

United States Army
Defense Appellate Division

Volume 13

Number 6

November — December 1981

Contents

391
THE JENCKS ACT: AN INTRODUCTORY ANALYSIS
James W. Kesler, Esq.

408
APPLYING THE "MISTAKE OF FACT" DEFENSE
Major Stephen J. Harper

421
SEARCH AND SEIZURE: A PRIMER
PART SEVEN — Domestic Gate Searches

430
ETHICS ROUND TABLE

433
PROPOSED INSTRUCTION

450
CASE NOTES

434
SIDE BAR

460
ON THE RECORD

439
USCMA WATCH

i
INDEX: VOLUME 13

CHIEF, DEFENSE APPELLATE DIVISION

COL Edward S. Adamkewicz, Jr.

EDITORIAL BOARD

Editor-in-Chief:	CPT E. Scott Castle
Managing Editor:	CPT John Lukjanowicz
Articles Editor:	CPT Edward J. Walinsky
Side Bar Editor:	CPT David M. England
USCMA Watch Editor:	CPT Joseph A. Russelburg
Case Notes Editor:	CPT James S. Currie
USATDS Representative:	MAJ John R. Howell

STAFF AND CONTRIBUTORS

Associate Editors

CPT Peter R. Huntsman
CPT Richard Vitaris
CPT Gunther O. Carrle

Contributors

MAJ James F. Nagle
CPT Gary Gray
CPT Maurice Portley

ADMINISTRATIVE ASSISTANTS

Mrs. Phyllis Reeves
Ms Diana Cooper
Ms Kim Jewell

Announcement

The Superintendent of Documents has established the following prices for a yearly subscription to The Advocate, beginning with Volume 14, issue 1: \$12.00 (domestic) and \$15.00 (foreign). The single issue prices are \$3.50 (domestic) and \$4.40 (foreign).

THE ADVOCATE (USPS 435370) is published under the provisions of AR 360-81 as an informational media for the defense members of the U.S. Army JAGC and the military legal community. It is a bimonthly publication of The Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, VA 22041. Articles represent the opinions of the authors or the Editorial Board and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Controlled circulation postage paid at Falls Church, VA. SUBSCRIPTIONS are available from the Superintendent of Documents, U.S. Government Printing Office, ATIN: Order Editing Section/SSOM, Washington, D.C. 20402. POSTMASTER/PRIVATE SUBSCRIBERS: Send address corrections to Superintendent of Documents, U.S. Government Printing Office, ATIN: Change of Address Unit/SSOM, Washington, D.C. 20402. The yearly subscriptions prices are \$8.00 (domestic) and \$10.00 (foreign). The single issue prices are \$2.00 (domestic) and \$2.25 (foreign).

OPENING STATEMENTS

Overview

The government's comparatively extensive investigative resources may place an accused at a disadvantage unless his defense counsel is familiar with available discovery tools. An understanding of the Jencks Act, 18 U.S.C. §3500 (1970), is crucial in this regard, and the lead article should assist the reader in interpreting and applying that statute. The second article, authored by a former military judge, presents a useful "checklist" of common offenses under the Uniform Code of Military Justice and discusses the manner in which the "mistake of fact" defense may negate or reduce culpability for those crimes.

The staff continues its seriatim review of judicially recognized exceptions to the fourth amendment's warrant requirement in part seven of "Search and Seizure: A Primer." This issue's installment addresses searches conducted at the gates of military installations located within the United States, and complements our analysis of border and overseas gate searches at 13 The Advocate 43 (1981). In the "Proposed Instruction" feature, the staff suggests a modification of the standard "conspiracy" instruction found at paragraph 3-3, Dept. of Army, Pamphlet No. 27-9, Military Judges' Guide (1969), and in "Ethics Round Table," we examine the responsibilities attending the presentation of witnesses who may incriminate themselves. Finally, this issue includes the annual index for Volume 13 of the journal.

Preview

The next issue of The Advocate will contain articles pertaining to Military Rule of Evidence 403, and the role of Army regulations in courts-martial.

THE JENCKS ACT: AN INTRODUCTORY ANALYSIS

by Mr. James W. Kesler*

The heightened responsibility placed upon military defense counsel by the Military Rules of Evidence underscores the need to be totally informed of an accused's right to discovery. In this regard, an understanding of the Jencks Act¹ [hereinafter the Act] is crucial not only because it is a valuable tool of discovery in its own right, but also because it clarifies the scope and application of Military Rules of Evidence 505(g)(3)(B) and 612. The Act establishes a procedure whereby the defense can demand the production of prior statements and reports made by prosecution witnesses. However, the Act does not create a general right of discovery for the defense,² and is instead limited to the

**Mr. Kesler, a former member of the U.S. Army JAG Corps, received his B.A. and his J.D. from the University of Georgia. While on active duty, he acted as both trial and defense counsel for the XVIIIth Airborne Corps at Fort Bragg. He is a Captain in the Reserves (213th Military Law Center, Chamblee Georgia), and has completed the JAGC Advanced Course. He is now in private practice in Carrollton, Georgia.*

1. For earlier accounts concerning the Jencks Act in military practice, see O'Brien, The "Jencks Act" - a Recognized Tool for Military Counsel, 11 The Advocate 20 (1979); and Waldrop, The Jencks Act, 20 A.F.L. Rev. 93 (1978). The Jencks Act, 18 U.S.C. §3500, appears in this article's Appendix. See also Fed. Rules Cr. Proc. Rule 26.2, 18 U.S.C. (eff. 1 Dec. 1980). Rule 26.2 parallels the Act, except paragraph (a) is not included, and remaining paragraphs give any party who did not call the witness the right to examine and use any statement of the witness (except statements by the defendant) in the proponent's possession which relates to the witness' testimony, subject to the same requirements of relevancy. For an interesting opinion discussing Rule 26.2 in conjunction with the Act and other authorities, see United States v. Algie, 503 F.Supp. 783 (E.D. Ky. 1980), reversed, 30 Crim.L.Rep. (BNA) 2285 (6th Cir. 8 Jan. 1982).

2. While this article is limited to discovery mandated by the Jencks Act, other considerations affect the scope of discovery. For example, Brady v. Maryland, 373 U.S. 83, (1963) held that the failure to disclose any exculpatory evidence violates due process regardless of the reason for nondisclosure. See also United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972). For a discussion of the interface between the Jencks Act and trial counsel's ethical obligations under Brady, supra; see generally, Note, Protecting a Defendant's Constitutional Rights: The Jencks Act and the Inadequacy of the Good Faith Exception, 59 B.U.L. Rev. 695 (1979).

production of statements which relate to the testimony of government witnesses on direct examination. The government's statutory obligation to produce these statements arises only after the prosecution witness has testified on direct examination.³

In working with the Act, defense counsel should consider several points:

- (a) what constitutes a "statement" under the Act?
- (b) when does the government possess a statement?
- (c) when and how is a request for a witness' statement made?
- (d) what sanctions, if any, are available if the government refuses to produce a requested statement?

Defining "Statements" Under the Act

In framing a request for production, defense counsel must remember that the Act was designed to limit access to government files in criminal prosecutions. Thus, producible statements are available to the defense only after the prosecution witness has testified on direct. To prevent a "fishing expedition" of government records, it is "incumbent upon the defense to be definitive in their request at least to the extent of limiting their demands to 'statements,'"⁴ which can fairly be said to be the prosecution witness' own words, "rather than the product of the

3. See *United States v. Dansker*, 537 F.2d 40 (3rd Cir. 1976) (Act does not apply to presentence report prepared by Court order); *United States v. Atkinson*, 512 F.2d 1235 (4th Cir. 1975) (Act imposes no affirmative duties on trial judge or government, absent valid, timely defense request); *United States v. Hotal*, 416 F.2d 607 (7th Cir. 1969) (Act does not apply to court's witness); *United States v. Erlichman*, 389 F.Supp. 95 (D.C. Cir. 1974) (Act does not apply to testimony before congressional committee); See also *United States v. Jackson*, 33 CMR 884 (AFBR 1963) (demand under Act must be honored if Article 32 investigating officer calls government law enforcement agent).

4. *Gordon v. United States*, 344 U.S. 414, 419 (1953); *Foster v. United States*, 308 F.2d 751, 755 (8th Cir. 1962) (request for government agent's entire case file denied).

investigator's selections, interpretations and interpolations."⁵ Consequently, a defense request for the production of an investigative case file, or a request for the court to inspect a file and retrieve any information helpful to the defense, will be overbroad. To use the Act effectively, defense counsel should ask each witness whether he was questioned by a government agent, or signed or concurred with any statements developed by the agent. If relevant statements exist, defense counsel will be prepared to request the government to produce them. In short, the time to determine the existence of possible Jencks Act statements is before, rather than during the trial.

The defense counsel's hardest and most important task is to establish that a government witness' prior remarks constitute a "statement" within the meaning of the Act. The Act restricts the definition of "statement" in order to "limit the right of inspection for use in cross-examination to reasonably accurate or authenticated statements and reports, for which the witness, not the Government agent, is responsible."⁶ The Act limits impeachment evidence to the witness' own words. However, as required by Section 3500(b) of the Act, those words or statements must relate to the subject matter of the witness' testimony on direct examination. The court must determine the statement's relevance to the witness' testimony. In making that determination, courts will not "speculate as to whether or not an otherwise producible statement . . . will be of any use to the defendant for impeachment purposes,"⁷ and any issue as to the statement's admissibility as evidence is irrelevant.⁸

There are two definitions of "statement" included in the Act. Both must be examined carefully in order to transform a requested document or recording into a producible statement. Section 3500(e)(1) "contemplates a writing which the witness is able to read and, if satisfied as to its accuracy, to adopt or approve by signature or otherwise."⁹ It is not

5. Palermo v. United States, 360 U.S. 343, 350 (1959).

6. United States v. Palermo, 258 F.2d 397, 399 (2nd Cir. 1958).

7. Lewis v. United States, 340 F.2d 678, 682 (8th Cir. 1965).

8. Palermo v. United States, supra note 5, at 353.

9. United States v. Thomas, 282 F.2d 191, 194 (2nd Cir. 1960). Section 3500(e)(3) applies to statements given to grand juries and therefore it will not be discussed. The question of whether an Article 32 Investigation is equivalent to a grand jury is beyond the scope of this article.

necessary that the witness write or type his own statement; it can be written by the investigating agent in note form, and if the notes are read back to the witness and he accepts and approves the writing, it becomes his statement.¹⁰ However, it should be understood that "every witness interview will involve conversation between the [investigating agent] and the witness," and the agent must therefore question the witness to insure that he "correctly understood what the witness has said." The requirement "clearly is not met when the [agent] does not read back, or the witness does not read, what the [agent] has written."¹¹ Thus, a CID interview report could be disclosed under the Act as a "statement" of the witness "if the recitals in the report were 'signed or otherwise adopted or approved' by the witness."¹² Conversely, handwritten notes or memoranda made by government agents during their investigation could be the proper subjects of a Jencks Act inquiry under Section 3500(e)(1) if they were adopted or approved by the testifying government witness.¹³ The Act would also cover a letter written by a prosecution witness to an investigating agent or prosecutor, if the letter related to the subject matter of the witness' testimony.¹⁴

Section 3500(e)(2) defines a "statement" as a "substantially verbatim recital of an oral statement" made by the witness which was "recorded contemporaneously" with the making of the oral statement. Thus, where the witness' own words are recorded, it is not necessary to establish that the statement was "signed or otherwise adopted or approved" by the

10. United States v. Jarrie, 5 M.J. 193 (CMA 1979). See also United States v. Kilmon, 10 M.J. 543 (NCOMR 1980) (unsigned handwritten outline orally verified by the authority was statement under Act); and United States v. Chitwood, 457 F.2d 676 (6th Cir. 1976).

11. See Goldberg v. United States, 425 U.S. 94, 110 n.19 (1976); Campbell v. United States, 365 U.S. 85 (1961).

12. Ogden v. United States, 303 F.2d 724, 734 (9th Cir. 1962).

13. See Clancy v. United States, 365 U.S. 312 (1961); United States v. Harris, 543 F.2d 1247 (9th Cir. 1975); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975); United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975); United States v. Bell, 457 F.2d 1231 (5th Cir. 1972); United States v. Albo, 22 USCMA 30, 46 CMR 30 (1972).

14. See United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974); United States v. Pacelli, 491 F.2d 1108 (2nd Cir. 1974).

witness. To be the witness' "own words", Section 3500(e)(2) requires only a substantially verbatim, not a precisely verbatim recital. Moreover, the writing, whether an original or a copy, need only be contemporaneously, not simultaneously made.¹⁵

Defense counsel should consider several factors in determining whether a particular document is a "statement" within Section 3500(e)(2):

- (1) the extent to which the statement conforms to the language of the witness;
- (2) the statement's length in comparison with the length of the interview;
- (3) the lapse of time between the interview and the statement's transcription;
- (4) the substance of the witness' remarks;
- (5) the use of quotation marks;
- (6) the presence of the comments or ideas of the interviewer;
- (7) the educational qualifications of the interviewer; and
- (8) the purpose for which the statement was obtained.¹⁶

An excellent example of a "statement" within the meaning of this provision is the tape recording of a witness who testifies at an Article 32 investigation. If the testimony is recorded substantially verbatim, these tapes are subject to disclosure under the Act.¹⁷ To be "substantially verbatim" the statement must be a fairly comprehensive reproduction, in a continuous

15. United States v. McKeever, 271 F.2d 669, 675 (2nd Cir. 1959).

16. Williams v. United States, 338 F.2d 286, 288 (D.C. Cir. 1964). See also Palemo v. United States, supra note 5, at 355 n.12.

17. United States v. Patterson, 10 M.J. 599 (AFCMR 1980); United States v. Thomas, 7 M.J. 655 (ACMR 1979) pet. granted on other grounds, 8 M.J. 138 (CMA 1979); United States v. Scott, 6 M.J. 547 (AFCMR 1978). Though a transcript of testimony in a prior trial is not within the language of the Act, United States v. Harris, 542 F.2d 1283 (7th Cir. 1976); United States v. Covello, 410 F.2d 536 (2d Cir. 1969); United States v. Baker, 358 F.2d 18 (7th Cir. 1966), "military due process" may demand that the defense be afforded access to such matter. See United States v. Matfield, 4 M.J. 843 (ACMR 1978); United States v. Jackson, supra note 3.

narrative form, of what the witness said to a government agent. In contrast, mere "summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes and hence rest on the memory of the agent," are excluded under Section 3500(e)(2), as are statements which "contain the agent's interpretations or impressions."¹⁸

Statement within Government Possession

The Act only compels production of statements "in the possession of the United States."¹⁹ Courts have construed this to mean statements "possessed by the prosecutorial arm of the federal government construed."²⁰ In the military, this narrowed interpretation of the term "United States" would certainly include statements in the possession of CID and MPI agents, military and security police, or members of any other federal organization involved in criminal investigation. However, the application of the Act to statements in the possession of an ordinary servicemember is less clear. In a broad sense, each member of the United States Army is an employee of the United States, and consequently his or her possession of a statement could be attributable to the United States under a theory of agency.²¹ However, employment with the United States Army will not per se characterize an individual as an "agent of the prosecutorial arm of the government."²² There must be a showing that the servicemember was in fact assisting in an investigative or prosecutorial capacity at the time he or she came into possession of the statement. If a company commander, pursuant to his inherent

18. Palermo v. United States, supra note 5, at 352. See also United States v. Valdes, 545 F.2d 957 (5th Cir. 1977) (customs agent's interview report was not a statement within the Act).

19. 18 U.S.C. §3500(b). See also Fed.R.Crim.P. 26.2 (eff. 1 Dec. 1980), the "reverse Jencks Act," providing for the production of statements of defense witnesses at trial in essentially the same manner in which statement of government witnesses are produced under the Act.

20. United States v. Dansker, supra note 3, at 61. See also United States v. Trevino, 556 F.2d 1265 (5th Cir. 1977); United States v. Calley, 46 CMR 1131 (ACMR 1973).

21. United States v. Woodard, CM 439977 (ACMR 29 May 1981) (unpub.). It has also been held that a court reporter is not an agent of the government within the Act. United States v. Baker, supra note 17.

22. Id. See also United States v. Ezell, 6 M.J. 307 (CMA 1979).

obligation to enforce the law, directs his first sergeant to interview and obtain written statements from potential witnesses of a criminal offense, the documents, once delivered to the first sergeant or unit commander, would become statements "in the possession of the United States." However, the Army Court of Military Review recently decided in a memorandum opinion that the unsolicited delivery of handwritten statements to a unit commander did "not suggest that [the unit commander] was actively engaged in the information-gathering process of law enforcement."²³ Thus, the statements were deemed not to be "in the possession of the United States" and were not subject to discovery under the Act.

