's use of the SIDPERS forms at trial may result in a number of legal errors. (See IV, below). Trial counsel's options follow.

3-2. Use of Original DA Form 2475-2 From Unit Files. Paragraphs 5-3, 5-5, and 5-6, AR 680-1, impose upon unit commanders the mandatory requirement of preparing and maintaining DA Forms 2475-2 for each assigned/attached member. Thus, in the instance of a member not dropped from the rolls as a deserter, the unit commander can authenticate the DA

Form 2475-2 as an official record. A possible authentication certificate for the original DA Form 2475-2 would contain words such as:

(Date certificate prepared)

I certify that I am the commanding officer of the organization recorded in part I of this form, and the official custodian of the personnel data - SIDPERS Cards, DA Form 2475-2 of the organization recorded in Part I, and that the attached/foregoing is the original of the DA Form 2475-2 of said organization maintained at
relating to (Grade)
(First name), (Middle name),
(Last name) (SSN)
(Signature)
Typed Name, Grade, and
Branch of Service.

3-3. Use of Duplicate DA Form 2475-2 From Unit Files. In the event a photocopy of the original DA Form 2475-2 is offered as evidence, its admissibility will be subject to the best evidence rule. A possible authentication certificate for a photocopy of the DA Form 2475-2 would contain words such as:

(Date certificate prepared)

I certify that I am the commanding officer of the organization recorded in Part I of this Form, and the official custodian of the Personnel data SIDPERS cards, DA Form 2475-2, of the organization recorded in Part I, and that the attached/foregoing is a true and complete copy of the DA Form 2475-2 of said organization maintained at
relating to (Grade) (First name)
(Middle name) (Last name)
(SSN)
(Signature)
Typed name, grade, and
Branch of service.

3-4. Use of Original DA Form 2475-2 From MPRJ. Paragraph 5-6b(9), C.7, AR 680-1, requires the inclusion of the original DA Form 2475-2 in a member's military personnel records jacket once he has been carried as

DFR. Thus, once a member is DFR'd, the MPRJ custodian can authenticate the DA Form 2475-2 as an official record. The authentication certificate should be similar to the certificates currently used on DA Forms 20 and Article 15's. However, because Paragraph 5-6b(8), C.7, AR 680-1, requires that the unit maintain a duplicate of the DA Form 2475-2, that copy could still be authenticated by the unit commander.

3-5. Use of "Copy 3" of DA Form 4187 From Unit Files. Paragraph 5-3a(1), C.7, AR 680-1, requires that unit commanders prepare and maintain DA Forms 4187 for all assigned/attached personnel. Paragraphs 5-10a(1), (2), and (3) require retention, at unit level, of copy 3 of a submitted 4187 for one year. Thus, in all AWOL and desertion cases, the unit commander can authenticate DA Forms 4187 as official records. If copy 3 is to be introduced into evidence, an authentication certificate could read as follows:

(Date certificate prepared)

I certify that I am the commanding officer of the organization listed on the attached/foregoing form, and the official custodian of copy 3 of the personnel action sheet, DA Form 4187, of the organization listed thereon, and that the attached/foregoing is a true and complete duplicate original (carbon copy) of the DA Form 4187 of said organization submitted at _____, relating to _____ (grade)

(first name), (middle name),
(last name) (SSN)

(signature)

Typed name, grade, and
branch of service.

But see IV, 4-10 below.

3-6. Use of Original DA Form 4187 From MPRJ. Paragraph 5-10a, C. 7, AR 680-1, requires that the original (copy 1) of DA Form 4187 be forwarded by unit commanders to the servicing MILPO for inclusion in a member's MPRJ when Section II is completed. Therefore, the MPRJ custodian can authenticate DA Forms 4187 as official records. The authentication certificate should be similar to the certificates currently used on DA Forms 20 and Article 15's.

3-7. Computer Print-outs. It is not anticipated that actual computer print-outs will be utilized at courts-martial. However, for possible legal treatment, see paragraphs 143a(2)c

and 144b Manual, supra; D.A. Pam. 27-2, "Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition)" page 27-15.

SECTION IV. Possible Legal Errors

4-1. Presumption of Regularity. The basis of admissibility of the SIDPERS forms is their status as official records, exempt from application of the hearsay rule. The key element in the official records exception is that the appropriate person properly performed his duties in the preparation of the document. If the document is regular on its face, military courts apply a presumption that the responsible official properly prepared the record, United States v. Creamer, 1 USCMA 267, 3 CMR 1 (1952). If it can be shown, however, that the SIDPERS form in question was not properly prepared, the document is hearsay and not within the official record exception. Hearsay cannot be waived at trial by trial defense counsel's failure to object. Paragraph 139a, Manual, supra. Many of the following possible errors concern attacking the presumption of regularity. [All paragraphs referred to will be from Army Regulation 680-1, C.7]

4-2. DA Form 2475-2 Tenure Block. Paragraphs 5-5e(1), 5-5f and 5-6b provide that the unit commander will sign and enter the appropriate date in the "Tenure" block of DA Form 2475-2 upon three occurrences: (1) change of command, (2) reassignment of the individual soldier, and (3) a "DFR" entry. Thus the question remains unanswered as to whether or not a Form 2475-2 is admissible to prove an unauthorized absence of a member not dropped from the rolls if the commander has signed or entered tenure dates without the occurrence of any of the three events mentioned above.

4-3. DA Form 2475-2. "Authorized Representative." Paragraph 5-5c(1) requires entry of the names, grades and initials of all "authorized representatives" on DA Form 2475-2 who may approve and initial entries on the reverse side of the form. Paragraph 5-5c(1) states that "authorized representatives should be limited to commissioned officers, warrant officers, 1 SG's, DAC's, or senior enlisted personnel (E7, E8, or E9)." If someone not included in the above paragraph is designated as an authorized representative, it is open to question whether or not the court would strictly limit the list of representatives to exclude the individual listed.

4-4. DA Form 2475-2. Change of Authorized Representatives. An authorized representative must initial all personnel.

status changes on the reverse side of DA Form 2475-2. Paragraph 5-5d. Paragraph 5-5g provides that a commander may change his authorized representatives by lining out their names on the DA Form 2475-2. No provision is made for dating these changes. Thus it can be argued, in any case where there is no date and where a former (lined-out) representative has initialed a personnel action, that the individual was no longer an authorized representative at the time he initialed the personnel entry.

4-5. DA Form 2475-2. Processed -- Unprocessed. On the reverse side of DA Form 2475-2 are two columns, one marked "P" and the other "U". Each personnel entry must be checked either "P" (processed) or "U" (unprocessed). If the "U" column is checked, the action is invalid and is required to be processed again. Procedure 5-1, DA Pam. 600-8. Therefore the remaining entries should be checked to see that the personnel action was again entered. A check should also be made to determine if the effective dates of the two entries are identical.

4-6. DA Form 2475-2. "Remarks." Part I of DA Form 2475-2 contains a section labeled "REMARKS." This provides the occasion for the entry of irrelevant and possibly prejudicial statements, e.g., uncharged misconduct.