Timeliness of Defense Request for Production

The Act provides that the trial court shall order production of statements to which the defense is entitled on motion of the defendant. While it is true that no "ritual of words" is required to activate the Act, it is the defense counsel's responsibility "to invoke the Jencks Act at the proper time and in a proper manner so that a trial court will have a specific opportunity to rule on the applicability of [the] request made thereunder."²⁴ The request must be directed to the court; a request addressed to the prosecution or a witness, even in open court, will not impose a duty upon the court to examine for the existence or order the production of a possible statement.²⁵ If the defense fails to tender its request to the trial court, the accused cannot later assert on appeal that the court's failure to order production or to undertake further inquiry was error.²⁶

23. United States v. Woodard, supra note 21.

24. Howard v. United States, 278 F.2d 872, 874 (D.C. Cir. 1960); Lewis v. United States, supra note 7, at 682.

25. See Mims v. United States, 332 F.2d 944 (10th Cir. 1964); United States v. Paroutian, 319 F.2d 661 (2nd Cir. 1963); Harrison v. United States, 318 F.2d 220 (D.C. Cir. 1963).

26. Ogden v. United States, supra note 12, at 733.

The Act does not specify when a request for a statement should be made; it simply states that a requested statement need not be produced until after the prosecution witness has completed his testimony on direct examination. The orderly management of the trial proceedings, however, "require[s] no more, but no less, than a timely motion,"²⁷ and accordingly defense should request the production "within a reasonable time proximate to the direct testimony" of the particular witness involved, in order to insure that the trial judge and government are informed as to the nature of the request.²⁸ Preferably, it should be made "immediately before, during, or immediately after the direct examination, although circumstances might permit requests at different points during the trial."²⁹

While Section 3500(b) of the Act specifically provides that the trial court shall not order the government to produce any statement until the witness has testified, some courts will conduct an inquiry prior to the particular witness' testimony if it can be shown that such a hearing could result in a considerable savings of time. Such an inquiry, for example, may be appropriate if the defense can show that a statement from a crucial government witness exists, and that the government cannot produce it. In that instance, the government may be prohibited from calling that witness. Even if an early inquiry cannot be conducted, the defense counsel should nevertheless make his request in a timely manner, and should routinely incorporate it into his pretrial motions practice. Alternatively, the request can be made immediately before the testimony of the particular witness involved. Most importantly, the request should be made immediately after the witness completes his or her testimony on direct examination.

Procedure for Requesting Statement

Upon a prima facie showing of the defense's entitlement to a statement, the court must determine whether the statement should be produced. While the benefit to the defense from a Jencks Act statement lies in its use as impeachment evidence, its value in that regard cannot be considered by the court. Rather, the decision as to whether a document

27. United States v. Harris, 458 F.2d 670, 679 (5th Cir. 1972). See also United States v. Burrell, 5 M.J. 617 (ACMR 1978).

28. Id.

29. Id. A district court judge has no authority to require the prosecution to turn over Jencks Act material in advance of the witness' court appearance. United States v. Algie, supra note 1, at 2285.

is discoverable is limited solely to the issue of whether it is a "statement" under the Act and whether it relates to the witness' testimony on direct examination.³⁰

Other than the in camera requirement for determining whether certain "statements" relate to a witness' in-court testimony, the Act is silent as to the mechanics for obtaining the information relevant to judicial analysis of the issue. However, appellate decisions indicate that the trial judge must decide, in light of the circumstances of each case, "what, if any, evidence extrinsic to the statement itself may or must be offered [outside the presence of the jury] to prove the nature of the statement."³¹ In Campbell v. United States, the Supreme Court decided that upon a prima facie showing of entitlement to a statement by the defense, the trial court must "administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute."³² The proper procedure, especially when the trial judge has the opportunity to inspect the questioned statement, is to call the necessary government agents on his own motion, or require the government to produce the necessary witnesses.

More importantly, the Court held that "reliance upon the testimony of the witness based upon [the witness'] inspection of the controverted document must be improper in almost any circumstance."³³ Such a practice creates the "obvious hazard that [the witness'] self-interest might defeat the statutory design of requiring the Government to produce papers which are 'statements' within the statute."³⁴ If a statement sharply conflicts with a witness' testimony on direct, the defense can be deprived of the

30. See Lewis v. United States, supra note 7; United States v. Dixon, 8 M.J. 149 (CMA 1979).

31. Palermo v. United States, supra note 5, at 354. See also United States v. Curry, 512 F.2d 1299 (4th Cir. 1975) (upon request of counsel Jencks Act disclosures should be made outside presence of jury).

32. Campbell v. United States, supra note 11, at 95.

33. Id. at 97.

34. Id.

use of that statement by the "obviously self-serving declarations of the witness that it did not accurately record what he told the agent."³⁵ Once it is established that the statement is discoverable under the Act, the trial court is required, on motion by the accused, to order the government to produce the statement for eventual delivery to the defense. If the government elects not to comply, the court, under the authority of Section 3500(d), shall strike the witness' testimony or declare a mistrial.³⁶

Sanctions for Noncompliance

If the government deliberately refuses to abide by the court's order to produce a particular statement in its possession, the remedies available in Section 3500(d) are appropriate. But should the court impose those sanctions when the government is unable to comply because the statement is no longer in its possession? The Supreme Court has not specifically answered that question, and lower appellate tribunals have not been uniform in deciding what penalties, if any, should be imposed. The problem facing the courts is that the sanctions enumerated in Section 3500(d) are to be imposed "if the United States elects not to comply with an order of the court under paragraph (b) or (c)" of that section.³⁷

As early as 1961, the Supreme Court in Campbell faced the issue of whether the destruction of a witness' pretrial statement could be regarded as noncompliance with a court order to produce under Section 3500(d) of the Act. In that case, the government argued that "only destruction for improper motives or in bad faith" should be considered as noncompliance, whereas the defendant argued that "destruction without regard to any circumstance should be the equivalent of noncompliance."³⁸ The Court avoided the question by stating that the record was silent as to the existence of the document in question and the manner of its destruction, if it had in fact been destroyed. Yet Justice Frankfurter, dissenting in part and concurring in the result in part, stated:

35. Id. at 98.

36. 18 U.S.C. §3500(d). See also Clancy v. United States, supra note 13; Lewis v. United States, supra note 7; United States v. Sheer, 278 F.2d 65 (7th Cir. 1960); United States v. Berry, 277 F.2d 826 (7th Cir. 1960).

37. 18 U.S.C. §3500(d) (emphasis added).

38. Campbell v. United States, supra note 11, at 98.

Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government

[The] contention that the words "in the possession of" must be interpreted as meaning "possession at any prior or present time" must be rejected. Congress surely did not intend to initiate a game of chance whereby the admission of a witness' testimony is made to depend upon a file clerk's accuracy or care.³⁹

Military defense counsel should not overlook the fact that this opinion was not adopted in the majority decision.⁴⁰

Eleven months later the Supreme Court attempted to answer, in part, the question it avoided in Campbell. In Killian v. United States,⁴¹ the Court was faced with the revelation that, despite government assertions to the contrary at trial and on appeal, Federal Bureau of Investigation notes of a witness' "oral reports of expenses [had been] destroyed in accord with normal [administrative] practice long prior to the trial" ⁴² While conceding that the notes may have been "statements" within the meaning of Section 3500(e)(2), the government argued that failure to produce the documents was not error since they were not in existence at the time of trial. On appeal, the petitioner argued that "the claimed destruction of the agents' notes . . . [amounted to] destruction of evidence that may have been helpful to him and deprive[d] him of his rights under Section 3500 and to due process of law[.]"⁴³ The Supreme Court responded:

39. Id. at 102.

40. See United States v. Lieberman, 608 F.2d 889, 895 (1st Cir. 1979).

41. 368 U.S. 231 (1961).

42. Id. at 241.

43. Id.

[I]t seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by the [the witness], and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive the petitioner of any right

It is entirely clear that petitioner would not be entitled to a new trial because of the non-production of the agents' notes if those notes were so destroyed and not in existence at the time of the trial.⁴⁴

As a result of the Killian decision, appellate courts began to inquire into the reason and timing of the destruction of producible statements and the degree to which the defendant had been prejudiced thereby. If such an inquiry revealed that the statement was destroyed in "good faith" with no substantial harm to the defendant, a trial court's decision not to impose the sanctions of Section 3500(d) would be viewed as harmless error on appeal.⁴⁵ Trial judges may therefore refuse to impose the sanctions enumerated in Section 3500(d) if there is a showing of good faith destruction with no substantial harm to the defendant. Under military law the government bears the burden of proving good faith and the absence of harm.⁴⁶

Because of the variety of decisions relating to the loss or destruction of producible statements, only a brief presentation is set out to highlight those factors which might convince a trial court that a failure

44. Id. at 242 (emphasis added).

45. See Chapman v. California, 386 U.S. 18 (1967); Lewis v. United States, supra note 7. See generally Note, supra note 2.

46. See United States v. Jarrie, supra note 10; United States v. Patterson, supra note 17; United States v. Kilmon, supra note 10.

to impose sanctions pursuant to Section 3500(d) is prejudicial error. No one factor will be dispositive of the issue; instead, a balancing test must be applied in which the court weighs the "degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice."⁴⁷ The defense counsel must investigate the manner of destruction or loss in order to determine whether the producible statement was deliberately destroyed in accordance with established, long-standing administrative procedures or whether its loss was occasioned by an "optional practice of discretionary destruction."⁴⁸ This investigation will undoubtedly require inquiry into the agency's "regulations governing the preservation [and destruction] of written [or typed] records of witness interviews" and the question of whether the agency was negligent in abiding with those regulations.⁴⁹ Additionally, the defense counsel should examine the training which new investigative agents receive concerning the types of materials to retain in investigatory case files.

The defense counsel should also ascertain the purpose for creating the original statement. If the statement had been made only to transfer data to another document which would then be signed by the witness, and the original statement was destroyed after serving its intended purpose, its destruction may be valid.⁵⁰ The date of the original statement's destruction may also be important. In one case, the investigating agent destroyed stenographic transcripts taken from the file of the prosecuting attorney a week and a half before the defendant's trial; the evidence showed that there were "substantial differences between the stenographic transcript" taken and the F.B.I. agent's formal report, which had been produced earlier in compliance with a court order.⁵¹ As a result, the defendant's conviction was reversed and remanded for a rehearing. The defense must also determine the degree of prejudice, if any, that would

47. United States v. Bryant, 439 F.2d 642, 653 (D.C. Cir. 1971). See also United States v. Patterson, supra note 17.

48. United States v. Jarrie, supra note 10, at 195.

49. United States v. Harrison, supra note 13, at 425. See also United States v. Scott, supra note 17.

50. See Killian v. United States, supra note 41.

51. United States v. Lonardo, 350 F.2d 523 (6th Cir. 1965).

result from the government's inability to produce the destroyed statement. Prejudice can only be gauged by ascertaining the availability of any secondary evidence, and by assessing any variance between the destroyed statement and the secondary evidence, and the relative importance of the witness' testimony.

The production of secondary evidence such as a formalized report does not relieve a trial court of its duty to determine whether the information contained therein is identical to that which was destroyed. Upon a showing that a formalized report does not substantially incorporate the contents of the destroyed statement, or that the contents of the destroyed statement cannot be accurately reconstructed, a court must infer that the secondary evidence is incomplete for the purpose of cross-examination.⁵² The potential for prejudice is thereby created, and as a consequence the defendant is not required to show any material harm to his case. Yet, whether this harm, standing alone, is sufficient to establish prejudicial and reversible error will depend in large part upon whether, in the absence of the testimony of the witness involved, "the evidence of guilt adduced at trial [is still] overwhelming."⁵³

Notwithstanding these general principles, there is disagreement among the federal courts over the destruction or loss of statements which had not been signed or adopted by the testifying government witness. The type of evidence involved usually is a tape recording of a witness' pretrial statement which was subsequently erased or destroyed after its contents had been summarized in a formal, signed report. A tape recording of a

52. See United States v. Sanchez, 635 F.2d 47 (2nd Cir. 1980); United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976); United States v. Lonardo, supra note 51; United States v. Patterson, supra note 17; United States v. Kilmon, supra note 10; United States v. Scott, supra note 17; United States v. Jarrie, supra note 10. But see United States v. Thomas, supra note 17.

53. United States v. Harrison, supra note 25, at 435. Compare, United States v. Niederberger, 580 F.2d 63 (3rd Cir. 1978) (harmless error found) and Lewis v. United States, supra note 7 (harmless error found) with United States v. Carrasco, supra note 52 (prejudicial error found) and Lee v. United States, 368 F.2d 834 (D.C. Cir. 1966) (prejudicial error found).

recital of past occurrences by a prospective government witness is a "statement" within the scope of the Act,⁵⁴ and yet numerous appellate courts have held that, in the absence of a showing of bad faith or prejudicial harm to the defendant, such tapes do not have to be preserved.⁵⁵ The Act, however, was designed to insure that government witnesses would only be impeached by their own words. "That purpose is not served when a government agent summarizes a witness' statement in his report and destroys the verbatim record. Whether or not [the agent's] conduct was routine, it was manifestly unreasonable in light of the expressed Congressional intent, and is no less a violation of the Jencks Act because it was pursued in good faith."⁵⁶ The military appellate courts have apparently adopted this philosophy.⁵⁷

Conclusion

In its search for the truth, the criminal justice system should ideally allow the fact-finders to consider only the "best" evidence. Common sense and due process dictate that the defense counsel respond in kind by requesting the opportunity to examine and use the complete pretrial statements directly attributable to government witnesses. The Jencks Act can be a valuable discovery tool for the defense, especially in jurisdictions where access to criminal investigatory records is substantially limited. If successfully invoked, it allows the accused to share the benefits of the government's enormous investigative resources.

54. See United States v. Esposito, 523 F.2d 242 (7th Cir. 1975), cert. denied, 425 U.S. 916 (1976); United States v. Lonardo, supra note 51; United States v. Borelli, 336 F.2d 376 (2nd Cir. 1964).

55. See United States v. Carrillo, 561 F.2d 1125 (5th Cir. 1977); United States v. Miranda, 526 F.2d 1319 (2nd Cir. 1975), cert. denied, 429 U.S. 821 (1976); United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

56. United States v. Carrasco, supra note 52, at 376.

57. United States v. Jarrie, supra note 10; United States v. Patterson, supra note 17; United States v. Kilmon, supra note 10. But see United States v. Thomas, supra note 17.

Appendix

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595; as amended by Pub.L. 91-452, Title I, Section 102, Oct., 15, 1970, 84 Stat. 926.

APPLYING THE "MISTAKE OF FACT" DEFENSE

by Major Stephen J. Harper*

A "guilty state of mind of one kind or another" is a requirement of many offenses,¹ and in some crimes a specific criminal intent is necessary.² In addition, knowledge of a specific fact is an element of certain "general intent" crimes.³ A mistake of fact as to any of these mental states may operate as a complete defense or reduce the accused's criminal culpability. Once the "mistake of fact" defense is raised by competent evidence, the military judge must instruct the court members on the issue,⁴ unless the purported mistake is specious and defies credibility.⁵ As in all affirmative defenses, the government must prove beyond a reasonable doubt that the defense is overcome.⁶

An analysis of cases in which the defense may be raised involves inquiry into two separate matters, each of which is comprised of two elements: whether the offense requires general or specific mens rea, and whether the accused's own belief is subjectively honest or objectively reasonable. For example, an individual who subjectively believes that his

**Major Harper graduated from the United States Military Academy in 1968 and received his J.D. from the University of Alabama Law School. He currently serves as Deputy Staff Judge Advocate at Fort McClellan, Alabama. Prior to his present assignment, he was a special court-martial Judge in the 5th Judicial Circuit.*

1. Para. 154a(1), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

2. Id.

3. Para. 154a(4), MCM, 1969.

4. Para. 73a, MCM, 1969; United States v. Miller, 2 USCMA 194, 7 CMR 70 (1953).

5. United States v. Knowles, 24 CMR 875 (AFBR 1957). See United States v. Ginn, 1 USCMA 453, 4 CMR 45 (1952).

6. United States v. Noe, 7 USCMA 408, 22 CMR 198 (1956); United States v. Roberts, 44 CMR 529 (ACMR 1971); para. 214, MCM, 1969.

victim would have consented to the taking of property does not possess general criminal mens rea, and he cannot be found guilty of larceny or wrongful appropriation even though he specifically intended to deprive the owner of that property.⁷ Likewise, in general intent offenses requiring actual knowledge of the identity of the substance possessed or the victim's status, a mistake as to one of these facts must only be honest in order to exonerate the accused or reduce his culpability. Thus, an individual who honestly believes he is holding an alfalfa cigarette lacks general criminal mens rea and should be acquitted of wrongfully possessing marijuana.⁸ In any criminal offense it is essential that the mistake relate to the fact which makes the accused's actions unlawful.⁹ Courts have instructed the fact-finder to use an objective standard when evaluating the accused's honesty.¹⁰ This approach facilitates the determination of the accused's mental state and represents a permissible application of circumstantial evidence to show actual knowledge.¹¹

One way to approach the "mistake of fact" defense is to analyze common criminal offenses and highlight certain principles which apply to particular crimes:

AWOL (Article 86, UCMJ):

This is a general intent offense, so a mistake as to authority to be absent, for example, must be both honest and reasonable in order to exonerate the accused.¹²

7. United States v. Hayes, 8 USCMA 627, 25 CMR 131 (1958), United States v. Caid, 13 USCMA 348, 32 CMR 348 (1962).

8. United States v. Lampkin, 4 USCMA 31, 15 CMR 31 (1951).

9. United States v. Baker, 2 M.J. 360 (AFQMR 1977).

10. United States v. Rowan, 4 USCMA 430, 436, 16 CMR 4, 10 (1954); United States v. Tatmon, 23 CMR 841, 847 (AFBR 1957).

11. United States v. Rowan, supra note 10, at 436, 16 CMR at 10; United States v. Curtin, 9 USCMA 427, 432, 26 CMR 207, 212 (1958); para. 154a(1), MCM, 1969.

12. United States v. Holder, 7 USCMA 213, 22 CMR 3 (1956); United States v. Welstead, 36 CMR 707, 710 (ABR 1966); United States v. Thompson, 39 CMR 537 (ABR 1968).

ARSON (Article 126, UCMJ):

Arson is a general intent crime. With regard to aggravated arson, it is not necessary that the accused actually know that the structure is a dwelling house or that there are people therein. The accused's mistake of fact must be honest and reasonable to constitute a defense.¹³

ASSAULT WITH A DANGEROUS WEAPON (Article 128, UCMJ):

This is a general intent crime, and a mistake of fact as to the nature of the weapon must be honest and reasonable.¹⁴ For example, if the accused mistakenly, yet honestly and reasonably believes a pistol is unloaded, he cannot be convicted of aggravated assault by aiming the weapon at another.¹⁵ Although at least one court apparently applied the doctrine of constructive knowledge in this context,¹⁶ the correct approach is to instruct on proof of actual knowledge by circumstantial evidence as this concept relates to the resolution of the mistake of fact issue. While this distinction appears semantic, the legal correctness of the ultimate result may be undermined by misplaced reliance on the constructive knowledge theory.¹⁷ If, on the other hand, the accused mistakenly thinks his pistol is loaded, there is no aggravated assault because the weapon, if used normally, is not likely to produce death or great bodily harm.¹⁸

ASSAULT WITH INTENT TO RAPE (Article 134, UCMJ):

This is a specific intent crime: the accused must intend to engage in sexual intercourse by force and without the victim's consent.¹⁹ Thus, his honest yet unreasonable belief that he was trying to seduce the victim

13. United States v. Duke, 16 USCMA 460, 37 CMR 80 (1966).

14. United States v. Redding, 14 USCMA 242, 244, 34 CMR 22, 24 (1965); United States v. Everson, 40 CMR 1005, 1007 (NBR 1969).

15. United States v. Bush, 47 CMR 532 (NCMR 1973).

16. United States v. Kilpatrick, 46 CMR 971, 972 (ACMR 1972).

17. United States v. Heickson, 40 CMR 475, 476 (ABR 1969).

18. United States v. Bush, supra note 15, at 535.

19. Para. 213f(1)(c), MCM, 1969.

will reduce the offense.²⁰ A mistake of fact as to consent, however, must be honest and reasonable,²¹ because consent relates only to the assaultive aspect of the offense. This analysis also applies to the offense of indecent assault under Article 134, UCMJ.

ASSAULT (Article 128, UCMJ):

Because assault is a general intent crime, a mistake of fact as to the victim's consent must be honest and reasonable.²² If the accused honestly and reasonably thinks that he is punching a wooden cigar store Indian, for example, he possesses no mens rea and should be acquitted of the offense. Where the government fails to prove beyond a reasonable doubt that the mistake of fact was not honest and reasonable, there can, of course, be no assault under the culpable negligence theory.

ASSAULT UPON A COMMISSIONED OFFICER, WARRANT OFFICER, OR NCO (Articles 90, 91, and 128, UCMJ):

These offenses require that the accused actually know the victim's status, and an honest mistake as to his actual knowledge of this fact will reduce the offense to simple assault.²³

ASSAULT WITH THE INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM (Article 128, UCMJ):

This offense requires a specific intent to cause death or inflict great bodily harm. Any mistake of fact as to the victim's consent relates only to the assaultive aspect of this crime. It must be honest and reasonable, since general intent is involved. For example, if the accused believes that the victim wanted to be whipped by the accused, this mistake must be honest and reasonable. But if the accused believed that the whip he used would result only in minor harm, his mistake need only be honest to reduce

20. United States v. Polk, 48 CMR 993 (AFCMR 1974).

21. United States v. Steele, 43 CMR 845, 848 (ACMR 1971).

22. United States v. Hand, 46 CMR 440, 442 (ACMR 1972); United States v. Davis, 49 CMR 463 (ACMR 1974).

23. United States v. Stewart, 44 CMR 526, 527 (ACMR 1971); United States v. Flucas, 23 USCMA 276, 49 CMR 451 (1975).

the offense to assault with a dangerous weapon or simple assault, as appropriate.²⁴ This subjective test is also applied to the degree of force the accused uses in self-defense.

ATTEMPTED MURDER (Article 80, UCMJ):

This crime requires the specific intent to kill another human being unlawfully. A mistake of fact as to the specific intent aspect of this offense must be honest in order to constitute a defense.²⁵ For example, if the accused fires his rifle at what he honestly thinks is a bear, he will be benefited by this honest mistake of fact, even though his belief is negligent.

ATTEMPTED RAPE (Article 80, UCMJ):

Attempted rape is a specific intent offense: it requires the intent to engage in sexual intercourse by force and without the consent of the victim.²⁶ Insertion of the penis, if done without consent, may constitute sufficient force. The requisite specific intent may be proved by circumstantial evidence, which may include an evaluation of the reasonableness of the accused's asserted mistake of fact in order to determine his credibility. The analysis of the state of mind parallels that of assault with intent to rape.

BIGAMY (Article 134, UCMJ):

Since this is a general intent offense, a mistake of fact -- for example, as to the dissolution of a prior marriage -- must be honest and reasonable.²⁷ However, a mistake as to the same fact when applied to the offense of larceny by obtaining marriage through the use of false pretenses need only be honest. This situation will be discussed under the offense of larceny.

24. United States v. Polk, supra note 20, at 997.

25. United States v. Walentiny, 47 CMR 60 (ACMR 1973).

26. Para. 213f(1)(c), MCM, 1969.

27. United States v. McClusky, 6 USCMA 545, 20 CMR 261 (1955); United States v. Noe, supra note 6, at 410, 22 CMR at 200.

BREAKING ARREST (Article 95, UCMJ):

Since the accused must actually know that he was arrested, any mistake as to that fact must be both honest and reasonable.²⁸

BRIBERY (Article 134, UCMJ):

Bribery requires the specific intent to influence the official action of another.²⁹ The accused who gives a superior an expensive watch, honestly believing it to be a mere bauble, will be exonerated even if his belief was negligent or unreasonable.

COMMUNICATION OF A THREAT (Article 134, UCMJ):

Because this is a general intent offense, the accused's mistake of fact must be honest and reasonable. He must have the general intent to communicate the threat, not the specific intent to execute it.³⁰ For example, if an accused opens his barracks window and shouts that he is going to kill the company commander, his assertion that he did not honestly believe that anyone would hear his communication must also be reasonable in order to constitute a defense. However, if an accused court-martialed for telling another servicemember that he is going to "shoot down" the company commander testifies that he was talking about an upcoming basketball game, there is no issue of mistake on his part. If the fact-finders are not convinced beyond a reasonable doubt that he is dishonest, they must acquit him on the basis of the government's failure to establish general criminal mens rea.³¹

28. In *United States v. Bell*, 40 CMR 825, 827 (ABR 1969), the court found that the accused knew he was under arrest, contrary to his assertions of honest mistake.

29. *United States v. Marshall*, 18 USCMA 426, 428, 40 CMR 138, 140 (1969).

30. *United States v. Humphreys*, 7 USCMA 306, 22 CMR 96 (1956).

31. *United States v. Nickson*, 35 CMR 753 (AFBR 1964).

CARRYING A CONCEALED WEAPON (Article 134, UCMJ):

The mens rea required for this offense is the intent to keep the weapon out of sight,³² not any intent to use it unlawfully.³³ One cannot be convicted of this offense if the concealment resulted from accident or was otherwise unintentional.³⁴ This suggests that the accused must actually know that the weapon was concealed, and an honest mistake as to the fact of concealment should excuse his conduct under a general mens rea analysis. State courts are divided on the issue of whether the offense involves general or specific intent.³⁵

DESERTION (Article 85, UCMJ):

An accused is guilty of desertion if he specifically intends to remain away from his unit, organization, or place of duty forever;³⁶ an honest mistake of fact will negate this intent.

DISHONORABLE FAILURE TO PAY JUST DEBTS (Article 134, UCMJ):

It is difficult to determine whether this offense requires general or specific intent. The courts have found the accused's conduct culpable when it was a product of deceit, evasion, bad faith, or gross indifference; simple negligence will not support a finding of guilty. An honest mistake by the accused will exonerate him, unless it is the product of his gross negligence.³⁷

32. United States v. Tobin, 38 CMR 884 (AFBR 1967).

33. United States v. Thompson, 3 USCMA 620, 624, 14 CMR 38, 42 (1954).

34. United States v. Tobin, supra note 32, at 889.

35. Id., and cases cited therein.

36. United States v. Holder, supra note 12; United States v. Vance, 17 USCMA 444, 38 CMR 242 (1968); United States v. Robarts, supra note 6, at 889.

37. United States v. Stratton, 11 USCMA 152, 28 CMR 376 (1960); United States v. Remele, 32 CMR 806, 811 (AFBR 1962); United States v. Taylor, 39 CMR 358, 361 (ACMR 1968); United States v. Kess, 48 CMR 106, 107 (AFCMR 1973). See also United States v. Connell, 7 USCMA 228, 22 CMR 18 (1956).

DISLOYAL STATEMENTS (Article 131, UCMJ):

In order to be convicted of this offense, the accused must specifically intend to promote disloyalty to the United States among other service-members, and the communication must be disloyal per se.³⁸ An honest mistake as to the status of the recipient of the communication constitutes a defense. An accused cannot be convicted of this offense if he was merely angry when he made the statement, and if he honestly did not intend to promote disloyalty.

DRUG OFFENSES (Article 92 and 134, UCMJ):

The accused must have actual knowledge of the identity and prohibited nature of the substance. An honest mistake which, if true, would make the accused's conduct legal, will exonerate him; one who thinks he possesses cocaine when it is in fact heroin will not, therefore, benefit from this mistake.³⁹ There is no constructive knowledge doctrine in the military,⁴⁰ but the fact-finder may make permissive inferences in resolving the issue of actual knowledge.⁴¹

FALSE CLAIMS (Article 132, UCMJ):

This is a specific intent crime, and the accused's honest mistake as to the knowledge of the falsity of his entitlement will therefore exonerate him.⁴²

38. United States v. Harvey, 19 USCMA 539, 42 CMR 141 (1970).

39. United States v. Hughes, 5 USCMA 374, 17 CMR 371 (1954); United States v. Avant, 42 CMR 692 (ACMR 1970); United States v. Anderson, 46 CMR 1073 (AFCMR 1973); United States v. Coker, 2 M.J. 304 (AFCMR 1976); United States v. Baker, supra note 9, at 360; United States v. King, 6 M.J. 927 (AFCMR 1979).

40. United States v. Heickson, supra note 17, at 476.

41. Para. 9-15, Dept. of Army Pamphlet No. 27-9, Military Judges' Guide (1969).

42. United States v. Rodriguez-Suarez, 4 USCMA 679, 682, 16 CMR 253, 256 (1954).

FALSE OFFICIAL STATEMENT (Article 107, UCMJ):

In order to be convicted of this offense, the accused must have actual knowledge of the falsity of his statement and he must specifically intend to deceive, rather than defraud, the official to whom the statement is made by leading him to believe the false facts knowingly offered by the accused. The accused's subjective motive is unimportant.⁴³ An honest but unreasonable mistake of fact regarding the statement's falsity will exonerate him.⁴⁴

FORGERY (Article 123, UCMJ):

The specific intent to defraud, not merely to deceive, is the essence of forgery.⁴⁵ The accused need not show that his lack of intent to defraud was honest.⁴⁶ But if he raises the issue of mistake of fact by urging, for example, that he felt he was authorized to sign his wife's indorsement to her allotment checks,⁴⁷ or that he was authorized by the transferer to provide his indorsement⁴⁸, the mistake need only be honest to exonerate the accused,⁴⁹ provided that the mistaken fact, if true, would have rendered his conduct legal.⁵⁰

43. United States v. Lile, 42 CMR 852, 854 (ACMR 1970).

44. Id. at 855

45. United States v. Candill, 16 USCMA 197, 198, 36 CMR 353, 354 (1966).

46. United States v. Pelletier, 15 USCMA 654, 657, 36 CMR 152, 155 (1966).

47. United States v. Tatmon, supra note 10, at 847.

48. United States v. Ebarb, 12 USCMA 715, 31 CMR 301 (1962).

49. United States v. Webb, 46 CMR 1083, 1085 (ACMR 1972).

50. United States v. Rowan, supra note 10; United States v. Tatmon, supra note 10, at 847.

FRAUDULENT ENTRY (Article 83, UCMJ):

To be guilty of this offense, the accused must specifically intend to enter the armed forces by fraudulently representing a material fact. An honest mistake as to the fraudulent fact will exonerate him.⁵¹

GRAFT (Article 134, UCMJ):

An accused is guilty of graft if he wrongfully reaps personal advantage or gain by abusing his public office. Graft is a general intent crime,⁵² and a mistake of fact must therefore be honest and reasonable. For example, if the accused, a property book officer, testifies that he thought he could take and sell for his own benefit certain expendable supplies because they were listed as "excess" on his books and the commander told him to "Get rid of it," the mistake must be honest and reasonable in order to excuse his conduct.

INDECENT EXPOSURE (Article 134, UCMJ):

With regard to this offense, the courts have held that the requisite intent is the accused's desire to be seen; it is an act designed to call attention to his exposed, not aroused, state.⁵³ In the absence of an intent to be seen, the act is not willful.⁵⁴ General criminal mens rea is not present when the exposure results from negligence, carelessness, or inadvertence.⁵⁵ The Air Force Board of Review has stated that willfulness does not equate to specific intent.⁵⁶ This suggests that an honest and

51. United States v. Halloway, 18 CMR 909, 911 (AFBR 1955).

52. United States v. Marshall, 18 USCMA 426, 40 CMR 138 (1969).

53. United States v. Brown, 3 USCMA 454, 13 CMR 10 (1953); United States v. Caune, 46 CMR 598 (ACMR 1972).

54. United States v. Conrad, 15 USCMA 439, 446, 35 CMR 411, 418 (1965).

55. United States v. Manos, 8 USCMA 734, 25 CMR 238 (1958); United States v. Burbank, 37 CMR 955, 956 (AFBR 1967).

56. United States v. Silva, 37 CMR 803, 807 (AFBR 1966).

reasonable mistake will exonerate the accused,⁵⁷ and the fact that the underlying nature of the offense is nuisance supports this conclusion.⁵⁸ But since there can be no negligent indecent exposure, how can a requirement of reasonableness be injected into the mistake of fact analysis? If the accused's mistake results from his negligence, his conduct is therefore unreasonable. The reasonableness of his act is apparently one factor to consider in determining the honesty of his mistake.⁵⁹

LARCENY and WRONGFUL APPROPRIATION (Article 121, UCMJ):

The specific intent permanently⁶⁰ or temporarily⁶¹ to deprive the rightful owner of his property is one element of the offenses of larceny and wrongful appropriation. An honest mistake as to this element will exonerate the accused.⁶² The most common type of mistake of fact does not relate to the specific intent element. There is no general criminal mens rea when one takes property that he honestly believes is his,⁶³ or when he honestly believes that the victim would have consented to the taking.⁶⁴ The reasonableness of the asserted mistake of fact is relevant to an assessment of the accused's credibility.