4-7. DA Form 4187. Commander's Signature. Each Form 4187 reflecting a duty status change must be certified by the unit commander or an authorized representative. Paragraph 5-9f. While paragraph 5-9f does allow an oral designation of an authorized representative, the language of paragraph 5-9f requiring "exceptional circumstances" is stricter than paragraph 5-5c(1). See 4-3 supra. Enlisted personnel below E7 very likely may not sign DA Form 4187.

4-8. DA Form 4187. Authorized Representatives Position or Title. Paragraph 5-9f also requires that an authorized representative indicate his position or title. Since there is no "position" or "title" block on Form 4187, cases most likely will arise where an authorized representative neglects to enter his rank or position.

4-9. DA Form 4187. Mistakes. Paragraphs 5-8c and 5-11a establish specific procedures to correct mistakes made on Form 4187. Erasures may not be made. The incorrect entry will be lined out and initialed by the person certifying the form. The correct entry will then be entered above the line-out. The second method of correction is to prepare a new Form 4187, indicating that there is a change made. Any deviation in these procedures will render the document irregular on its face.

4-10. Authentication of "Copy 3." DA Form 4187. When trial counsel cannot obtain the original DA Form 4187 (located at the military personnel center), he will probably attempt to use "Copy 3" of the form (located in the unit's files). Whether or not this carbon copy (the signature is, of course, also a carbon copy) can be authenticated as indicated in Section III, 3-5, is an open question. But see paragraph 143a Manual for Courts-Martial, United States, 1969 (Revised edition).

4-1. "REMARKS." DA Form 4187. Like DA Form 2475-2, DA Form 4187 also has a "REMARKS" section. Thus, the possibility exists that objectionable and prejudicial material will be erroneously presented to the court. Attention should be paid to determine whether trial counsel masked the objectionable information.

4-12. Name. DA Form 4187. Paragraph 5-8b states that "extreme caution will be exercised to guard against errors in personal identification entries..." Paragraph 5-9b(1) requires that the full name of the soldier be entered: last name, first name, middle name. No middle initial will be used unless the initial is the soldier's full middle name. In spite of these explicit requirements, the section for the soldier's name on Form 4187 states only: "Name." Thus situations will undoubtedly arise where a Form 4187 is admitted into evidence without the "name" block filled out according to AR 680-1.

4-13. Address. DA Form 4187. The address blocks of Form 4187 are to be filled out according to Paragraph 5-9a.

4-14. Purposes of Prosecution. DA Form 4187. It is arguable that "copy 1" of DA Form 4187 is prepared primarily for the purposes of prosecution and therefore does not qualify as an exception to the hearsay rule. Paragraph 144d. While "copy 2" and "copy 3" have valid personnel accounting purposes with the finance office and at the unit level, "copy 1" remain in the soldier's MPRJ until charges are about to be filed.

4-15. Mandatory Preferral of Charges. Paragraph 5-6b(9) originally required that charge sheets and the appropriate SIDPERS forms be sent to the Military Personnel Office and included in the individual's MPRJ "as an action pending document" when the individual was dropped from the rolls as a deserter. However, an amendment to paragraph 5-6b(9) added the provision that the charge sheets be forwarded through the officer "exercising summary court-martial jurisdiction, in accordance with Paragraph 33b, Manual for

Courts-Martial, United States, 1969 (Revised edition)." (Statute of limitations). An issue may develop as to whether or not this procedure is, in effect, ordering that an individual be charged with an offense under the Uniform Code of Military Justice.

4-16. Burton Problems. The SIDPERS documents used to prove unauthorized absences will remain at the unit level for relatively short periods of time. Indeed AR 680-1 provides for destruction of many of the forms within 1 year of preparation and the central storage of other copies at Fort Benjamin Harrison, Indiana and other "holding areas" or "overseas records centers." (See, e.g. Paragraph 5-6a, 5-10a). Thus, especially for long absences, trial counsel will occasionally be hard pressed to obtain the appropriate SIDPERS forms within the 90-day limit. This may result in attempts on the part of trial counsel to offer unorthodox and possibly improper SIDPERS documents to prove their cases. Documentary evidence in cases involving lengthy absences tried immediately prior to expiration of the Burton limit should be examined closely.

4-17. Authentication. The precise form of the authentication used by trial counsel should be reasonably similar to those listed in Section III, above. Objection to improper authentication can be waived by failure of trial defense counsel to object specifically to the attempted authentication. Paragraph 143b(1), Manual, supra, United States v. Castillo, 1 USCMA 352, 3 CMR 86 (1952). See paragraph 143b(2) for authenticating official records.

Check List of Errors

I. DA Form 2475-2.

- A. Tenure Block (4-2)
- B. "Authorized Representative" (4-3)
- C. Change of Authorized Representatives (4-4)
- D. Processed - Unprocessed (4-5)
- E. "Remarks" (4-6)

II. DA Form 4187.

- A. Commander's Signature (4-7)
- B. Authorized Representative's Position or Title (4-8)
- C. Mistakes (4-9)
- D. Authentication of "Copy 3." (4-10)
- E. "Remarks" (4-11)
- F. Name (4-12)
- G. Address (4-13)
- H. Purposes of Prosecution (4-14)

III. Miscellaneous

- A. Mandatory Preferral of Charges (4-15)
- B. Burton Problems (4-16)
- C. Authentication (4-17)

PERSONNEL DATA - SIDPERS
For use of this form, see AR 630-1; the proponent agency is MILPERCEN.

PART I

ORGANIZATION (UPC)

UNIT/STATION

1. NAME (Last, First, Middle) **2. SSN** **3. GRADE & PAY GRADE** **4. BLOOD TYPE**

5. DUTY ASSIGNMENT **6. DUTY PHONE NUMBER** **7. LOCAL ADDRESS (Include ZIP Code)** **8. LOCAL PHONE NO.**

9. NEXT OF KIN (Name and Address) (Include ZIP Code) **10. HOME OF RECORD**

11. PLACE OF BIRTH **12. HIGHEST AWARD(S)**

13. MOS EVALUATION (Score and Date)

14. **15.** **16.** **17.**

REMARKS

COMMANDER'S OR AUTHORIZED REPRESENTATIVE'S GRADE, NAME AND INITIALS

GRADE	NAME	INITIALS	GRADE	NAME	INITIALS

CERTIFICATE

I certify that the initials appearing above opposite the name and on the reverse side of this form are those of myself as Commander or my authorized representatives. I further certify that the entry on the reverse side as initialed is a true statement as pertains to the individual indicated hereon for the reporting period.