LEAVING THE SCENE OF AN ACCIDENT (Article 134, UCMJ):

If the accused is honestly mistaken in his belief that no accident occurred, his conduct is excused.⁶⁵

57. United States v. Conrad, supra note 54, at 444, 35 CMR at 416.

58. United States v. Manos, supra note 55, at 736, 25 CMR at 240.

59. United States v. Manos, supra note 55; United States v. Stackhouse, 16 USCMA 479, 37 CMR 99, 102 (1967).

60. United States v. Rowan, supra note 10, at 433, 16 CMR at 7.

61. United States v. Ross, 25 CMR 548 (ABR 1958).

62. Id. at 551.

63. United States v. Rowan, supra note 10, at 434, 16 CMR at 8.

64. United States v. Gill, 50 CMR 206 (AFCMR 1975).

65. United States v. Schoonover, 43 CMR 455, 458 (ACMR 1970).

MISSING MOVEMENT (Article 87, UCMJ):

Though there is some confusion regarding this offense, the accused should have actual knowledge of the fact of movement.⁶⁶ His honest mistake of fact, even if it is unreasonable, will therefore exonerate him.

PREMEDITATED AND UNPREMEDITATED MURDER, (Article 118, UCMJ) AND VOLUNTARY MANSLAUGHTER (Article 119, UCMJ):

These offenses require specific intent,⁶⁷ and their treatment parallels that of assault with intent to murder. An accused who empties his weapon into the supine body of his worst enemy, honestly believing him to be dead, will be acquitted of murder, even though the victim turned out to be asleep.

ORDERS, DISOBEDIENCE OF (Article 90, 91 and 92, UCMJ):

An honest mistake by the accused as to his duty to obey an order will excuse his willful failure to obey. For example, if an accused honestly believes his induction into the Army was faulty and that he is therefore not subject to a superior officer's order, his conduct is excused.⁶⁸ The accused's asserted mistake as to the order's lawfulness must be honest and reasonable.⁶⁹ But the accused's mistake as to the factual meaning of the order need only be honest to excuse him. For example, one who does not honestly know the meaning of the term "at ease" cannot be found guilty of disobeying that order.⁷⁰ The reasonableness of the asserted mistake is one factor which may be considered in determining the accused's honesty. An honest mistake as to the status of the person giving the order also constitutes a defense.⁷¹ A mistake as to the existence of the order

66. United States v. Chandler, 23 USCMA 193, 48 CMR 945 (1974); United States v. Helliker, 49 CMR 871 (NCOMR 1974).

67. United States v. Vaughn, 48 CMR 726 (AFCMR 1974); United States v. Aragon, 1 M.J. 662 (NCOMR 1975).

68. United States v. Pendergrass, 17 USCMA 391, 38 CMR 189 (1968).

69. United States v. Crump, 30 CMR 899 (AFBR 1968).

70. United States v. Rose, 40 CMR 591 (ABR 1969).

71. United States v. Ross, 40 CMR 719 (ABR 1969); United States v. Pettigrew, 19 USCMA 191, 195, 41 CMR 191, 195 (1970).

need only be honest since he must be shown to actually know of the order.⁷² A mistake as to failure to obey must be honest and reasonable since negligence is not a defense.⁷³

RAPE (Article 120, UCMJ):

Rape is a general intent crime,⁷⁴ whereas attempted rape and assault with intent to commit rape are specific intent crimes.⁷⁵ Courts seem to rely on the premise that penetration conclusively demonstrates the accused's intent to have sexual intercourse with the victim and thereby gratify his lust.⁷⁶ A mistake of fact as to the victim's consent is a viable defense. The Army Court of Military Review has suggested that the mistake must be honest.⁷⁷

ROBBERY (Article 122, UCMJ):

Robbery is a compound offense involving the general mens rea to wrongfully take property with the specific intent to permanently deprive the rightful owner of it. The taking is accomplished by force and without the victim's consent.⁷⁸ Mistakes of fact may relate to both the assaultive and larceny aspects of the crime.

Conclusion

Defense counsel should explore the mistake of fact defense whenever the mens rea element of the charged offense is contested. The problem of applying the defense to a particular charge can be simplified by remembering the basic principle that "specific intent" offenses require only an honest mistake, while the mistake must be both honest and reasonable to constitute a defense to "general intent" crimes.

72. See United States v. Curtin, 9 USCMA 427, 26 CMR 207 (1958).

73. United States v. Pinkston, 6 USCMA 700, 21 CMR 22 (1956).

74. United States v. Headspeth, 2 USCMA 635, 10 CMR 133 (1953).

75. United States v. Polk, supra note 20, at 996.

76. Id.

77. United States v. Steele, supra note 21, at 848; United States v. Lewis, 6 M.J. 581 (ACMR 1978).

78. United States v. Roeder, 17 USCMA 447, 451, 38 CMR 245, 249 (1968).

Part Seven - Domestic Gate Searches

Assessing the constitutionality¹ of a military "gate search" conducted overseas, the Court of Military Appeals concluded in United States v. Rivera that the factual similarities between an international border and the entrance onto an overseas American military installation justify adoption of the "border search" exception to the fourth amendment's warrant requirement;² accordingly, it held that searches at entry points of overseas American military installations or enclaves need not be based upon probable cause or a search warrant.³ The Court emphasized that the foreign situs of the intrusion supported the "border search" analogue, and it did not purport to determine the constitutionality of searches conducted at the gates of military installations within the United States.⁴ Less than three months after that decision, however, the tribunal did address this issue in United States v. Harris.⁵

1. The official detention of a vehicle at the gate of a military installation constitutes a seizure, and that form of governmental intrusion is consequently subject to the fourth amendment. United States v. Harris, 5 M.J. 44, 48 (CMA 1978). See United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); United States v. Nuna, 525 F.2d. 958, 959 (5th Cir. 1976); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973); United States v. Harris, 404 F.Supp 1116, 1123 (E.D. Pa. 1975). For a general discussion of this topic, see Eisenberg and Levine, The Gate Search: Breaches In the Castle's Fortifications, The Army Lawyer, September 1979, at 5.

2. United States v. Rivera, 4 M.J. 215 (CMA 1978).

3. Id. at 217. See United States v. Ramsey, 431 U.S. 606 (1977); 13 The Advocate 44 (1981). The Army Court of Military Review has held that "essentially the same rationale" applies to exit searches in overseas areas. United States v. Alleyne, CM 439423 (ACMR 30 December 1980) (unpublished). See generally United States v. Johnson, 6 M.J. 681, 685 (NCMR), pet. denied, 6 M.J. 89 (CMA 1978). Cf. Mil.R.Evid. 314(c).

4. Id. at 217 n.8

5. United States v. Harris, supra note 1.

Commanders' "Inherent Authority" to Search

The Court began its review of the gate search in Harris by noting that two of its earlier decisions⁶ had upheld that form of governmental intrusion. In United States v. Poundstone, it had declined to adopt the "border search" analogy, and instead had cited the "long-established rule that, inherent in his responsibility for control of the military property of his organization, the military commander has power to search Government property," and that the power may be delegated.⁷ Upon this principle the Court premised its holding that "persons in a military vehicle which is suspected of being used to import forbidden matter into the command area may be searched as an incident to search of the vehicle, especially if they are not [members] of the command."⁸

These references to the commander's "inherent powers" suggest that the tribunal viewed the intrusion under review in Poundstone as an inspection rather than a search.⁹ In a dissenting opinion, Judge Duncan criticized this characterization, contending that the nexus between the search of Private Poundstone and the fitness of his unit is "[f]ar different and far more remote" than in previous "inspection theory" cases, where the "professed concern" underlying the intrusion was the "current

6. See United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973) (overseas gate search); United States v. Unrue, 22 USCMA 466, 47 CMR 556 (1973) (domestic on-post roadblock).

7. United States v. Poundstone, supra note 6, at 281, 46 CMR at 281.

8. Id. at 282.

9. The Court noted in an earlier opinion that:

Both the generalized and particularized types of searches are not to be confused with inspections of military personnel entering or leaving certain areas, or those, for example, conducted by a commander in furtherance of the security of his command. These are wholly administrative or preventive in nature and are within the commander's inherent powers.

United States v. Gebhart, 10 USCMA 606, 610 n.2, 28 CMR 172, 176 (1959) (emphasis added). See United States v. Lange, 15 USCMA 486, 35 CMR 458 (1965); United States v. Gaddis, 41 CMR 629 (ACMR 1969).

status of unit, personnel and equipment, rather than criminal activity of any particular individual."¹⁰ Judge Duncan concluded that the constitutionality of the gate search could not be ascertained without applying a balancing test in which the "competing interests" would be weighed.¹¹

The Court had also reviewed the constitutionality of a dual roadblock system comprised of checkpoints randomly established within a military post rather than at its gates.¹² At the first roadblock, the driver's license and vehicle registration were checked, and a sign at that site advised all motorists that a second inspection would be conducted "about 30 feet down the road." All passengers were accorded the opportunity to dispose of drugs in their possession, without punitive action, by dropping them in an "amnesty barrel" before proceeding to the next checkpoint, where a narcotics detection dog was escorted around the vehicle. If the dog "alerted," the automobile and its passengers would be searched.

The Court began its analysis by stating that the legality of a governmental intrusion into an "individual's person or private effects" depends upon "whether the action by the Government was, in the circumstances, reasonable."¹³ It concluded that "military necessity" rendered the intrusion reasonable in this case. An "inspection system" designed to keep drugs out of the command is a "proper regulatory program in light of the conditions;" further, the "means selected to effectuate the program demonstrate a concern that the inspection system [would remain] as 'carefully limited in time, place and scope' as the purpose of the system required and the effectiveness of the system necessitated."¹⁴ Judge Duncan, who did not join the majority opinion, referred to his dissent in Poundstone, and reiterated his disinclination to characterize

10. United States v. Poundstone, supra note 6, at 281, 46 CMR at 281.

11. Id.

12. United States v. Uhrue, supra note 6.

13. Id. at 468, 47 CMR at 558. See United States v. Hartsook, 15 USQMA 291, 35 CMR 263 (1965); United States v. Battista, 14 USQMA 70, 33 CMR 282 (1963).

14. Id. at 470, 47 CMR at 560. See United States v. Biswell, 406 U.S. 311, 315 (1972).

the search under review as an "administrative inspection or 'shakedown' which may be made without authorization to search and not upon probable cause."¹⁵

United States v. Harris: The "Border Checkpoint" Paradigm

A military policeman stopped the automobile in which Private Harris was riding as it approached the main gate at Marine Base in Twentynine Palms, California. The policeman asked the driver to pull off the road and directed all passengers to alight from the car. Private Harris dropped two bags containing marijuana as he was exiting the vehicle. At his court-martial and on appeal, he challenged the admissibility of the marijuana, contending that the gate search was unconstitutional. The military policeman testified that the search was conducted with a narcotics detection dog which had to be periodically "remotivated," and that his judgment as to the dog's willingness to participate in the operation determined which vehicles would be stopped. He averred that "when his dog is ready to work, he takes the vehicle which enters the gate at that time," and that "[t]hereafter, he might give the dog a break if she is fatigued and then repeat the process."¹⁶

The Court quickly distinguished Poundstone, and United States v. Unrue, as well as a lower court decision¹⁷ upholding a gate search. It then declined to apply the "implied consent" doctrine,¹⁸ and concluded

15. Id. at 472, 47 CMR at 562 (Duncan, J., dissenting).

16. United States v. Harris, supra note 1, at 44.

17. See United States v. Blade, 49 CMR 646 (AFCMR 1974) (all incoming and departing vehicles subjected to search).

18. Subsequently decisions have accordingly concluded that the validity of a gate search does not depend upon prior notification of the date, time, and place of the proposed intrusion. See, e.g., United States v. Johnson, supra note 3.

that the legality of the search depends upon its reasonableness as determined by a process in which the public interest is balanced against the individual's right to personal freedom from arbitrary governmental interference. In developing the framework for this analysis, the Court cited several Supreme Court decisions dealing with border patrol activities¹⁹ and adopted the "various aspects of roving patrol-checkpoint stops" as an appropriate model.²⁰ Accordingly, in assessing the reasonableness of the gate search, the Court evaluated (1) the public need justifying the intrusion; (2) available alternatives to the gate search; (3) the search's potential for frightening or offending motorists; (4) the scope of the intrusion; (5) the extent of interference with legitimate traffic; (6) the amount of discretion exercised by the officers conducting the search; and (7) the practicality of requiring "reasonable suspicion."²¹ Emphasizing the relatively broad degree of discretion exercised by the police officer conducting the gate search under review, the Court concluded that the search would be unconstitutional unless it were supported by individualized probable cause or consent. The Court proceeded, however, to consider several additional matters it deemed significant, including the commander's "virtually absolute" responsibility to safeguard the health, safety, welfare, morale, and efficiency of those under his command; the accused's right and duty to enter the base; and military necessity.²²

19. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (probable cause is prerequisite to roving border patrol's stop and search of vehicle); *United States v. Ortiz*, 422 U.S. 891 (1975) (search of vehicle for illegal aliens at fixed checkpoint away from border must be based on probable cause or consent); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) ("articulable suspicion" supports roving border patrol's detention of vehicles near border for "brief inquiry" into passengers' residence status); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) ("stops for brief questioning routinely conducted at permanent checkpoints" need not be premised upon "individualized suspicion").

20. *United States v. Harris*, supra note 1, at 55.

21. Id. at 57-59.

22. Id. at 59-65.

23. Id. at 65.

After weighing these factors, the Court determined that the "use of gate searches to deter persons from introducing contraband onto a military installation is an eminently reasonable response to a serious problem affecting the military."²³ With regard to the manner in which these searches may be conducted, the Court held that "[t]o insure the least possible intrusion into the constitutionally protected area, and thereby preserve freedom from unreasonable invasions of personal privacy, a procedure must be employed which completely removes the exercise of discretion from persons engaged in law enforcement activities."²⁴ The holding in Harris "contemplates a completely independent determination of times when the searches will be conducted, the method of selecting the vehicles to be stopped, the location of the operation, and the procedure to be followed in the event something is discovered."²⁵ Noting that the policeman conducting the search personally ascertained his dog's readiness, the tribunal concluded that such a decision "involves too much discretion to serve as an independent basis" for selecting the vehicles to be stopped.²⁶

In a concurring opinion, Chief Judge Fletcher agreed that military commanders have a "distinct constitutional authority to establish reasonable gate inspection procedures as a necessary prerequisite" to their responsibility for the installation's order and security.²⁷ He cautioned, however, that the inspection power must entail an "effective program to ensure proper control of the intrusion into constitutional protections" and that the degree to which authority is delegated to

24. Id. at 65.

25. Id.

26. Id. at 66.

27. Id. at 67 (Fletcher, C.J., concurring).

28. Id.

29. Id. at 67 (Cook, J., dissenting). See Carroll v. United States, 267 U.S. 132 (1925); United States v. 12 200 ft. Reels of Film, 413 U.S. 123 (1973).

police officers may not be so broad as to abrogate the commander's regulatory responsibility to protect the base.²⁸ Judge Cook, on the other hand, dissented. Observing that electronic inspection of handcarried articles upon entry into government buildings is "reasonable" under the fourth amendment, and that customs officials may "search an incoming individual and his effects for contraband and duty items, without regard to probable cause or suspicion of wrongdoing,"²⁹ he argued that the "military community has similar authority as regards persons entering its territory," provided the search is properly limited in time, place and scope.³⁰

United States v. Harris: The Aftermath

Military appellate courts applying Harris emphasize that the central inquiry in assessing the reasonableness of gate searches is the extent to which the police officer conducting the search exercises discretion in selecting vehicles to detain. The Air Force Court of Military Review, for example, sanctioned a random selection procedure pursuant to which every fifth vehicle entering the military installation was stopped. The court concluded that although the law enforcement supervisor directed the time, place, and duration of the inspection, he did not "select particular vehicles for inspection, but simply initiate[d] the procedure by which the gate guard commence[d] to select each fifth vehicle thenceforth."³¹ Similarly, the "inadvertent, premature commencement of the

30. Id. See United States v. Unrue, supra note 6, at 470, 47 CMR at 560. Judge Cook determined that the reasonableness of the government action in this case was not undermined by reliance upon a suspect classification or utilization of drug detection dogs. He concluded that the accused discarded the contraband while exiting the vehicle and in view of law enforcement officers; thus, the "guard's recovery of the articles discarded . . . was indisputably legal and those articles were admissible into evidence at trial." Id. See United States v. Wilson, 492 F.2d 1160 (5th Cir. 1974), cert. denied, 419 U.S. 858 (1974).

31. United States v. Bowles, 7 M.J. 735, 739 (AFCMR 1979).

random inspection procedure" did not invalidate a search conducted at the gate of an overseas military installation.³² Violations of prescriptive government regulations or other errors which are "administrative" in nature and do not affect the randomness of the selection process except as to the time frame within which it is implemented, in other words, will not render a gate search unconstitutional.³³

Conclusion

The importance of insuring the security of military forces, property, and equipment justifies the commander's "nearly absolute" authority to control access to his installation.³⁴ This authority enables the commander to deny entry to persons who do not submit to a search at the installation's gateway.³⁵ It also permits him to conduct searches at the entry points of the base, provided the procedures he employs completely remove discretion from persons engaged in law enforcement activities.³⁶ Defense counsel should contend that an assessment of the constitutional "reasonableness" of such an intrusion necessitates ad hoc examination

32. United States v. Holsworth, 7 M.J. 184, 196 (CMA 1979). See United States v. Caceres, 440 U.S. 741 (1979) (reasonable, good-faith attempt to comply with government regulation that is not required by constitution or statute does not justify sanction of strict exclusionary rule).

33. Id. at 186.

34. United States v. Blade, supra note 17. See Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961); United States v. Vaughan, 475 F.2d 1262 (10th Cir. 1973).

35. United States v. Stuckey, 10 M.J. 347, 359 (CMA 1981).

36. See United States v. Harris, supra note 1. Cf. Delaware v. Prouse, 440 U.S. 648 (1979) (condemning random stop of auto for checking license and indicating roadblock stops of all traffic may be permitted).

of each of the factors identified in United States v. Harris,³⁷ and that the holding in that case is not talismanic. The most crucial judicial inquiry, however, addresses the manner in which law enforcement officers identify the vehicles to be stopped. In sum, the gate search amounts to a general search for evidence of contraband, and while the Court of Military Appeals has held that such an intrusion is constitutionally reasonable within the factual context under review in Harris, it "can only be tolerated if there is no possibility that law enforcement officers may exercise any discretion."³⁸ Thus, while the constitutional basis of the commander's power to conduct gate searches is well established, the degree to which that power is delegated, and the manner in which it is implemented,³⁹ may invalidate the intrusion.

37. Thus, the defense counsel should insure that the record reflects the underlying need for the search as well as all other factors bearing on the reasonableness of the challenged intrusion, including whether the subject military installation is "open" or "closed." Id. at 66 (emphasis in original).

38. Id. at 66 (emphasis in original).

39. See Army Reg. 190-22, Military Police - Search, Seizure and Disposition of Property (Cl, 23 Oct. 70); Army Reg. 210-10, Installations - Administration (15 Apr. 78).

ETHICS ROUND TABLE

In this installment of Ethics Round Table, the staff of The Advocate examines the ethical responsibilities attending the presentation of witnesses whose testimony may be self-incriminating.

Facts

Private First Class Smith has been charged with assault. Essential to establishing his claim of self-defense is the testimony of a civilian who witnessed the incident. In order to establish his presence at the scene of the crime, however, the civilian must incriminate himself in an unrelated offense. He is not represented by counsel. What are your obligations?

Discussion

The Code of Professional Responsibility [hereinafter Code] provides little guidance for resolving this problem. While Ethical Consideration (EC) 7-9 requires the attorney to act in a manner consistent with his client's best interests, he may ask the client to forego that course of action if he feels that it is unjust. Moreover, according to EC 7-10, a counsel's zeal for his client should not mitigate his obligation to refrain from needlessly harming any party involved in the litigation. The Disciplinary Rules preclude counsel from professionally advising unrepresented individuals, other than suggesting that they obtain counsel, if their interests are adverse to his client's. Arguably, however, this constraint applies only to adversarial situations and does not extend to communications with a witness. See DR 7-104(A)(2). Furthermore, DR 7-102(A)(1) prohibits a lawyer from performing any act on behalf of his client which is intended merely to harass or maliciously injure another. Thus, the Code appears to leave the matter to the attorney's discretion. The Model Rules of Professional Conduct (Final Draft) [hereinafter Model Rules] are also of limited usefulness in resolving this issue. Although Model Rule 4.4 provides that attorneys may not obtain evidence in a manner that violates the legal rights of third parties, the discussion of that rule in the Proposed Final Draft, dated 30 May 1981, seems to limit it to methods of obtaining evidence, such as wiretaps and other means that invade the privacy of potential witnesses.

The ABA Standards for Criminal Justice: The Defense Function, (2d edition 1980) [hereinafter Defense Function], while not binding, directly address the problem. Defense Function Standard 4-4.3(b) provides:

It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.¹

Defense Function Standard 4-4.3(b) originally provided that "it is proper but not mandatory" to caution a prospective witness. See History of [New] Standard 4-4.3(b). The standard currently states, however, that "it is not necessary" to warn a prospective witness, because that practice may be inconsistent with a defense counsel's adversarial responsibilities. According to the commentary accompanying this rule, "[t]he lawyer's paramount loyalty to his or her own client must govern in this situation." Further, while he may not mislead or deceive the witness, the defense counsel may advise a prospective prosecution witness of his rights in an attempt to discourage him from testifying. See ABA Committee on Professional Ethics, Informal Opinion No. 575 (1962).

For the military attorney, the problem involves more than ethical responsibilities. Indeed, Article 31(b), UCMJ, provides that:

no person subject to this chapter may . . . request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Read in context, this provision arguably implies that no such obligations arise with regard to civilian witnesses. See United States v. Zeigler, 20 USCMA 523, 43 CMR 363 (1971). If a military defense counsel intends to use the incriminating testimony of a military witness, however, it may be necessary to warn the witness of his Article 31(b) rights and then attempt to obtain immunity for him.

1. Because of the differences in the prosecutor's obligations, however, he is ethically required to warn a potential witness even in the absence of custodial interrogation. See ABA Standards for Criminal Justice: The Prosecution Function, 3-3.2(b) and related commentary. However, it is improper for a prosecutor or a defense counsel to advise a witness not to submit to an interview by opposing counsel.

If the defense counsel is deliberately seeking incriminating statements from a witness-suspect unrepresented by counsel, military due process and fundamental fairness require that he give appropriate warnings.² United States v. Milburn, 8 M.J. 110, 113 (CMA 1979). See United States v. Rexroad, 9 M.J. 959, 960 (AFCMR 1980). Further, Chief Judge Fletcher adhered to his previously stated position that warnings are required whenever the suspect "could perceive" that the interviewer's "position of authority" is the moving force behind requiring possible incriminating answers." United States v. Milburn, *supra* at 112 n.2. See United States v. Kelly, 8 M.J. 84, 88 (CMA 1979); United States v. Dohle, 1 M.J. 223 (CMA 1975). The military judge, however, may have an obligation to warn an apparently uninformed witness of his rights if his testimony appears to be self-incriminating. See Mil.R.Evid. 301(b)(2). Considering Judge Cook's dissent in Milburn and his specific rejection of the "position of authority" test in Kelly, as well as Chief Judge Everett's application of Article 31 in cases such as United States v. Armstrong, 9 M.J. 374 (CMA 1980), it is doubtful that Milburn reflects the Court's current view.

2. The court relied, in part, on the provision in the original Defense Function Standard 4-4.3(b) that such advice was "proper but not mandatory." As a result, it is unclear what the Court's position would be in light of the current standard, which states that advising the witness is probably inconsistent with the defense counsel's responsibilities.

PROPOSED INSTRUCTION

Withdrawal from Conspiracy

The Seventh Circuit Court of Appeals has reversed itself as to the burden of proof of withdrawal in conspiracy cases. United States v. Read, 50 U.S.L.W. 2239 (7th Cir. 1981). The Court, in overruling United States v. Dorn, 561 F.2d 1252, 1256 (7th Cir. 1977), stated that because withdrawal from the conspiracy negates an essential element of membership in the conspiracy, withdrawal must be disproved beyond a reasonable doubt by the government. Defense counsel should now request the following modification of the conspiracy instruction found at paragraph 3-3, Department of Army, Pamphlet No. 27-9, Military Judges' Guide (1969):

There has been some evidence that the accused may have (abandoned) (withdrawn from) the charged conspiracy. (Specify significant evidentiary factors bearing upon the issue and indicate the respective contentions of both counsel.) An effective (abandonment) (withdrawal) requires some action by the accused which is inconsistent with support for the unlawful agreement and which shows that he is no longer part of the conspiracy. If, at the time of the overt act, the accused is no longer part of the conspiracy, he cannot be convicted of the offense. Because there is evidence that the accused (abandoned) (withdrew from) the conspiracy, the government must prove beyond a reasonable doubt that the accused did not (abandon) (withdraw from) the conspiracy or, alternatively, that he rejoined the conspiracy at or during the commission of the overt act in contemplation of the conspiracy. Unless the government proved beyond a reasonable doubt that the accused never (abandoned) (withdrew from) the conspiracy, or that he rejoined it at or during the overt act, the accused cannot be convicted of conspiracy.

The Read court acknowledged that United States v. Hyde, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 114 (1912) may be interpreted as placing the burden of proving withdrawal from a conspiracy on the defense. The Read court concluded, however, that previous decisions have misinterpreted Hyde, and that the decision placed only the burden of going forward on the accused. The proposed instruction acknowledges that the accused bears the burden of production, but imposes the burden of persuasion on the government.

SIDE BAR

Recent Military Justice Amendments

The "Military Justice Amendments of 1981," Public Law 97-85, which became effective on 19 January 1982, modify various articles of the Uniform Code of Military Justice [hereinafter UCMJ] in five general areas: appellate leave, post-trial confinement, the right to counsel, petitions to the Court of Military Appeals, and appeals under Article 69, UCMJ.*

Appellate Leave: Under prior law, the decision to apply for appellate leave rested with the servicemember. Under the new law, the general court-martial convening authority may place on excess leave an accused who receives an unsuspended punitive discharge or dismissal. If an accused is required to take excess leave and his discharge is subsequently set aside or is not adjudged upon a rehearing, he will be entitled to full pay and allowances while on excess leave, minus any salary earned from civilian employment during that period.

Post-trial confinement: While incarcerated soldiers awaiting final action were treated less rigorously than those whose sentences had been executed, see Dept. of Army Reg. 190-47, The United States Army Correctional System (1 Oct. 78), the new law amends Article 13, UCMJ, by deleting the distinction between these classes of sentenced prisoners.

Right to counsel: Article 38, UCMJ, confers on an accused a right to both individually requested counsel and detailed military counsel. Under the new amendments, the accused is entitled to only one military defense counsel, although the convening authority may authorize more than one detailed or individual military counsel. This law does not affect an accused's right to hire a civilian lawyer and to retain him in addition to authorized military counsel. Article 32, UCMJ, has also been modified to conform to the amended right to counsel under Article 38. The amendment further directs service secretaries to define, by regulations, when a requested counsel is "reasonably available."

*The amendments also modify other provisions of Title 10, U.S.C. to provide conforming changes.

Interim changes to paragraph 48, Manual for Courts-Martial, United States, 1969 (Revised edition), as amended, provide that trial judges, trial counsel, appellate defense or government counsel, principal command legal advisors and principal assistants (i.e., staff judge advocates and deputy staff judge advocates), instructors or students at service schools, and members of the OTJAG staff are unavailable to serve as individual defense counsel. Under interim changes to Dept. of Army Reg. 27-10, Legal Services-Military Justice (26 Nov. 68), the Chief, Military Justice/Criminal Law Section, and counsel assigned outside the Trial Defense Service region in which the proceedings will be conducted are also "unavailable" unless they are stationed within 100 miles of the situs of the proceedings.

Petitions to the Court of Military Appeals: Under prior law, an accused could petition the Court of Military Appeals within 30 days from his receipt of the Court of Military Review decision. The new law changes this significantly by authorizing constructive service. The accused now has 60 days to petition the Court from the earlier of the date he receives service, or the date on which a copy of the decision, after being served on appellate defense counsel, is deposited in the mail for delivery to the accused at his last-known address. In this case, the 60-day period commences when the decision is mailed to the accused, even if he never receives a copy.

Additionally, the Rules of Practice and Procedure of the Court of Military Appeals have been amended, effective 19 January 1982, to permit an accused to file his petition for grant of review directly with the Court or by mailing or delivering his petition to the staff judge advocate office of the command where he was tried or is presently located for forwarding to OTJAG and the Court.

To insure that clients are able to exercise their appellate rights, trial defense counsel should stress the importance of insuring that the accused keep his trial and appellate defense counsel and the staff judge advocate's office advised of his excess leave address.

Article 69 Appeals: Under prior law, there was no statutory time limit on Article 69 appeals. The new law requires that these appeals be made not later than two years from the date of the convening authority's action; the statute provides a cut-off date of October 1, 1983 for old cases.

Requests for Preservation of Evidence

Defense counsel frequently request that the verbatim tape recordings of Article 32 Investigations be preserved for later review or use at trial. In the absence of a written request for preservation of the tapes, the defense counsel may be required to recuse himself in order to testify that the request was made. He should therefore insure that a written request is delivered not only to the court reporter, but also to the Article 32(b) investigating officer and perhaps even to the staff judge advocate and convening authority. The defense counsel could also append the request to the letter in which the accused notifies the investigating officer of the counsel and witnesses he desires.

Anti-Deficiency Act Violations

Defense counsel representing soldiers who are involuntarily returned to military duty from excess leave in order to work without pay, or who are beyond their expiration of term of service (ETS) date and are assigned to a personnel confinement facility to work without pay, may argue that the acceptance of voluntary services violates the Anti-Deficiency Act, 31 U.S.C. §665(b) (1976). The Act, frequently referred to as R.S. §3679, provides: "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property." Violations of the Act can result in administrative or criminal penalties against the individual accepting such services, and require detailed reporting to the President through high-level agency channels. 31 U.S.C. §665(i). The Army's implementation of the Act is reflected in Dept. of Army Reg. 37-20, Financial Administration - Administrative Control of Appropriated Funds (1 Aug. 1980), which also includes the applicable DOD Directive in Appendix A. Essentially, defense counsel may contend that the unpaid soldier's services are either voluntary or involuntary. If they are involuntary, the Army violates Amendment XIII of the United States Constitution through a form of unpaid involuntary servitude. If, on the other hand, the services are rendered voluntarily, the Army violates the Anti-Deficiency Act by accepting services without compensating the soldier or properly obligating the funds necessary to remunerate him. See 54 Comp. Gen. 862 (1974) for an analysis of entitlements to pay under these circumstances.

Selection of Trial Fora

Each fiscal year, the Chief Trial Judge of the Army Trial Judiciary prepares a consolidated report of trial activities, expenses and related administrative data. The following information extracted from the 1981 report reflects the differences between trials by judge alone and with members as to the imposition of punitive discharges:

General Courts-Martial

Area	Judge Alone				With Members			
	Total Cases	Guilty Pleas	BCD/DD	%	Total Cases	Guilty Pleas	BCD/DD	%
USAREUR	414	298	343	83%	292	100	142	49%
Korea	21	14	17	81%	20	8	11	55%
CONUS	402	245	349	87%	313	85	185	59%
Total	837	557	709	85%	625	193	338	54%

BCD-Special Courts-Martial

USAREUR	713	471	411	58%	257	79	83	32%
KOREA	87	36	46	53%	32	13	11	34%
CONUS	989	605	648	66%	511	191	202	40%
Total	1789	1112	1105	62%	800	283	296	37%

While several factors may cause these differences, the statistical abstracts highlight the importance of an accused's selection of the trial forum. This decision can be knowing and intelligent only if it is based on the informed advice of counsel.

Telfaire Instructions

Last year The Advocate published an article endorsing the instruction on eyewitness identification adopted in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). See Brower, Attacking the Reliability of Eyewitness Identification, 12 The Advocate 62 (1980). The instruction emphasizes the potential unreliability of eyewitness identifications, and suggests that defense counsel direct the members to examine the circumstances under which they were made.