COMMANDER	TENURE DATES	COMMANDER	TENURE DATES
COMMANDER	TENURE DATES	COMMANDER	TENURE DATES
COMMANDER	TENURE DATES	COMMANDER	TENURE DATES

PERSONNEL ACTION

For use of this form, see AR 680-1; the proponent agency is MILPERCEN;

THRU: (Include ZIP Code)	TO: (Include ZIP Code)	FROM: (Include ZIP Code) Commander
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SECTION I - PERSONAL IDENTIFICATION

NAME	GRADE/PAY GRADE	SSN
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SECTION II - DUTY STATUS CHANGE

The above member's duty status is changed from _____
 _____ to _____
 effective _____ hours, _____ 19 _____

SECTION III - REQUEST FOR PERSONNEL ACTION (DA Pam 600-8)

I request the following action:

	PROC		PROC
Service School	3-10	Extension (OTRA) (EM only)	4-3
ROTC or NGUS Duty (EM only)	3-12	Excess/Advance Leave	4-8
Deferment from Overseas	3-13	Leave to CONUS/outside CONUS	4-8
Volunteer for Foreign Service	3-14	Officer Candidate School	4-10
Ranger Training	3-15	Change of Name/SSN/DOB	4-11
Reassignment Family Problems	3-16	Separation (Depn/Hardship)	4-15
Reassignment Married Army Couples	3-32	Identification Card	4-23
Exchange Reassignment	3-18	Identification Tags	4-24
Airborne Training	3-19,20	Separate Rations	5-27
Special Forces Duty	3-22	Advancement to PV2	5-27
On-the-job Training	3-23	Other (Specify)	

SIGNATURE OF MEMBER (When required)	DATE
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SECTION IV - REMARKS (Applies to Sections II, III and V) (Cont page auth)

SECTION V - CERTIFICATION/APPROVAL/DISAPPROVAL

I certify that the duty status change (Section II) or that the request for personnel action (Section III) contained herein ---
 has been verified
 Recommend Approval is approved
 Recommend Disapproval is disapproved

COMMANDER	SIGNATURE	DATE
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Recent Federal Cases

Summary Court-Martial: Right to Counsel

Betonie v. Sizemore, CA 5, July 5 1974, 15 Crim. L. Rptr. 2382.

- Sixth Amendment Right to counsel applies to summary courts-martial which could result in incarceration.

Evidence: Voluntariness of a Prior Inconsistent Statement.

La France v. Bohlinger, CA 1, June 28 1974, 15 Crim. L. Rptr. 2388.

- A witness' claim that an out-of-court statement the prosecution introduced to impeach him was coerced, required an immediate judicial determination of its voluntariness. If found to have been coerced, the statement must be suppressed as a matter of due process.

Search and Seizure: Automobile searches.

United States v. McCormick, CA 9, July 7 1974, 15 Crim. L. Rptr. 2433

- A warrantless search of an automobile without exigent circumstances can not be justified solely by a statute authorizing the seizure and forfeiture of vehicles used to transport or conceal contraband (49 U.S.C. 782) - court distinguishes Cooper v. California, 386 U.S. 58.

United States v. Hand, CA 5 July 26 1974, 15 Crim. L. Rptr. 2448.

- The court extended the rationale of Chambers v. Maroney, 399 U.S. 42 to justify a warrantless search of a purse since there was sufficient probable cause and exigent circumstances requiring immediate action.

Federal Jurisdiction: Exhaustion of Military Remedies.

Scott v. Schlesinger, CA 5 August 16 1974, 15 Crim. L. Rptr. 2484.

- The Fifth Circuit agrees with the Fourth Circuit Dooley v. Plober, 491 F.2d 608 as well as the Third Circuit, Sedivy v. Richardson, 485 F.2d 1115, "that the rule of exhaustion of military remedies is applicable where a serviceman brings a proceeding challenging the service-connection of an offense for which he is being tried, or for which he has been convicted by a military court-martial".

Voir Dire: Racial Bias

United States v. Bear Runner, CA 8 August 5 1974, 16 Crim.
1. Rptr. 2011.

- The judge erred by refusing to inquire more fully of the prospective jurors concerning possible racial prejudice. The judge's single question concerning racial prejudice, which was general in scope and directed to the jurors as a group, was inadequate.

Recent State Cases

Escape from Confinement: Duress and coercion.

People v. Harman, Mich. Ct. Ap. July 24 1974, 15 Crim. L. Rptr. 2425.

- A prison inmate who can establish some basis for his claimed fear of homosexual attacks may assert that fear to establish a duress defense against a charge of escaping from a penal facility.

Search and Seizure: Probable cause/unnamed informer.

Abercrombie v. State, Tex. Ct. Crim. App. July 24 1974, 15 Crim. L. Rptr. 2447.

- An unnamed informer's admission in an affidavit in support of search warrant that he had smoked marijuana in the past was insufficient to satisfy the second prong of Aguilar v. Texas, 378 U.S. 108. Although a plurality opinion in United States v. Harris, 403 U.S. 573 indicates that declarations against penal interest may in some cases satisfy the requirement of informers credibility, this declaration must be clear and specific.

Confession: Coercion by private individuals.

People v. Haydel, Calif. Sup. Ct. July 30 1974, 15 Crim. L. Rptr. 2453.

- The confession of the defendant which was procured by private individuals "in an atmosphere of substantial coercion" may not be admitted at trial. The exclusionary rule is designed not only to deter illegal police conduct but also to ensure a fair trial.

Search and Seizure: Warrants/scope of search.

State v. Nabarro, Hawaii Sup. Ct. July 23 1974, 15 Crim. L. Rptr. 2472.

- A lawfully issued warrant to search premises does not entitle police to search personal property of individuals known to be non-residents.

Search and Seizure: Automobile search.

People v. White, Mich. Sup. Ct. September 6 1974, 16 Crim. L. Rptr. 2021.

- Warrantless search of an automobile was unreasonable when police acted without sufficient probable cause. Also, dicta suggests that assuming there was probable cause there was not sufficient exigent circumstance to trigger the automobile exception to warrant requirement when the car is unoccupied and could have been guarded until judicial authorization to search was obtained.

Voir Dire: Pretrial publicity.

State v. Pokini, Hawaii Sup. Ct. August 29 1974, 16 Crim. L. Rptr. 2011.

- The purpose of voir dire is to enable a party to exercise his right of preemptory challenge intelligently and to accomplish this a party must have ample opportunity to inquire into those matters which tend to influence jurors. The judge's cursory voir dire about extensive publicity was inadequate. The constitutional right to an impartial jury requires examination into objective as well as subjective indicia of prejudice.

Recent CMR Cases

18 December 1974

United States v. Dyson, SPCM 9624 - Specification under Article 134 alleging attempted sale of amphetamines failed to allege criminality. Held: This was a fatal defect and the charge and specification were ordered dismissed. Sentence reassessed on the basis of other charges.

12 September 1974.

United States v. Goode, 49 CMR 292 (ACMR 1974) (certified to COMA) - Pretrial agreement provided for suspension of the punitive discharge and the designation of the Correctional Training Facility at Fort Riley as the place of confinement. This was conditioned on the absence of misconduct between trial and the convening authority's action. The convening authority deferred service of the confinement. After receiving word from the command SJA that the appellant had been AWOL, the convening authority rescinded the deferment and determined that he would not suspend the execution of the punitive discharge. Held: Before a convening authority may rescind a deferred sentence to confinement for subsequent misconduct, he must, as a matter of fundamental fairness accord the accused the opportunity to present matters in his own behalf. Failure to do so was error. As to the vacation of suspension of the discharge, the appellant should be allowed to present matters in his own behalf because of a purported violation of the terms of a pretrial agreement.

12 September 1974.

United States v. Elkinton, 49 CMR 251 (ACMR 1974) - Pretrial agreement premised upon entry of guilty plea prior to presentation of evidence on the merits and/or presentation of nonjudicial motions. The Court found this invalid as against public policy but affirmed the findings and sentence as they found no prejudice. (Army Lawyer agreement). Precise issue is presently before USCOMA and was argued 28 February 1975.