Several federal circuits require some form of eyewitness identification instruction when the issue is raised at trial. United States v. Barber, 442 F.2d 517 (3d Cir. 1971) (instruction required unless witness had opportunity to observe defendant; witness is positive in his identification; his testimony is not weakened by prior failure to identify accused or prior inconsistent identification; and identification remains positive and unqualified after examination); United States v. Holley, 502 F.2d 273 (4th Cir. 1974) (omission of instruction viewed with grave concern); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975) (omission of instruction viewed with grave concern); United States v. Cain, 616 F.2d 1056 (8th Cir. 1980) (omission of instruction is reversible error where identification is questionable and uncorroborated); McGee v. United States, 402 F.2d 434 (10th Cir. 1968) (trial judge must emphasize that jury must believe accused committed offense when identification is challenged); United States v. Telfaire, *supra* (instruction required). Other circuits, while not requiring an eyewitness identification instruction, have recognized the appropriateness of such an instruction, but leave the issue to the trial court's discretion. United States v. Kavanaugh, 572 F.2d 9 (1st Cir. 1978); United States v. Boyd, 620 F.2d 129 (6th Cir. 1980).

The Kansas Supreme Court recently adopted the Telfaire instruction and required its use in all cases in which eyewitness identification is critical and disputed, because general instructions inadequately highlight the dangers of misidentification. State v. Warren, 30 Crim.L.Rep. (BNA) 2192 (Kan. 9 November 1981). Viewing with concern the danger that innocent persons will be convicted as a result of erroneous eyewitness identifications, the court reversed a conviction which had been obtained through testimony based on a 15 to 20-second viewing which occurred four and one-half months prior to trial. Military appellate courts have not yet required eyewitness identification instructions, although the issue is currently before the Army Court of Military Review in United States v. Foster, CM 440659 (argued 18 October 1981). Trial defense counsel should request a Telfaire-type instruction whenever the government's proof depends largely on eyewitness testimony. Failure to do so may result in a Salley-type waiver. See United States v. Salley, 9 M.J. 189 (CMA 1980); United States v. Cotten, 10 M.J. 260 (CMA 1980).

USCMA WATCH

Synopses of Selected Cases In Which The Court of Military Appeals Granted Petitions for Review or Entertained Oral Argument

During November and December 1981, the Court heard oral argument in two cases involving the scope of a staff judge advocate's power to bind a convening authority to a specific course of action in approving courts-martial convictions. In United States v. Brown, AFCMR 22752, pet. granted, 11 M.J. 405, modified 12 M.J. 22 (CMA 1981), argued 18 November 1981, the issue concerned the modification of a pre-trial agreement to insure that the accused would testify at a related trial. In Cooke v. Orser, 12 M.J. 116 (CMA 1981), argued 10 December 1981, the Court addressed the staff judge advocate's power to bind the convening authority to a promise of immunity. In both cases, the Court was asked to formally define, in contractual terms, what has previously been a variable in the equation of plea negotiations: the extent to which the convening authority's action on court-martial charges may be dictated by his staff judge advocate's prior promises to the accused.

GRANTED ISSUES

TRIAL COUNSEL: Closing Argument

The Court will re-examine the permissible scope of closing arguments in United States v. Clifton, ACMR 440087, pet. granted, 12 M.J. 113 (CMA 1981). The accused's credibility was a critical issue, and the defense counsel had successfully suppressed a portion of the victim's pre-trial statement. The prosecutor referred to the accused as a liar in his closing argument and suggested that the defense counsel's suppression motion had prevented the court members from hearing "all" of the facts.

JURISDICTION: Assimilative Crimes Act

The Court granted review in United States v. Perry, AFCMR 23028, pet. granted, 12 M.J. 112 (CMA 1981), and decided the case on the same day. The accused pled guilty to violating Missouri Statute §311.310, and during the providence inquiry the trial counsel acknowledged that he was proceeding under the Assimilative Crimes Act, 18 U.S.C. §13 (1976). Noting that the government did not establish, on the record, that the United States had either exclusive or concurrent jurisdiction over the Air Force base where the crime had occurred, the Court stated

that it could not automatically assume that the Act applied. Noting that the Air Force has only proprietary rights over some installations, the Court deemed it inappropriate to judicially notice the jurisdictional status of the base in question, and dismissed the specification.

FINDINGS: Deliberations

In United States v. Nash, 5 USCMA 550, 18 CMR 174 (1955), the Court ruled that members are limited to one ballot in resolving the accused's culpability. In United States v. Lawson, ACMR 440520, pet. granted, 12 M.J. 179 (CMA 1981), the court members were allowed to take unofficial "straw polls" prior to conducting an official ballot. The Court will decide whether court members are limited to one vote on guilt or innocence or whether multiple unofficial votes may be taken during their deliberations on findings.

APPELLATE REVIEW: Article 69, UCMJ

During a review pursuant to a Article 69, UCMJ, in United States v. Kelly, 12 M.J. 509 (ACMR 1981), the court ruled that a military judge may enter a verdict of not guilty after court members have returned guilty findings. The Judge Advocate General certified the issue to the Court of Military Appeals. The Court then specified the issue of whether, notwithstanding the limits on further review contained in Article 69, an appellant may cross-appeal once the Court has jurisdiction as a result of TJAG certification under Article 67(b)(2), UCMJ.

MILITARY JUDGE: Instructions

In United States v. Curtis, NCMR 801989, pet. granted, 12 M.J. ____ (CMA 1981), the military judge presented the standard instruction on reasonable doubt, and refused to recite the instruction proffered by the defense counsel, which did not include the "substantial doubt" language found objectionable in United States v. Cotton, 10 M.J. 260 (CMA 1981). The Court will determine whether the issue is preserved in the absence of a formal objection to the military judge's instruction.

MILITARY JUDGE: Instructions

The Court will examine the mens rea of solicitation in United States v. Mitchell, 11 M.J. 907 (ACMR 1981), pet. granted 12 M.J. ____ (CMA 1981). The military judge instructed the members that an objective test must be applied to determine the accused's intent to commit the alleged acts. The appellant asserts that solicitation entails a speci-

fic intent to encourage a violation of the law and that an instruction requiring the court members to determine the accused's subjective intent was required.

JURISDICTION: Subject Matter

In United States v. Alt, AFCMR S25145, pet. granted, 12 M.J. ____ (CMA 1981), the Court will decide whether a court-martial has jurisdiction over a servicemember for fraudulently procuring money from an off-base bank where the sole service connection is the on-base theft of the military identification card used in the fraud.

EVIDENCE: Admissibility

In United States v. Butner, AFCMR S25054, pet. granted, 12 M.J. ____ (CMA 1981), the accused's first confession directly resulted from an illegal search and seizure. Two days later, police officials told the accused that his first statement would not be used against him, and he again confessed. The Court will determine whether the second confession and its derivative evidence are admissible where the accused would not have been a suspect but for the original, illegal search and seizure.

REPORTED ARGUMENTS

PRETRIAL NEGOTIATIONS: Estoppel

To what extent is a convening authority bound by his staff judge advocate's promises? In United States v. Brown, AFCMR 22752, pet. granted, 11 M.J. 405 (CMA 1981), modified 12 M.J. 22 (CMA 1981), argued 18 November 1981, the accused provided information concerning several drug sales in exchange for a promise of either an administrative discharge under other than honorable conditions or clemency at his court-martial. Because of a misunderstanding with the Air Force Office of Special Investigations regarding the value of the accused's information, the defense counsel wanted to terminate the pretrial agreement. The staff judge advocate then promised the accused, through counsel, that he would arrange for the convening authority to approve the administrative discharge. The staff judge advocate became seriously ill, however, and was unable to act. The acting staff judge advocate successfully recommended that the convening authority approve the clemency option of the original agreement. On appeal, the accused sought to enforce the agreement as modified by the staff judge advocate. Government appellate counsel argued that the defendant obtained what he bargained for and that the Court should discourage sub rosa agreements. Several judges were concerned with the staff judge advocate's power to legally

bind the convening authority. Additionally, the Court asked whether the risk to the accused in providing drug information amounted to sufficient detrimental reliance on his part to require enforcement of the agreement as he understood it.

In Cooke v. Orser, 12 M.J. 116 (CMA 1981), argued 10 December 1981, a well-publicized case involving alleged espionage by an Air Force officer, the Court of Military Appeals heard arguments from the parties and four amicus curiae; Mr. F. Lee Bailey argued for the accused. The issue in this extraordinary writ case is whether prosecution is barred by a grant of immunity pursuant to paragraph 68h, Manual for Courts-Martial, United States, 1969 (Revised edition). Mr. Bailey argued that the accused had been granted immunity in an arrangement whereby he agreed to reveal to the Air Force Office of Special Investigations (OSI) and to the Strategic Air Command's (SAC) Damage Assessment Team the information he had relayed to the Russians, and also to pass a polygraph examination in order to prove that his disclosure was complete. In a telephone conversation with Brigadier General Teagarden, the Staff Judge Advocate of the Strategic Air Command (SAC), defense counsel requested a written grant of immunity from the convening authority. Defense counsel and the OSI understood General Teagarden to say that the convening authority agreed to allow immunity for Cooke, provided he successfully completed the polygraph examination.

The military judge found that General Teagarden, "regardless of what he may have intended, did communicate to [trial defense counsel] and [the OSI], that if the accused made a full disclosure and passed a polygraph, he would be discharged and there would be no prosecution." The military judge also found that the accused detrimentally relied on this promise. The accused took several polygraph examinations and admitted to extensive involvement with the Soviets. The military judge found that there was no effective grant of immunity because the convening authority did not personally grant immunity or authorize his staff judge advocate to do so. Mr. Bailey argued that the accused complied with the bargain to his detriment, while the government, in bad faith, reneged once it had assessed the damage to national security. Although trial defense counsel should have demanded a written immunity agreement signed by the SAC Commander, it was reasonable and proper for him to trust the word and authority of a lawyer and general officer of the Air Force. Government counsel countered that (1) the accused had not complied with the verbal agreement and that he had failed the polygraph [the military judge had entered a finding of fact that the accused had passed]; (2) the government's primary interest was to obtain justice and not to safeguard national security; (3) trial defense counsel was at fault for not insisting on a written agreement; (4) the

military judge was correct in determining that there was no grant of immunity because it was not personally authorized or ratified by the commander of SAC; and (5) the proper remedy is not dismissal as requested in the extraordinary writ but the suppression of any statements illegally taken from the accused.

Chief Judge Everett queried whether the trial defense counsel acted reasonably in not insisting upon a written grant of immunity. He also asked about the convening authority's ability to ratify the staff judge advocate's actions. The Chief Judge questioned whether a message to the Chiefs of Staff containing the comment "agreement abrogated" indicated that there had been an understanding between the parties. His final inquiry to several counsel was whether dismissal of the military charges would bar subsequent federal prosecution for espionage. Judge Cooke was concerned with who can grant immunity and whether there could be ratification by silence. He also asked about the mechanics of granting immunity, focusing on the interrelationship between the convening authority and the staff judge advocate. Government appellate counsel replied that the staff judge advocate has no authority to immunize and can only execute the convening authority's commands with respect to a grant of immunity.

SENTENCE: Disparity Among Coactors

While the accused in United States v. Olinger, ACMR 439358, pet. granted, 10 M.J. 251 (CMA 1981), argued 23 October 1981, was one of eight coactors convicted of stealing lead from a cargo yard at Fort Eustis, Virginia, he was the only participant who received a punitive discharge. In his post-trial review, the staff judge advocate notified the convening authority of the results in the related cases but did not recommend any adjustment in the sentence beyond that required by a pretrial agreement. The accused argued that it was an abuse of discretion to allow one individual to receive a punitive discharge when seven other coactors convicted of the same offense did not receive discharges. The government countered that the sentence was individualized and appropriate to the appellant's rank and involvement in the crime.

EVIDENCE: Sentencing

To what extent do the protections embodied in Article 31, UCMJ, apply to inculpatory pretrial statements introduced to rebut defense evidence in extenuation and mitigation? In United States v. Donnelly, AFCMR 22668, pet. granted, 10 M.J. 392 (CMA 1981), argued 17 December 1981, the accused pled guilty to seven specifications of possession and sale of hashish. After the military judge found the accused guilty, the defense counsel called a noncommissioned officer to testify about his past duty performance and rehabilitative potential. In rebuttal, the trial counsel, over defense objection, used the accused's pretrial statement, a document which had not been offered into evidence and in which the latter admitted culpability not only for the charged offenses, but also for several similar acts of misconduct occurring over the previous two years.

The appellate defense counsel argued that since this case occurred before the effective date of the Military Rules of Evidence, the prosecution was required to establish the voluntariness of the confession and proffer evidence that the accused was apprised of his rights under Article 31, UCMJ, before it could be used at trial. See paragraph 140a(2), Manual for Courts-Martial, United States, 1969 (Revised edition). The government contended that the rights afforded by Article 31 do not pertain to sentencing proceedings in general and relied on United States v. Mathews, 6 M.J. 357 (CMA 1979), and United States v. Spivey, 10 M.J. 7 (CMA 1980). The appellate defense counsel responded that these two cases were overruled by Estelle v. Smith, 451 U.S. ___, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981). The Court focused on the fact that the pretrial statement was never actually introduced into evidence, and the possibility that, because evidentiary rules are relaxed during extenuation and mitigation, the use of this rebuttal evidence could be permissible.

APPELLATE REVIEW: New Trial Petitions

A petition for a new trial may be granted under Article 73, UCMJ, when newly discovered evidence is presented in the form of an affidavit of an alleged coactor who had previously refused to testify at trial because his testimony would have been self-incriminating. See United States v. Peterson, 7 M.J. 981 (ACMR 1979). Under similar facts, in United States v. Bacon, ACMR 438981, pet. granted, 12 M.J. ___ (CMA 1981), argued 19 November 1981, the lower court denied the appellant's petition for a new trial because the fact-finders would determine that a prosecution witness was more credible than the "newly discovered" defense witness. The Court will determine whether the lower tribunal erred by denying the petition on the basis that the credibility issue

would be resolved in the government's favor at a new trial. The very nature of the new trial remedy arguably anticipates that issues of fact and credibility will be resolved by the finder of fact at the new proceeding. Once it is determined that the newly discovered evidence is not inherently incredible, disputed facts should be resolved at a new trial rather than through speculation as to the probable disposition of such matters by a hypothetical fact-finder. Government counsel responded that the lower court correctly determined whether the newly discovered evidence would probably lead to a substantially more favorable result at a new trial.

OFFENSES: Robbery

Does a larceny closely followed by an assault constitute a robbery? In United States v. Chambers, 9 M.J. 933 (ACMR 1980), pet. granted, 10 M.J. 245 (CMA 1980), argued 24 October 1981, the appellant argued that the assault, which occurred when the victim tried to retrieve his property, did not facilitate the theft, and was instead committed after the taking. Government counsel maintained that since there had been no asportation of the money, the larceny was not yet complete when the accused assaulted the victim.

OFFENSES: Conspiracy

What constitutes a sufficient allegation of an overt act in a specification charging conspiracy, and what evidence is required to prove that act? In United States v. Collier, NCMR 39,941, pet. granted, 10 M.J. 333 (CMA 1981), argued 16 December 1981, the government alleged that the accused had conspired to commit a robbery and had departed from his barracks room in furtherance of that conspiracy. Although federal law does not require the allegation of an overt act, the appellant counsel argued that to allow the allegation and proof of such an innocuous act to fulfill the "overt act" requirement of a conspiracy charge would emasculate Article 81, UCMJ. The Court asked whether the alleged and proven acts were sufficient to support the inference of an intent to pursue the planned crime.

WITNESSES: Production

May a United States citizen be ordered to testify at a court-martial held outside the United States? The military judge in United States v. Bennet, AFMCR 22664, pet. granted, 10 M.J. 251 (CMA 1981), argued 20 November 1981, determined that a defense-requested witness was material. However, while the trial was pending in the Phillipines and after the defense had requested him, the witness separated from the Air Force and

returned to the United States. When he refused to voluntarily return to the Phillipines, the military judge, over defense objection, directed that the trial continue in his absence, and the parties stipulated to his expected testimony. The appellant argued that since the witness was deemed to have been material, his presence was required: the government should have either granted the motion for a change of venue to a situs where he would have been amenable to a subpoena, or abated the proceedings. Although the United States may require a citizen to travel outside its territory, however, there was no dispute over the stipulated testimony, and any error may have been harmless. The Army government appellate counsel, in an amicus brief, asserted that the United States may not require an American citizen to travel to a jurisdiction not under the protection of the United States courts. The Court expressed some concern over the danger to witnesses who are involuntarily required to leave the protection of the United States in order to testify.