United States v. Herren, SPCM 9333 - Insufficiency of evidence to support a conviction for disobedience when the alleged order given by the sergeant was "I...told him to get his butt to the motor pool." A second order, also found deficient, was for appellant "not to leave the motor pool" where appellant testified that he remained in the motor pool area. Affirmed on other grounds.

18 September 1974.

United States v. Burkey, 49 CMR 204 (ACMR 1974) - Failure by military judge to advise appellant of his right to avail himself of the Statute of Limitations was prejudicial error. Note: This was a guilty plea case.

United States v. Long, 49 CMR 198 (ACMR 1974) - Military judge failed to instruct that the court should vote on proposed sentences beginning with the lightest. The test is fair risk of prejudice. Findings affirmed, rehearing ordered.

United States v. Clark, 49 CMR 192 (ACMR 1974) - Guilty Plea. Military judge allowed prosecution to amend five specifications alleging larceny from the mails to receiving stolen property. This "error" is non-jurisdictional and therefore waived. Also found to be no error in this situation. This case also included the same error as in Long, supra, but no prejudice. Note: See lengthy discussion of amendment by prosecution at trial.

United States v. Kapp, 49 CMR 200 (ACMR 1974) (issue is before COMA) - Held that pretrial agreement requiring the entry of a guilty plea prior to the presentation of any evidence by the government was not void as against public policy. The guilty plea agreements does not foreclose the contesting of proof of guilt; it is the plea which so operates.

23 September 1974.

United States v. Mixson, CM 429860 - Convening authority disqualified from taking action in the case because of his pre-determined and fixed idea as to sentences in cases dealing with drugs. (See United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974). New review and action.

United States v. May, SPCM 9310 - Orders to "come with us to the orderly room" and "to stand at attention in a specific spot at his desk" after marijuana had been discovered in appellant's wall locker insufficient to to effect apprehension. (Appellant was charged with escape from confinement after he ran from the orderly room).

24 September 1974.

United States v. Rodgers, SPCM 9943 - Staff judge advocate review noted failure of appellant to abide by the pretrial agreement which required appellant to make full restitution

to the victim of the larceny in a full and timely manner. Court disapproved in strong language the addition of contractual agreements in the pretrial agreement. The agreements are limited to an exchange of a guilty plea for a stated maximum sentence. But note three opinions in the Court - Opinion - balance the public interest in the reimbursement against public policy to keep contracts out of pretrial agreements. Concurring 1 - If the agreement was not met, are the parties to be placed in status quo? That is, since appellant was not financially able to repay the victim (so stated in the record) does this void the agreement? Issue is mooted by disapproval of the bad conduct discharge which is all that appellant bargained for. Concurring 2 - Justice cannot be tied to economic status. The victim has his own remedies independent of the agreement.

17 October 1974.

United States v. King & Wright, 49 CMR 257 (ACMR 1974) - The military judge abused his discretion in not ruling on speedy trial motions, as he incorrectly applied Rule 34 of the Rules of Court (advising the court and trial counsel of all motions to be made at the 39a session). It was clear that the motion was timely under Rule 33. However, no prejudice since it was apparent that the Burton presumption did not apply to pretrial restriction and, therefore, the motion was nonmeritorious.

21 October 1974.

United States v. Grider, 49 CMR 391 (ACMR 1974) - Simultaneous carrying of two concealed revolvers held multiplicitous for sentencing.

23 October 1974.

United States v. Eaton, 49 CMR 426 (ACMR 1974) - Burton rule applied by length of pretrial confinement and appellant's demands for speedy trial. Record of trial devoid of information as to why the military judge did not try the case during the two weeks prior to his departure or why the two visiting judges did not try the case sooner. Findings and sentence set aside and charges dismissed.

25 October 1974.

United States v. Ortiz, CM 430956 - A specification which alleges unlawful entry of a motor vehicle as a violation of Article 134 does not state an offense. However, court reassessed sentence and affirmed as to the other specifications.

United States v. McNeal, CM 431457 - Underage enlistment with no ratification by parent or guardian. Also, no indication as to whether or not appellant had a police or juvenile record, whether or not he was undergoing court action of any kind, or whether civil custody existed. No constructive enlistment. Finding and sentence set aside and charges dismissed.

United States v. Severs, CM 430521 - Voluntary intoxication was raised by the evidence but judge failed to instruct on the lesser included of unpremeditated murder. Appellant was found guilty of felony murder and a mandatory life sentence was adjudged. The Court affirms the offense of unpremeditated and orders a rehearing a sentence.

United States v. Williams, 49 CMR 431 (ACMR 1974) - Members were added to the court by a second order, but only the members named on the first order did the sentencing with no indication of rereferral. Due to the fact that the sentence had been suspended and remitted by the time the case came before the court, the remedy was simply disapproval of sentence.

United States v. Dixon & Armstrong, SPCM 9171 - Seven officers were detailed to the court-martial. Five were present when the court was convened and two were absent after being excused by the convening authority. One member was challenged and withdrew. The judge instructed that 4 of 5 present was necessary to reach a decision which leaves the possibility of an interloper. No jurisdiction. New trial may be had.

29 October 1974.

United States v. Gaillard, 49 CMR 471 - Insufficient assistance of counsel. Defendant spoke to CPT F's investigative assistant. Defendant had requested the presence of a witness. At trial, of seven witnesses, counsel asked no questions of two witnesses, two questions of one witness, three questions of another, and two pages of the other two. The defense witness was asked but two questions. As a whole, there was no effective assistance of counsel. Rehearing may be had.

United States v. Hammer, SPCM 9682 - Defense counsel gave oral notice of motion under Rules 33 & 34, but the military judge refused to hear it as there was no written notice and applied Rule 34 to prohibit further motions (Note: Trial was held within 10 days after service of charges) Held: Military judge erred. Sentence and findings set aside.

United States v. Burroughs, 49 CMR 404 (ACMR 1974) - Convicted of willful disobedience of a lawful order of a superior commissioned officer, appellant stated during providency that he was passively resisting what he thought to be an apprehension. Court held that appellant had been overcharged and applied lesser punishment by assimilation as described in Footnote 5, TMP, MCM. Citing United States v. Nixon, 21 USCMA 480, 45 CMR 254 (1972).

United States v. McClelland, 49 CMR ____ (ACMR 15 Nov 1974) - "Wharton's Rule" on conspiracy applies to the military and, therefore, conspiracy may not be charged under the facts of this case where (1) a minimum of two parties is required to an agreement on the sale of drugs (2) an agreement is an essential element of the offense (3) the purported conspiracy does not contain any additional elements of proof not found in the original offense. Note: WHARTON'S RULE - "can not charge conspiracy when substantive act requires by its nature the participation of two persons for its commission." In military, can not charge conspiracy, regardless of whether or not substantive offense is committed.

United States v. Cockerell, 49 CMR ____ (ACMR 1974) - Did the military judge err by failing to recuse himself after rejecting a guilty plea? (Objection by defense counsel) No in this situation because the information supplied by accused during providency was not proof of guilt due to the nature of the testimony. Also government sustained its proof of sanity in that "voluntary ingestion of alcohol will not serve to negate criminal responsibility when the individual is aware, from prior experience that such ingestion will create the condition." Defense had tried to show insanity via intoxication.

19 November 1974.

United States v. Tawes, SPCM 9293 - Appellant introduced testimony of K from a previous trial. Government introduced the promulgating order from the previous trial indicating K was perjurer. The military judge's limiting instruction was insufficient. Further, the judge's remark as to the appellant's testimony was "an impermissible denigration." Finally, trial counsel, in argument referred to other witnesses not present and indicated what their testimony would be. Waiver applies but will not be invoked. Findings and sentence set aside.

22 November 1974.

United States v. Stoehr, CM 429953 - Returned for separate hearing on jurisdiction. While not litigated at trial because

on the record it was stated that appellant had been separated under "other than honorable conditions" from the Air Force Academy.

29 November 1974.

United States v. Massa, CM 431106 - Remarks of military judge coupled with prosecutor's zealous advocacy together resulted in prejudice. The military judge was found to have acted in a partisan manner. New hearing on sentence.

3 December 1974.

United States v. May, SPCM 9642 - Appellant's suspended bad conduct discharge was vacated without a hearing and record as required by Article 72, Uniform Code of Military Justice. The suspension was revoked before it became effective; the revocation was done by a later order. Also a jurisdictional question as to whether the court could hear Article 72 violation. Held: (1) there is jurisdiction (2) Article 72 was violated since first order "could not have been revoked by the subsequent order without a hearing."

10 December 1974

United States v. Barnes, CM 430017 - Record was authenticated by court reporter in lieu of the absence of the military judge and trial counsel. This was a trial before members. A reporter may authenticate only in a judge alone trial; Article 64(a) Uniform Code of Military Justice, paragraph 82f Manual for Courts-Martial, United States, 1969 (Revised edition). Action set aside and a new authentication is ordered.

30 December 1974.

United States v. Putnam, CM 430573 - AWOL conviction where appellant had testified and the testimony was corroborated, that he went home pursuant to leave orders. He had an outstanding record and had made no efforts to conceal his whereabouts. Findings and sentence set aside and charges dismissed.

United States v. Hergert & McDonald, CM 430659 - illegitimate use of hearsay to show intent to permanently deprive. The court finds the accused guilty of wrongful appropriation. Note: "However, when used at trial for an illegitimate purpose, it can not be used by an appellate court as though admitted for a different purpose "citing Shepard v. United States, 290 U.S. 96 (1933).

30 December 1974.

United States v. Smith, CM 431201 - Substitution of military judge after arraignment with no good cause shown. Held: the error was waived.

United States v. Hurst, CM 430474 - Failure to instruct on the issue of burden of proof when self-defense is raised is prejudicial error. Court sets aside that charge and specification and reassesses.

United States v. Adams, CM 430425 - Underage enlistment supported by affidavits. Court ordered a limited rehearing on jurisdiction. Appellant appeared to be 16 at the time of enlistment.

United States v. Rodgers, CM 431553 - AWOL commenced prior to the Burton decision and terminated after the Marshall decision. Appellant was in pretrial confinement for more than 90 days. Held: AWOL is not a continuing offense, therefore this AWOL was committed prior to Burton, the ruling which was clearly prospective. Applying pre-Burton standards the appellant was not denied a speedy trial. Dissent: Judge Alley would dismiss because AWOL is a continuing offense and this case, therefore, fits within the Burton rule.

31 December 1975.

United States v. Branscomb, CM 430867 - Fort Carson regulation number 210-5 dated 12 October 1960 with change 3 dated 12 February 1970 is nonpunitive and can not sustain a conviction. No statement that regulation was punitive. However, the other specifications were sufficient. Affirmed after ordering the specification alleging the regulation violation dismissed, and reassessed the sentence.

United States v. Rhoten, CM 431530 - Catlow error raised via affidavit. Hearing ordered on question of jurisdiction. Note: Government opposed the filing of affidavits on the grounds that affidavits could only be used for new trial motion. The court specifically disagreed with that argument.

The following represents the continuation
of the "Quick Reference Outline" initiated
in Volume 6 Number 1 The Advocate.

Defense of Drug Offenses

Search and Seizure

A. Probable Cause: The Basic Test

1. Aguillar-Spinelli - Adopted by United States v. Penman, 16 USCMA 67, 36 CMR 223 (1966) for military.
 - a. Underlying circumstances for informant's knowledge.
 - b. Informant's reliability must be shown so that probative value can be assessed. See United States v. Houston, 23 USCMA 200, 48 CMR 952 (1974); excellent discussion of how this must be done.
2. Critical factor is what is told to the commander who assumes the role of the magistrate prior to the search. United States v. Davis, 44 CMR 358 (ACMR 1971); United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962).
3. Special area of informants - again the Aguillar-Spinelli test comes into play--must establish this informant's past reliability.

KEY: It is not enough if agent knows enough to meet probable cause, he must convey it all to the magistrate. United States v. Vasquez, 22 USCMA 492, 47 CMR 793 (1973); United States v. Lidle, 21 USCMA 455, 45 CMR 229 (1972). United States v. Houston, supra.

a. Government often relies on United States v. Draper involving a course of observation of predicted events by the police - not a one shot deal with an unknown tipster.

b. Anonymous informants - particular problem - key case in the area is United States v. Gamboa, 23 USCMA 83, 48 CMR 591 (1974). See United States v. Gibbins, 21 USCMA 556, 45 CMR 330 (1972). United States v. Gamboa effectively undercuts such reliance upon use of anonymous informants.

c. Government often cites United States v. Harris, 403 U.S. 573 (1971) but note the care the Supreme Court took in that case to stress the declaration against penal interest.

4. Area of Locker searches: Key case is United States v. Sam, 22 USCMA 124, 46 CMR 124 (1972). See United States v. Alston, 20 USCMA 581, 44 CMR 11 (1971); United States v. Troy, 22 USCMA 195, 46 CMR 195 (1973); United States v. Salatino, 22 USCMA 531, 43 CMR 16 (1973). There must be a showing on the record to justify the search of the locker. The mere fact that the individual is a drug/robbery suspect, etc. is insufficient. United States v. Whitler, 23 USCMA 121, 48 CMR 682 (1974). Must connect locker to goods sought. United States v. Soto, 16 USCMA 683, 37 CMR 203 (1967). This of course goes to other areas where a soldier might place things.

B. Neutral and Detached Magistrate:

Recognize initially that there is somewhat of a logical inconsistency in the military in that this requirement is filled by a non-legal, partisan individual, i.e. commanding officer. Must be worked around. See most recent decision in United States v. Staggs, 23 USCMA 111, 48 CMR 672 (1974). United States v. Drew, 15 USCMA 449, 35 CMR 421 (1965).

See also: United States v. Weaver, 9 USCMA 13, 25 CMR 275 (1958); United States v. Neloms, 48 CMR 207 (ACMR 1973) where SJA or Provost Marshal held disqualified.

C. Search vs. Inspection - Tainted Purpose Rule

1. Test - Is this really a subterfuge for a search?
2. Key decisions are United States v. Lange, 15 USCMA 486, 35 CMR 458 (1965); United States v. Grace, 18 USCMA 409; 42 CMR 11 (1970). Any question revolves around these decisions.
3. Inspection:
 - a. to see if things are in order
 - b. part of a routine
 - c. goes through entire area; not just one or two suspects
 - d. need not be scheduled or announced
 - e. not conducted with a view toward particularized prosecution.