EVIDENCE: Admissibility

In United States v. Leiffer, 10 M.J. 639 (NCOMR 1980), certificate of review filed, 9 M.J. 281 (CMA 1980), argued 18 November 1981, the government asked the Court to rule that the lower tribunal misapplied its fact-finding power in holding that an illegal interrogation of the accused tainted government evidence. An illegal interrogation will not bar subsequently obtained evidence if there is an independent source for the evidence or if the connection with the interrogation is sufficiently attenuated. See, e.g., United States v. Kesteltant, 8 M.J. 209 (CMA 1980). In this case, however, attenuation was not in issue and the government had declined to offer proof of an untainted, independent source at trial.

PRETRIAL AGREEMENT: Enforceability

In United States v. Schaffer, NCOMR 80-0263, pet. granted, 10 M.J. 282 (CMA 1981), argued 17 December 1981, the Court considered whether an accused may waive his rights under Article 32, UCMJ, as part of his pretrial agreement. The accused pled guilty at a general court-martial pursuant to a pretrial agreement which allowed him to enter mixed pleas as to several charges. As part of his agreement, he offered to waive a formal pretrial investigation. On appeal, he argued that although this waiver was not a jurisdictional matter, Article 32 is binding on all persons administering the Code; furthermore, pretrial agreements which bargain away substantial rights violate public policy. Appellate government counsel stressed that because this pretrial agreement constituted an

attempt by the defense to secure a sentence limitation, it should be enforced: the appellant received the benefit of his bargain, was not prejudiced, and should not be allowed to challenge his earlier decision.

GUILTY PLEA: Providence

In United States v. Bedine, NCMR 78145, pet. granted, 10 M.J. 16 (CMA 1980), argued 19 November 1981, the appellant pled guilty to carnal knowledge in return for a pretrial agreement providing for the suspension of any bad-conduct discharge adjudged. The record did not reflect whether the accused was aware that Navy regulations provided for mandatory initiation of administrative discharge proceedings. The appellant argued that a plea is improvident when the appellant waives a trial on the merits because he is assured that he will remain in the service. See United States v. Santos, 4 M.J. 610 (NCMR 1977). The government responded that since the administrative discharge had subsequently been suspended and remitted, the issue was moot. Alternatively, the providence inquiry does not include noncriminal matters and the record does not reveal the accused's motivation. While the Court was concerned that the possibility of an administrative discharge had not been mentioned in the agreement, it seemed to agree that the appellant had received all he bargained for.

SEARCH AND SEIZURE: Scope

May a commander conducting a lawful health and welfare inspection seize savings bonds wrapped in a piece of paper from a jacket in a servicemember's wall locker? That is the primary issue in United States v. Brown, ACMR 14226, pet. granted, 10 M.J. 299 (CMA 1981), argued 16 December 1981. Judge Cook questioned the government's argument that under United States v. Middleton, 10 M.J. 123 (CMA 1981), the scope of a health and welfare inspection is limited only by the commander's authorization and that a soldier has no expectation of privacy. Although the appellant did not concede that the search was legal, he argued that even in a lawful inspection there are certain areas, such as private papers, which cannot be examined absent some reasonable suspicion that contraband will be found. Federal courts have recognized privacy rights in convicted and jailed felons, and soldiers who have volunteered to defend their country should have more rights than prisoners. Judge Fletcher speculated whether there were any "sacred" areas in a true health and welfare inspection.

SEARCH AND SEIZURE: Reasonable

In United States v. Kozak, 9 M.J. 929 (ACMR 1980), pet. granted, 10 M.J. 198 (CMA 1980), argued 18 November 1981, the appellant challenged a search of a train station locker in Germany by foreign and American police. A commander authorized the apprehension and search of the appellant at the train station after a reliable informant reported that a locker at the station contained hashish which the appellant or his friend would pick up later that night. During a search of all the lockers, the police discovered and removed eleven plates of hashish from a locker at the station and only replaced a small piece. When the appellant arrived, he opened the locker and then slammed the door in anger. The officers apprehended and searched him as he started to walk away, but they uncovered no contraband. A second search of the locker revealed the small piece of hashish. The trial judge suppressed 10 of the 11 plates of hashish and convicted the accused of possessing the remaining piece.

The Court of Military Review accepted the government's argument, raised initially on appeal, that the appellant had abandoned the hashish. Chief Judge Everett noted the similarities between this case and United States v. Draper, 358 U.S. 160 (1959), and stated that under Article 7, UCMJ, the CID apparently had authority to apprehend even without the commander's authorization. The Court was particularly interested in the abandonment theory and in the extent to which an expectation of privacy vests in a rented locker at a public train station. Judge Fletcher asked whether property once seized by the police could then be abandoned. Appellate defense counsel asserted that the government's abandonment theory denied the appellant the opportunity to claim at trial that he saw no hashish when he opened the locker.

GUILTY PLEA: Providence

May an accused jeopardize a guilty plea and pretrial agreement by litigating suppression motions prior to pleading? In United States v. Bethke, ACMR 439241, pet. granted, 10 M.J. 245 (CMA 1980), argued 16 December 1981, the military judge warned the accused that if a fourth amendment suppression motion were unsuccessful, he would face difficulty in convincing the military judge that his anticipated guilty plea was voluntarily entered. The appellant thereupon withdrew the motion and pled guilty. On appeal, he argued that the military judge's action impermissibly chilled his right to litigate a pretrial motion and was tantamount to adding an illegal condition to the pretrial agreement. The government argued that the issue was waived when the motion was withdrawn, that there is no right to a pretrial agreement, and that if the suppression motion had any merit the appellant would not have withdrawn it so readily. Further, because the case was tried before 1 September 1980, the military judge was not required to hear the violation.

See Mil. R. Evid. 311(d). The Court asked whether the military judge had effectively precluded the litigation of the pretrial motion. In response to Judge Cook's suggestion that the judge had perhaps gone "too far" in assuming that the accused was aware of his rights, the government replied that it was then the defense counsel's obligation to correct him. The Chief Judge wondered why the military judge thought that the suppression motion had anything to do with providency, and Judge Fletcher questioned whether the alleged error was attended with any prejudice as long as the choice was left with the accused.

CASE NOTES

Synopses of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

CHARGES: Withdrawal and Rereferral

United States v. Giles, CM 439299 (ACMR 30 November 1981) (unpub.).
(ADC: CPT McAtamney)

Shortly before the accused's trial by a special court-martial empowered to adjudge a bad-conduct discharge, the trial counsel discovered evidence supporting the referral of an additional charge. After the accused refused the prosecutor's offer not to "pursue" the additional charge if he would waive the provisions of Article 35, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §835 (1976), the original charges were withdrawn and rereferred, with the additional charge, to a general court-martial. The military judge denied the accused's motion to dismiss the charges because of "prosecutorial vindictiveness." See Blackledge v. Perry, 417 U.S. 21 (1974), and North Carolina v. Pearce, 395 U.S. 711 (1969). The appellate court affirmed. The preferral of additional charges justifies the withdrawal of the original charge and subsequent rereferral of all charges to a higher court. United States v. Jackson, 1 M.J. 242 (CMA 1976). The court also found as a matter of fact that the government's actions were not prompted by the accused's refusal to "deal" and that the "many built-in protections against 'prosecutorial vindictiveness'" were not violated. See United States v. Bass, 11 M.J. 545 (ACMR 1981).

CHARGES AND SPECIFICATIONS: Sufficiency

United States v. McNeal, CM 440605 (ACMR 30 October 1981) (unpub.).
(ADC: CPT Lukjanowicz)

Charged with robbery, the accused was convicted of aggravated assault. Although not challenged at trial, the specification was deemed defective by the appellate court because it failed to allege that the stealing was from the person or presence of the victim. The omission did not negate the assault aspect of the offense because the "allegation . . . that the [accused] acted 'by means of force and violence' to steal from the victim was sufficient to appraise him of the lesser included offense[.]" See United States v. King, 10 USCMA 465, 28 CMR 31 (1959).

FIFTH AND SIXTH AMENDMENT RIGHTS: Invocation
United States v. Eason, CM 439760 (ACMR 17 December 1981) (unpub.).
(ADC: CPT Currie)

Shortly after the accused requested counsel and invoked his right to remain silent, a CID agent talked to him about the offense and told him they "needed" his side of the story. He then waived his rights and made an inculpatory statement. At trial, he unsuccessfully attempted to suppress the statement as the fruit of an unlawful governmental solicitation before his request for counsel had been honored. See Edwards v. Arizona, ___ U.S. ___, 101 S.Ct. 1880 (1981). The appellate court held that the agent's comments were not the "functional equivalent" of interrogation because they were not statements the agent knew or should have known were "reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291 (1980). Furthermore, the agent's statement was not, under the circumstances, an improper inducement to confess since he simultaneously told the accused that he could not talk to him because he had requested a lawyer. The agent questioned the accused only after the latter "insisted" on making a statement and waived his rights. The court distinguished Edwards v. Arizona, supra, by noting that, unlike the defendant in that case, the accused "did not indicate he wanted a lawyer to assist him in his dealing with police interrogation." But see United States v. Dillon, 11 M.J. 922 (AFCMR 1981). The court failed to note that the accused had specifically requested counsel on a DA Form 3881 (Rights Warning Certificate) and found that he "did not really invoke his right to have counsel present during custodial interrogation because at the same time he stated he wanted counsel he invoked his right not to be subjected to any interrogation." The court affirmed the findings and sentence.

FINDINGS: Finality
United States v. Beach, CM 440589 (ACMR 29 October 1981) (unpub.).
(ADC: MAJ Nagle)

Charged with forcible sodomy, the accused pled guilty to consensual sodomy. The military judge accepted the pleas and found the accused guilty, but not guilty of the element of force. He then withdrew the findings, and characterized them as "inadvertent" in order to allow the government to present evidence on the issue of consent, as all parties to the trial had originally intended. Because the court's initial pronouncement did not "accurately and correctly reflect [its] true and actual findings," there was no error. United States v. Boswell, 8 USCMA 145, 23 CMR 369 (1957). But see United States v. Hitchcock, 6 M.J. 188 (CMA 1979).

FOURTH AMENDMENT: Seizure

United States v. Giraud, SPCM 15428 (ACMR 29 October 1981) (unpub.).
(ADC: CPT Walinsky)

Two CID agents noticed the accused carrying a paper bag along an unlit path shortly after midnight. They decided to "check his identity" because they thought it was unusual for anyone to be alone in that area at that hour. They stopped their vehicle five feet from him, identified themselves, and said, "Step over here, please." The accused dropped his bag and assumed a search position. An agent looked inside the open bag and seized it and the marijuana it contained. The accused unsuccessfully moved to suppress the drugs and a subsequently rendered confession as the fruit of an illegal stop. The Army appellate court affirmed determining that, because nothing in the record suggested that he had any objective reason to believe that he was not free to end the encounter and walk away, the accused had not been "seized." See United States v. Mendenhall, 446 U.S. 544 (1980).

OFFENSES: Indecent Acts

United States v. Wellington, CM 440906 (ACMR 21 December 1981) (unpub.).
(ADC: CPT Huntsman)

At the accused's request, his daughter took nude photographs of her twelve-year old girlfriend. His plea of guilty to committing an indecent act was deemed improvident because his daughter's action did not signify "a form of immorality relating to sexual impurity which tends to excite lust and deprave morals with respect to sexual relations." Cf. United States v. Johnson, 4 M.J. 770 (ACMR 1975) (voyeurism per se is not indecent act). The court set aside the findings as to the charge and reassessed the sentence.

OFFENSES: Multiplicity

United States v. Buckley, CM 440969 (ACMR 20 November 1981) (unpub.).
(ADC: CPT Bloom)

The military judge denied the accused's motion to dismiss one specification as multiplicitious for findings with another because the government alleged that the "separate specifications were required by exigencies of proof." The accused then pled guilty to both specifications. As a result of the providence inquiry, the military judge concluded that they did allege one continuous transaction and considered them as a single offense for sentencing purposes. However, he erred by not requiring the government either to elect which specification they wished to prosecute or to consolidate the specifications. See United States v. Rushing, 11 M.J. 95 (CMA 1981).

OFFENSES: Multiplicity

United States v. Jensen, SPCM 16197 (ACMR 20 November 1981) (unpub.).
(ADC: CPT Ferrante)

The accused was convicted of two charges of larceny. The findings with respect to one of the charges was based on the law of principals; accordingly, even though both occurred at the same time and place, the offenses were not multiplicitious for findings. But see paragraph 200a(8), Manual for Courts-Martial, United States, 1969 (Revised edition) [herein-after Manual].

POST-TRIAL REVIEW: Service

United States v. Combest, CM 440228 (ACMR 15 December 1981) (unpub.).
(ADC: CPT Ferrante)

The post-trial review of the accused's court-martial, in which the staff judge advocate noted the accused's allegation that his trial defense counsel was incompetent, was improperly served upon the trial defense counsel because of the "clear conflict of interest between the attorney and his client." United States v. Stith, 5 M.J. 879 (ACMR 1978). The appellate court ordered a new review and action by a different convening authority.

PRETRIAL AGREEMENT: Interpretation

United States v. Thompson, SPCM 16940 (ACMR 29 December 1981) (unpub.).
(ADC: CPT Ferrante)

Although a pretrial agreement provided that the convening authority would not approve any sentence in excess of, inter alia, forfeiture of \$334.00 pay per month for three months, the convening authority did not err by approving the adjudged sentence, which provided for a fine, and converting it to the lesser punishment of the maximum forfeitures allowed by the agreement. He was not precluded from "approving types of punishment not specifically mentioned unless the agreement specifically so state[d]," provided the approved sentence was no more severe than that agreed upon.

PRETRIAL AGREEMENT: Validity

United States v. Toro, CM 440812 (ACMR 31 December 1981) (unpub.).
(ADC: CPT Vitaris)

A pretrial agreement authorizing the commutation of a punitive discharge to confinement does not violate public policy. Cf. United States v. Darusin, 20 USCMA 354, 356, 43 CMR 194, 196 (1971) (confinement for one year is less severe than bad-conduct discharge). Furthermore,

"[c]ommutation is permitted in a negotiated plea case unless it is specifically precluded" by the terms of the agreement. See United States v. Schoemaker, 11 M.J. 849 (ACMR 1981), pet. denied, 12 M.J. ____ (CMA 1981).

RIGHT TO COUNSEL: Pretrial Psychiatric Examination

United States v. Mathis, CM 440457 (ACMR 27 October 1981) (unpub.).
(ADC: CPT Pardue)

A psychiatrist examined the accused before trial, but the defense counsel was not notified of the time or location of the exam as requested. During the trial, the accused raised the defense of insanity, and in rebuttal, over defense objection, the psychiatrist testified that the accused was "mentally responsible at the time of the alleged offenses." The appellate court distinguished this case from Estelle v. Smith, ____ U.S. ____, 101 S.Ct. 1866 (1981), and held that the accused was not denied his sixth amendment right to assistance of counsel because the defense had requested the examination, the accused had an opportunity to consult with his attorney beforehand, and, since he "was required to submit to an examination by a psychiatrist selected by the Government in order to present his evidence relating to the sanity issue . . . it is very unlikely his counsel would have advised him to invoke" his right to remain silent. See also United States v. Olah, CM 440832, ____ M.J. ____ (ACMR 16 December 1981) (psychiatric examination to determine competency to stand trial is not critical stage in criminal prosecution so as to invoke right to assistance of counsel).

RIGHT TO COUNSEL: Waiver

United States v. Scott, CM 440761 (ACMR 31 December 1981) (unpub.).
(ADC: CPT Cain)

Suspected of several drug offenses, the accused made a sworn statement denying culpability. Several days later, he recanted the first statement and admitted his guilt. He was convicted of, inter alia, false swearing. The accused contended that the second sworn statement was inadmissible because he was not advised that he was suspected of lying in his initial statement. Although the government agents who took the latter statements believed that the accused had lied earlier, they had no obligation to tell him of their suspicions. "The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction . . . in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety." United States v. Rice, 11 USQMA 524, 526, 29 CMR 340, 342 (1960).

RIGHT TO COUNSEL: Waiver

United States v. Tyson, SPCM 15892 (ACMR 9 November 1981) (unpub.).
(ADC: CPT Pepler)

The accused confessed to larceny after questioning by a CID agent who was aware that he had been convicted of an unrelated offense the day before. Although he knew that the accused had been represented at trial by counsel, he had no obligation to contact the latter before interrogating the accused because the offenses and investigations were "separate and unrelated." See United States v. Littlejohn, 7 M.J. 200 (CMA 1979); Mil.R.Evid. 305(e).