4. View toward prosecution vs. determination of fitness or readiness.
- D. Consent - obviates the need for a warrant but can be withdrawn or limited. See most recent decision: United States v. Castro, 23 USCMA 166, 48 CMR 782 (1974).
 - E. Fruits of the Poisonous Tree - Wong Sun v. United States, 371 U.S. 471 (1963).
 1. United States v. Crow, 19 USCMA 384, 41 CMR 384 (1970) - as to admission of goods found.
 2. See United States v. Armstrong, 22 USCMA 438, 47 CMR 479 (1973) as to admission of witness testimony drawn from exploitation of illegally seized evidence.
 - F. Gate searches or Border Searches (Dogs).
 - Primarily developed out of the case of United States v. Unrue, 22 USCMA 466, 47 CMR 556 (1973).

Initially note certain key factors on the dog searches:

1. United States v. Unrue - no expectation of privacy; there was an Amnesty Box (Note United States v. Neloms, 48 CMR 702 (ACMR 1973) is same post and set-up as United States v. Unrue).
2. OK as a matter of police power (licensing and registration).
3. Border Search - Almedia-Sanchez v. United States, 413 U.S. 266 (1973) dual concept: need because of border and mobility doctrines. Neither apply to walk throughs in barracks or at gates absent exigent circumstances. United States v. Neloms, 48 CMR 702 (ACMR 1973).

Should be attacked as general and exploratory search under United States v. Martinez, 16 USCMA 40, 36 CMR 196 (1965); United States v. Battista, 14 USCMA 70, 33 CMR 282 (1963).
4. Stop at gate does not equal implied consent. Nor will it be sustained as valid under plain view or pursuant to an arrest United States v. Robinson, 414 U.S. 218 (1973) or Gustafson v. State of Florida, 414 U.S. 260 (1973).
5. Must establish a nexus between the stop and the search. Warden v. Hayden, 387 U.S. 294 (1967).

- 6. Under United States v. Carson, 22 USCMA 203, 46 CMR 203 (1973) the use of dogs to make general searches at airport terminals based on suspicion is illegal as general and exploratory.
- 7. Following United States v. Neloms it would seem that the government's position will be to couch all such searches on military necessity or no expectation of privacy under United States v. Simmons, 22 USCMA 288 46 CMR 288 (1973); United States v. Weschenfelder, 20 USCMA 416, 43 CMR 256 (1971) or United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973).

Search Incident to Apprehension -

- A. Again the standard is probable cause - absent probable cause for apprehension, search is bad.
 - 1. Stop & Frisk - Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968). Elements are danger to officer, furtive actions, suspicious activity. United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959); United States v. Myers, 20 USCMA 269, 43 CMR 109 (1971).
 - 2. Allowed to use all the senses. Defense should stress unreliability of test used or the concept of search based on inarticulate hunch. Brinegar v. United States, 388 U.S. 160 (1949); United States v. Beck, 179 U.S. 89 (1964).
 - 3. "Immediate action" will not obviate the need for probable cause. United States v. Soto, 16 USCMA 583, 37 CMR 203 (1967).
- B. Scope of Search - it must be strictly tied to and justified by the underlying circumstances. Chimel v. California, 395 U.S. 752 (1969).
- C. Car searches - again go to probable cause; standard is less strict however as a practical matter. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970). Mobility doctrine permits greater latitude and plain view doctrine has been grossly expanded by recent Court.

Entrapment -

- A. Predisposition vs. Inducement - United States v. Russell, 411 U.S. 423 (1973).
1. Opportunity vs. improper inducement United States v. Fensterman, 17 USCMA 578, 38 CMR 376 (1968); See United States v. McGlenn, 8 USCMA 286, 24 CMR 96 (1957); United States v. Holthause, 40 CMR 357 (ABR 1968).
 2. Rarely litigated; exclusive factual area; most recent case United States v. Henry, 23 USCMA 70, 48 CMR 541 (1974).

Intent - primarily two areas

- A. Knowing and conscious possession.
1. Inferred from possession - United States v. Alvarez, 10 USCMA 24, 27 CMR 98 (1958).
 2. Rebutted by circumstantial evidence - United States v. Whitehead, 48 CMR 344 (NCRM 1974); United States v. Branch, 41 CMR 545 (ACMR 1969); United States v. Avant, 42 CMR 692 (ACMR 1970); See United States v. Hughes, 5 USCMA 374, 17 CMR 374 (1954); United States v. McKinney, S7009 (ACMR January 1972). See also early decision of United States v. Pile, 11 CMR 375 (ABR 1953).

Note: Usually involves small amount of drugs; such as grains or fibers in clothing or picking up a pipe in a common area. But can as in United States v. Pile be based on doubt created by accused's denial.

- B. Agency - that is, in an illegal sale the accused is shown to be doing no more than acting as a procuring agent for an individual; he therefore can not be considered the seller. United States v. Fruscella, 21 USCMA 26, 44 CMR 80 (1971).

See United States v. Stewart, 20 USCMA 300, 43 CMR 140 (1971); United States v. Hane, 9 USCMA 601, 26 CMR 381 (1958); United States v. Magindez, 13 USCMA 445, 32 CMR 445 (1963).

WAIVER

The following is an introductory guide to the problem of "waiver" as it affects appellate litigation. The guide is meant only as that, is not necessarily complete, and is not necessarily definitive. The authorities cited may always be attacked in appropriate cases on the basis of "plain error", "manifest injustice", "military due process", or whatever other theory you can devise.

<u>ERROR</u>	<u>HOW WAIVED</u>	<u>SOME (?) AUTHORITY</u>
Jurisdiction	not	<u>Johnson</u> , 23 USCMA 104, 48 CMR 665 (1973) <u>Montanez</u> , 22 USCMA 418, 47 CMR 355 (1973).
Hearsay Evidence	not	¶ 139a, MCM, 1969 (Rev.)
Insanity/Mental Capacity	not	<u>Washington</u> , 45 CMR 550 (ACMR 1972)
Statute of Limitations	aff, knowing & intelligent	<u>Wiedemann</u> , 16 USCMA 365, 36 CMR 521 (1966).
Speedy Trial (Burton "90")	fail to obj.	<u>Sloan</u> , 22 USCMA 587, 48 CMR 211 (1974)
Speedy Trial (Mil due Proc) (Arts. 10, 33)	not (specific) -----	<u>Schalck</u> , 41 USCMA 371, 34 CMR 151 (1968) but: <u>McGovern</u> , 45 CMR 868 (1972).
Unauthenticated Art. 15s (note: "personnel records")	fail to obj.	<u>Taylor</u> , 20 USCMA 93, 42CMR285 (1970).
Minor defects in Specs.	fail to obj. guilty plea	<u>Crawford</u> , 44 CMR342 (ACMR 1971) ¶ 27,28,69, MCM, 1969, (rev.)
Major Defects in Specs.	not	<u>Buswell</u> , 45 CMR 742 (ACMR 1972) <u>Fleig</u> , 16 USCMA 444, 37 CMR 64 (1966)
Amendment of Specs.	fail to obj.	<u>Rodman</u> , 19USCMA 102, 41 CMR 102
Multiplicity	fail to obj.	<u>Bucholz</u> , 47 CMR 179 (ACMR 1973)
Unsworn Charges	fail to obj.	<u>May</u> , 1USCMA174, 2 CMR 80 (1952)
Uncharged Misconduct (before findings) (before sentence)	guilty plea not (but MJ alone) is	<u>Eskridge</u> , 41 CMR 912 (ACMR 1969). <u>Hill</u> , 21 USCMA 203, 44 CMR 257 (1972).

<u>ERROR</u>	<u>HOW WAIVED</u>	<u>SOME (?) AUTHORITY</u>
Improper previous conviction Records (20B)	not(hearsay)	<u>Perkins</u> , 48 CMR 975 (ACMR Jun 26, 1974) <u>Sidney</u> , 22 USCMA 185, 47 CMR 801 (Jul 5, 1974).
Improper argument by TC	fail to obj. unless so flagrant as to be "plain error"	<u>Simmons</u> , 44 CMR 804 (ACMR 1971).
Article 32 Defects (partiality etc.)	fail to obj.	<u>Lopez</u> , 20 USCMA 76, 42 CMR 268 (1970).
Instructions	not, if essential	<u>Buchana</u> , 19 USCMA 394, 41 CMR 394 (1970).
	fail to req. unless "plain error"	<u>Chase</u> , 43 CMR 693 (ACMR 1971) and cases therein.
Substitution of MJ after arraignment, or Members after assembly	fail to obj. (but jurisdictional?)	<u>Butson</u> , 47 CMR 973 (ACMR 1973). <u>Boysen</u> , 11 USCMA 331, 29 CMR 147 (1960) ¶39e, MCM, 1969, (Rev.).
MJ challenge for cause	fail to obj. (unless "miscarriage")	<u>Wisnann</u> , 19 USCMA 554, 42 CMR 156 (1970) ("cause" on record, DC aware of) <u>Haynes</u> , 44 CMR 48 (ACMR 1971).
Voluntariness of Confession (govt. must lay foundation)	fail to obj. + Use by DC	<u>Masemer</u> , 19 USCMA 366, 41 CMR 366 (1970).
Affirmative Defenses	fail to obj. Guilty Plea	<u>Squirrel</u> , 2 USCMA 146, 7 CMR 22 (1953).
Denial of Req. for indiv. Mil. Counsel ("unavail.")	fail to obj.	<u>Mitchell</u> , 36 CMR 14 (ACMR 1965).

NON-PUNITIVE REGULATIONS

- I Background:
- A) Digests under Disobedience of Orders
 - B) The Army Lawyer, March 1974, p.27
 - C) AR 600-50 as a model punitive reg

II COMA

- A) United States v. Hogsett, 8 USCMA 681, 25 CMR 185 (1958) - Regulation which combines advisory instructions with other instructions which contain a specific penalty for non-compliance is not intended as a general order or regulation within the meaning of Article 92, Uniform Code of Military Justice.
- B) United States v. Tassos, 18 USCMA 12, 39 CMR 12 (1968) - Orders not applicable to individuals. Regulation required implementation.
- C) United States v. Nardell, 21 USCMA 327, 45 CMR 101 (1972) - No single characteristic of a general order determines punitive application. Direct application of sanctions must be self-evident.
- D) United States v. Woodrum, 20 USCMA 529, 43 CMR 369 (1971) - Successor regulation to that in Tassos, *supra*, but this contained a clause making it applicable to individuals. It still required implementation and, therefore, was non-punitive.
- E) United States v. Scott, 22 USCMA 25, 46 CMR 25 (1972) - Regulation was merely a listing of drugs and drug paraphernalia. Court states that drafter of regulation should make clear that it is punitive.

III CMR

- A) United States v. Baler, 46 CMR 1121 (ACMR 1973) - Requirement of implementation makes it non-punitive..
- B) United States v. Jackson, 46 CMR 1128 (ACMR 1972) - Use of term "prohibited" does not make regulation punitive.
- C) United States v. Wright, 48 CMR 319 (ACMR 1974)- look to regulation in its entirety to find out if it is punitive.

INSANITY

I. MENTAL RESPONSIBILITY (Time of offense)

A. General

If reasonable doubt exists as to mental responsibility of accused for offenses charged, he cannot be legally convicted of offense. To constitute lack of mental responsibility, impairment must not only be result of mental defect, disease or derangement, but must also deprive accused of his ability to distinguish right from wrong and to adhere to right. Para. 120 b MCM

B. Burden of proof

1. When evidence of lack of mental responsibility is introduced, government has burden to prove beyond reasonable doubt that accused was mentally responsible. U.S. v. Walker, 20 USCMA 241, 43 CMR 81 (1971).
2. Testimony by psychiatrist who examined accused that it was possible accused might have been psychotic, that accused probably could distinguish right from wrong, and that he probably had ability to adhere to right is insufficient to prove beyond a reasonable doubt that accused was mentally responsible when he committed the acts. U.S. v. Beard, 42 CMR 822 (ACMR 1970).
3. Opinions of sanity board are not admissible as evidence of accused's mental condition when offered in hearsay fashion by testimony of only one of the board members. U.S. v. Smith, 47 CMR 952 (ACMR 1973).

C. Evidence raising issue

1. Test of whether accused's lack of mental responsibility has been placed in issue is whether the record of trial shows "some evidence" tending reasonably to raise the issue, and if it does, judge must instruct on issue. U.S. v. Jones, 45 CMR 497 (AFCMR 1972).
2. In determining necessity for instructions on lack of mental responsibility, technical classification of particular mental disorder involved is immaterial, since it is evidence presented concerning the disorder that raises the issue and not the nomenclature used to classify it. U.S. v. Storey, 9 USCMA 162, 25 CMR 424 (1958).
3. Fact that evidence may have come only from the accused does not deny its standing for purposes of raising an instructional issue. U.S. v. Thomas, 20 USCMA 249, 43 CMR 89 (1971).

4. Testimony of physician without specialized psychiatric training was sufficient to raise issue. U.S. v. Peak, 44 CMR 658 (CGCMR 1971).
5. Lay testimony and non-expert medical testimony may raise issue. U.S. v. Thomas, No. S-8543 (ACMR 14 May 1974).
6. Failure to instruct on insanity where evidence included a finding of pathological intoxication constituted error. U.S. v. Smith, 44 CMR 292 (ACMR 1971).
7. Judge erred by failing to inquire into sanity issue raised by evidence in mitigation that accused had been committed to state mental hospital and state medical authorities regarded him as psychotic (providency problem). U.S. v. Batts, 19 USCMA 521, 42 CMR 123 (1970).

D. Evidence of following not sufficient to raise issue

1. Claustrophobia. U.S. v. Emmett, 47 CMR 598 (ACMR 1973).
2. Drug dependency. U.S. v. Reitz, 47 CMR 608 (NCMR 1973).
3. Voluntary intoxication. U.S. v. Lewis, 14 USCMA 79, 33 CMR 291 (1972); U.S. v. Hernandez, 20 USCMA 19, 43 CMR 59 (1970).
4. Alcoholic amnesia. U.S. v. Hernandez, 41 CMR 985 (ACMR 1970).
5. Mental confusion. U.S. v. Acemoglu, 21 USCMA 561, 45 CMR 335 (1972).
6. Chronic personality disorder in association with chronic sexual deviation. U.S. v. Hood, 47 CMR 356 (ACMR 1973).
7. Statement by defense counsel at 39(a) session that he intended to raise insanity issue does not per se raise issue. It is what facts lawyer presents, not what he says, that raises issue. U.S. v. Parmes, 44 CMR 628 (ACMR 1971).

II. PARTIAL MENTAL RESPONSIBILITY

- A. Mental condition which produces lack of mental ability to possess actual knowledge or to establish a specific intent or premeditated design to kill is a defense to crime requiring one of these states of mind. Para. 120 c MCM

Partial mental impairment (e.g. voluntary intoxication) is not recognized as a defense in cases involving general intent crimes. U.S. v. Reitz, 47 CMR 608 (NCMR 1973).

B. Mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise does not necessarily indicate insanity, although it may demonstrate an impairment in ability to adhere to right. Para. 120 b MCM

1. Personality defect or character and behavior disorder does not amount to "mental defect, disease or derangement" and can provide no foundation for a defense of lack of mental responsibility. U.S. v. Hernandez, 41 CMR 985 (ACMR 1970).

2. Evidence of character or behavior disorder may require instructions if it may have impaired accused's capability to entertain a specific intent. U.S. v. Silva, 37 CMR 803 (ABR 1966).

III. MENTAL CAPACITY (Time of trial)

A. No person should be brought to trial unless he possesses sufficient mental capacity to understand nature of proceedings against him and to conduct or cooperate intelligently in his defense. Para. 120 d MCM.

B. There is no requirement that incapacity to stand trial be the result of mental disease, defect or derangement as in the case of insanity at time of the crime. U.S. v. Victor, 36 CMR 814 (CGBR 1966).

C. Issue of mental capacity was raised by testimony of qualified psychiatrist, a defense witness, that the accused lacked the "cognitive ability" to understand nature of proceedings and to assist his counsel in his defense. U.S. v. Wieser, 46 CMR 1100 (CGCMR 1973).

D. Accused suffering from amnesia still had mental capacity to stand trial. U.S. v. Dunaway, 39 CMR 908 (ABR 1968).

IV. POST-TRIAL INSANITY

A. If record as whole raises reasonable doubt as to accused's mental responsibility, findings should be disapproved by convening authority or appropriate higher authority. If doubt relates to mental capacity, rehearing may be ordered when incapacity is gone. Para. 124 MCM

B. Accused's sanity may be examined on appellate review regardless of whether it was determined at trial against him. Examination may be into whether 1) accused has mental capability to understand appellate proceedings, 2) accused had mental capacity, or 3) accused had mental responsibility. U.S. v. Triplett, 21 USCMA 497, 45 CMR 271 (1972).

C. COMR's consideration of post-trial psychiatric reports is limited to determining if effect of expert medical opinion in reports

is sufficient to create reasonable doubt as to mental responsibility of accused. U.S. v. Locklin, 47 CMR 101 (ACMR 1973).

- D. Rehearing may be ordered because of psychiatric reports obtained subsequent to trial. U.S. v. Chambers, 47 CMR 469 (ACMR 1973); U.S. v. Lemons, 46 CMR 1015 (ACMR 1972).
- E. No rehearing is required when, considering all the matter on the issue of accused's mental responsibility (including post-conviction reports), a different verdict would not reasonably result. U.S. v. Triplett, 21 USCMA 497, 45 CMR 271 (1972).
- F. Where post-trial medical board's report, together with other post-trial psychiatric information, was based on new and thorough medical examinations, rehearing should be ordered because that evidence was reasonably likely to produce a different result. U.S. v. Norton, 22 USCMA 213, 46 CMR 213 (1973).
- G. Although insanity was raised for first time on appeal, COMR dismissed findings and sentence based upon the findings of a board of officers it had ordered convened. U.S. v. Rubio, No. S-8624 (ACMR 20 June 1974).

MULTIPLICITY

I. Defined

A. Para, 26b: one transaction should not be made the basis for unreasonable multiplication of charges unless contingencies of proof necessitate.

B. Para. 74b(4): D may be found guilty of 2+ offenses arising out of one transaction regardless of separateness.

C. Para. 76a(5): Max sentence may be imposed for each separate offense arising out of one transaction

II. Tests:

A. Included offenses - para. 76a(5)

B. General rule - identity of elements - para. 76a(5)

Woodall, 43 CMR 522 Contra, Sloan, 47 CMR 436

C. Working rule - identity of facts - Blockburger v. US

284 US 299; Posnick 8 USCMA 201, 24 CMR 11, Smith, 17 USCMA 55, 37 CMR 319

D. Single impulse: Pearson 19 USCMA 379, 41 CMR 374; Weaver, 20 USCMA 58, 42 CMR 250.

E. The current trend: Single integrated transaction -

Burney 21 USCMA 71, 44 CMR 125. To be multiplicitious, "a course of conduct resulting in criminal charges should have a similar combination of like object and insistent flow of events, i.e, a single purpose to a timely act which

technically violates two articles: Dicario, 8 USCMA 353, 24 CMR 163; Payne, 12 USCMA 455, 31 CMR 41; Murphy, 18 USCMA 571, 31 CMR 41; Brown, 8 USCMA 18, 23 CMR 242.

F. Others: Separate duties, Soukup, 7 CMR 17; different societal norms, Beene, 4 USCMA 177, 15 CMR 177; para, 200a(8) re: objects of multiple larceny.

G. On conspiracies, see Beverly, 14 USCMA 468, 34 CMR 248; Smith 20 USCMA 589, 44 CMR 19.

H. Caveat: so long as there are separate offenses charged and found, regardless of the fact that they may arise out of the same transaction, sentence may be imposed for each offense. Larney, 2 USCMA 563, 10 CMR 61, cf. para 74b(4) at I.B.

I. For discussions of the tests: 8 MLR 73; Burney, supra; Johnson, 42 CMR 630.

III. Waiver: Buchholtz, 47 CMR 177; Sweney, 48 CMR 476. If not raised at trial, we must argue: (1) plain error not harmless, (2) manifest miscarriage of justice, (3) error affecting the fairness, integrity or public reputation of the judicial proceedings. See Buchholtz at 178. Scott 16 USCMA 478, 37 CMR 98.

IV. Remedies

- A. Motion at trial
- B. Instructions
- C. - Argue prejudice
- D. Dismissal on appeal
- E. Reassessment
- F. Reversal

V. Doubt should be resolved in favor of the accused.

Bell v. US 349 US 81; Simpson 42 CMR 683

VI. What to look for:

A. Similarity of time and place in the specifications.

B. Course of conduct

C. Similarity of offense

D. Table of lesser included offenses

E. Specifically:

1. AWOL and escape , break restriction, disobey order to remain, et al.

2. Possession of drugs and sale, introduction, et al.

3. Robbery and assault

4. Further examples.

a. larceny spec for each item taken-para. 200a(8)

b. possession of two of the same item-drugs,
concealed weapons

c. several offensive statements to the same officer

d. several acts of disobedience to one order

5. Larceny and housebreaking

6. Substantive offense and possession of article

necessary to that offense- arson and possession of a
Molotov cocktail

7. Substantive offense and attempt, conspiracy

See Smith 20 USCMA 589, 44 CMR 19; Crusoe 3 USCMA 793, 14 CMR 211