SEARCH AND SEIZURE: Reasonableness

United States v. Gould, SPCM 15709 (ACMR 23 October 1981) (unpub.).
(ADC: CPT Walinsky)

The accused was alone in a friend's barracks room when the charge of quarters (CQ) approached it to billet a new soldier. Although the CQ was initially told that the room was empty, he thought he heard someone attempting to leave through the window. He left the building, peered through the window, saw the accused rummaging in a dresser drawer, returned to the room, and identified himself. As he entered the room, he smelled marijuana and told the accused to stand in a corner. Instead, she removed a bag from the dresser and attempted to leave, but, when ordered, replaced the bag and stopped. Under oath, the unit sergeant related these facts to the battalion commander, who authorized a search of the room. The accused's motion to suppress the fruits of that search was properly denied. Although casual visitors may have a limited expectation of privacy in a barracks room, it does not extend to the "interior of a dresser placed in the room for use by assigned occupants." See Mil.R.Evid. 311(a)(2). In addition, the CQ was not "searching [within the meaning of the fourth amendment] for any particular suspect or evidence of a crime" when he looked through the window; rather, he was attempting to protect the security of the barracks. See United States v. Lewis, 11 M.J. 181 (CMA 1981).

SENTENCE: Limitation of Punishment

United States v. Hilliard, CM 440597, ___ M.J. ___ (ACMR 29 October 1981).
(ADC: CPT Carrle)

The accused was sentenced to, inter alia, reduction to the grade of Private E-1 and extra duty for four months. Although neither the Manual nor the UCMJ limits the duration of extra duty, the similarity between that punishment and confinement without hard labor, when the former

includes a sentence to reduction to the lowest enlisted grade, suggests that the limitations regarding confinement at hard labor should apply to sentences imposing extra duty. See paragraph 126k, Manual. The sentence was reassessed accordingly.

FEDERAL COURT DECISIONS

CONFLICT OF INTEREST: Former Defense Counsel
United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981).

The defendant's initial trial ended in a mistrial. A superseding indictment was returned and a "myriad of defense motions" were filed, denied, and appealed. Pending the appeal, the defendant's counsel withdrew from the case and joined the U.S. Attorney's office which was prosecuting the defendant. His former counsel was not assigned or permitted to discuss the case with any other attorney in the office. Disciplinary Rule 5-105(D) of the ABA Code of Professional Responsibility does not disqualify this U.S. Attorney's office from reprosecuting the defendant. The court noted the differences between the relationship among lawyers within a private firm and those who represent the government, and held that when an individual attorney in a government department is separated from participating in matters affecting his former client, "vicarious disqualification" of that department is neither necessary nor wise.

EVIDENCE: Expert Testimony
United States v. Lawson, 653 F.2d 299 (7th Cir. 1981).

The defendant was examined by a psychiatrist who, in part, based his opinion of the former's mental state on the reports of other physicians, the FBI, the military, and the U.S. Attorney. Expert witnesses may rely on material that would otherwise be inadmissible hearsay if it is "of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject" and if the defendant has access to the information relied upon and is given an adequate opportunity to prepare an effective cross-examination. See Fed.R.Evid. 703 and 705. Those standards were met in this case.

EVIDENCE: Hearsay
United States v. Parry, 649 F.2d 292 (5th Cir. 1981).

At trial, the defendant claimed that he knew that a purported buyer of illicit drugs was a government undercover agent, and that he participated in drug transactions only because he believed he was assisting the agent's investigation. The trial judge erroneously excluded as hearsay testimony by the defendant's mother that he had told her the

identity of the agent before the incidents. The statement was not hearsay because it was not offered to prove the truth of the matter asserted and instead was "circumstantial evidence of the declarant's knowledge of the existence of some fact." Furthermore, it was admissible as a prior consistent statement offered to rebut the government's charge that the defendant fabricated his story. See Fed.R.Evid. 801(d)(1)(B).

EVIDENCE: Opinion

United States v. Polsinelli, 649 F.2d 793 (10th Cir. 1981).

Several character witnesses testified about the defendant's reputation for truth and veracity at his trial for distributing cocaine. On cross-examination, the prosecution asked, over defense objection, if their opinion of the defendant would change if they knew he had distributed cocaine. The question was improper because the witnesses had not originally testified about their opinion of the defendant and it violated the presumption of innocence by asking them to assume that he was guilty of the charged offenses. See United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977). The court reversed the conviction.

INSTRUCTIONS: Entrapment

United States v. Valencia, 645 F.2d 1158 (2nd Cir. 1980).

The defendant and his wife were tried jointly for selling cocaine to an undercover informant and government agent. The defendant's wife testified that she had been pressured to sell the cocaine by the informant and that the defendant was not a party to the transaction. The defendant contended that he was not involved in the sale or, in the alternative, was entrapped. The trial judge erroneously instructed the jurors that a defendant cannot be entrapped unless he has had actual contact with a government agent who directly induced him to commit the offense. See United States v. Swiderski, 539 F.2d 854, 858-59 (2d Cir. 1976). However, the court held that, in general, a vicarious entrapment defense can be presented to a jury only if the defendant first introduces admissible evidence that the agent's inducement was directly communicated to him by another. The court reversed the conviction and ordered a new trial.

JUDGE: Denial of Continuance

Slappy v. Morris, 649 F.2d 718 (9th Cir. 1981).

The defendant's court-appointed attorney became ill shortly before trial, and although a replacement was appointed, the defendant refused his services and requested a continuance until his original counsel recovered. The trial judge erroneously denied the request. Although an indigent

defendant does not have an unqualified right to appointment of counsel of his own choosing, he does have the right to a meaningful attorney-client relationship. The court held that the trial judge abused his discretion by not, at a minimum, inquiring about the probable length of the original counsel's unavailability before refusing the continuance.

SIXTH AMENDMENT: Exclusion of Evidence
United States v. Davis, 639 F.2d 239 (5th Cir. 1981).

The trial judge excluded two defense witnesses who would have impeached the character of the prosecution's chief witness because the defense inadvertently failed to comply with a pretrial discovery order, see Fed.R.Crim.Pro. 16(d)(2), and because the testimony was cumulative, see Fed.Rul. Evid. 403. The judge erred because "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." Furthermore, the trial judge abused his discretion by determining that the defense witnesses' testimony was cumulative. The Fifth Circuit reversed the conviction and ordered a new trial.

STATE COURT DECISIONS OFFENSES: Classification of Cocaine as Narcotic
People v. McCarty, 427 N.E.2d 147 (Ill. 1981).

The court, overruling a lower state appellate court, held that the legislative classification of cocaine as a narcotic is not irrational and does not deny the defendant equal protection under the law. Although cocaine is not scientifically defined as a narcotic, "a legislative body is not logically bound to follow previously existing definitions of terms created by persons in other fields." After examining the potential dangers associated with cocaine, the court concluded that the legislature may treat it as a narcotic in order to penalize "illicit traffickers or profiteers" of the drug more severely than they would be if it were classified as a nonnarcotic. [The lower court's decision is synopsisized in 13 The Advocate 230 (1981)].

TRIAL: Presence of Guards in Courtroom
State v. Peacher, 280 S.E.2d 559 (W.Va. 1981).

Over defense objection, a deputy sheriff in civilian clothes sat within fifteen feet of the defendant during the trial. The appellate court likened the use of guards to the imposition of physical restraints upon an defendant, and held that the trial judge erred by not balancing

the need for additional security precautions against the potential prejudice to the defendant, including the inference of guilt created by the sheriff's proximity to the defendant, and the interference with the latter's ability to assist in his defense. The absence of such a determination did not constitute reversible error in this case.

TRIAL COUNSEL: Conduct
State v. Towns, 432 A.2d 688 (R.I. 1981).

At the defendant's trial for murder, a government agent testified that a blood detection test revealed traces of "non-visible blood" on the defendant's hands. Although the prosecutor was unaware that the agent's testimony was "spurious" until the state's expert witness testified that the test results "conclusively [prove] an absence of blood," he denied the defendant his right to due process by failing to "correct this false evidence," objecting to the defenses counsel's curative motions, and emphasizing the agent's testimony during his closing argument. The court reversed the conviction and ordered a new trial.

Notice

Readers who desire copies of military decisions synopsised in Case Notes, most of which are released by the service courts as unpublished opinions, may contact the editor of that feature by telephoning Autovon 289-1195 during duty hours (289-2277 during off-duty hours), or by writing to Case Notes Editor, The Advocate, Defense Appellate Division, United States Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041.

ON THE RECORD

or

*Quotable Quotes from Actual
Records of Trial Received in DAD*

(Voir dire during involuntary manslaughter case):

ADC: Have any of you been the victim of an offense similar to that charged in this case? Apparently not.

MJ: Have you been discharged from this case by the accused?

IDC: Not formally, Your Honor.

ACC: You're fired.

MJ: Welcome back to Germany, Captain A. I understand you have been back to the States and have returned for this trial.

DC: Yes, Your Honor, except it is my understanding that this is Korea.

MJ: Are both counsel aware that one of the court members was the accused in this very court room a few months ago?

TC: How far from the main road were you?

WIT: Should I express it in meters?

TC: Yes, please.

WIT: I don't know.

(Defense counsel's examination of the roommate of the CID confidential informant, Specialist X).

DC: During that time, did you ever have occasion to observe Specialist X's off-duty activities?

WIT: Yes.

DC: Could you describe those for the court, please?

WIT: Some of his off-duty activities were, he would, ah -- he was a good pickpocket, for one.

DC: Can you hear normal conversation?

WIT: Pardon me, sir?

DC: Can you hear normal conversation all right?

WIT: Sir, my battery just went out on my hearing aid. I can hardly hear you.

MJ: Do you think this girl was raped? In your own heart?

ACC: I've got mixed feelings about it.

MJ: Then why did you plead guilty?

ACC: Well, my lawyer said that was the best thing for me to do.

MJ: What do you think of your lawyer?

ACC: Well, I've got mixed feelings about him, also.

MJ: Private _____, I now ask you how do you plead? However, before receiving your plea, I advise you that any motions to dismiss the Charge or to grant other relief should be made at this time.

DC: Your Honor, the defense has no motions at this time. The accused pleads, to the Charge and its specifications, guilty.

ACC: Like hell I do.

INDEX

Volume 13, Numbers 1-6

West Military Justice Digest Topic and Key Numbers © 1979
used herein with permission of West Publishing Company.

Subjects are arranged in accordance with the West Key Number System currently used in the Military Justice Reporters. Within each topic the articles (underlined) are listed first in reverse chronological order, followed by everything else in reverse chronological order. The page references are by volume: number: page.

I. IN GENERAL

2. Statutes, rules, and regulations

Jurisdiction: Amendment of Article 2 UCMJ	13:3:224
Jurisdiction: Amendment of Article 2 UCMJ	13:3:222
Jurisdiction: Amendment of Article 2 UCMJ	13:3:205
Statutes: Retroactive application (Article 2 UCMJ)	13:1:64

3. _____ Validity of code articles

<u>The UCMJ's Death Penalty: A Constitutional Assessment</u>	13:3:74
Jurisdiction: Amendment of Article 2 UCMJ	13:3:224
Jurisdiction: Amendment of Article 2 UCMJ	13:3:222
Jurisdiction: Amendment of Article 2 UCMJ	13:3:205
Jurisdiction: Amendment of Article 2 UCMJ	13:1:64

4. _____ Validity of regulations

Regulations: Constitutionality	13:1:70
--------------------------------	---------

5. _____ Construction and operation in general

<u>The UCMJ's Death Penalty: A Constitutional Assessment</u>	13:2:74
Post-trial review: Correction Boards	13:3:228
Jurisdiction: Amendment of Article 2 UCMJ	13:3:224
Jurisdiction: Amendment of Article 2 UCMJ	13:3:222
Jurisdiction: Amendment of Article 2 UCMJ	13:3:205
Jurisdiction: Amendment of Article 2 UCMJ	13:1:64

7. Persons subject

Jurisdiction: Amendment of Article 2 UCMJ	13:3:224
---	----------

8. _____ Validity of induction or enlistment
 Jurisdiction: Amendment of Article 2 UCMJ 13:1:64
10. _____ Reservists; National Guard personnel
 Jurisdiction: Involuntary Recall 13:5:380

II. APPLICATION OF THE BILL OF RIGHTS

(A) In General

20. Application to the military in general
The UCMJ's Death Penalty: A Constitutional Assessment 13:2:74
21. Particular provisions, applicability
Demonstrating Prejudice in "Speedy Trial" Cases 13:2:89
The UCMJ's Death Penalty: A Constitutional Assessment 13:2:74
 Sixth Amendment: Exclusion of Evidence 13:6:457
 Post-Trial Hearings: Vacation Proceedings 13:3:225
 Pretrial Proceedings: Right to Investigator 13:1:63
23. Self-incrimination
 Fifth and Sixth Amendment Rights: Invocation 13:6:450

(B) SEARCHES AND SEIZURES

30. In general
Search and Seizure: A Primer, Domestic Gate Searches 13:6:422
Search and Seizure: A Primer, "Plain View" 13:5:357
Search and Seizure: A Primer, Search Incident to
 Lawful Apprehension 13:4:285
Search and Seizure: A Primer, Automobiles 13:2:108
Search and Seizure: A Primer, Border and Overseas
 Gate Searches 13:1:43
 Search and Seizure: Reasonableness 13:5:375
 Search and Seizure: Foreign Officials 13:5:374

31. Reasonableness; need for warrant, authority, or probable cause		
<u>Search and Seizure: A Primer, Domestic Gate Searches</u>		13:6:422
<u>Search and Seizure: A Primer, Search Incident to</u>		13:4:285
<u>Lawful Apprehension</u>		
<u>Search and Seizure: A Primer, "Hot Pursuit"</u>		13:3:178
<u>Search and Seizure: A Primer, Automobiles</u>		13:2:108
Search and Seizure: Reasonable		13:6:447
Search and Seizure: Reasonableness		13:5:386
Search and Seizure: Reasonableness		13:5:386
Search and Seizure: Reasonableness		13:5:385
Search and Seizure: Reasonableness		13:5:375
Search and Seizure: Third Party Consent		13:4:312
Search and Seizure: Reasonableness		13:4:310
Search and Seizure: Detention of Luggage		13:4:310
Search and Seizure: Search Incident to Lawful		13:4:308
<u>Apprehension</u>		
Search and Seizure: Reasonableness		13:4:307
Search and Seizure: Articulate Suspicion		13:2:139
Search and Seizure: Probable Cause		13:1:59
32. Inspection or search		
Search and Seizure: Scope		13:6:446
Search and Seizure: Expectation of Privacy		13:1:59
33. Investigatory stops, road blocks, and gate searches		
<u>Search and Seizure: A Primer, Domestic Gate Searches</u>		13:6:422
<u>Search and Seizure: A Primer, Automobiles</u>		13:2:108
<u>Search and Seizure: A Primer, Boarder and Overseas</u>		13:1:43
<u>Gate Searches</u>		
Fourth Amendment: Seizure		13:6:451
Warrantless Detention: Legality		13:5:386
Search and Seizure: Reasonableness		13:5:375
Search and Seizure: Scope		13:4:311
Search and Seizure: Scope		13:4:311
Search and Seizure: Detention of Luggage		13:4:310
Challenging Automobile Searches		13:3:197
Search and Seizure: Exit Gate Searches		13:1:62

35.	Probable cause in general	
	<u>Search and Seizure: A Primer - "Hot Pursuit"</u>	13:3:178
	Fourth Amendment: Seizure	13:6:451
	Warrantless detention: Legality	13:5:386
	Search and Seizure: Reasonableness	13:5:386
	Search and Seizure: Reasonableness	13:5:386
	Search and Seizure: Reasonableness	13:5:385
36.	Search incident to arrest	
	<u>Search and Seizure: A Primer - Search Incident to</u>	13:4:285
	<u>Lawful Apprehension</u>	
	Search and Seizure: Reasonableness	13:5:386
	Search and Seizure: Scope	13:4:311
	Search and Seizure: Scope	13:4:311
	Search and Seizure: Search incident to	13:4:308
	Lawful Apprehension	
	Search and Seizure: Lawfulness of Apprehension	13:3:216
	Challenging Automobile Searches	13:3:197
37.	Plain view	
	<u>Search and Seizure: A Primer - "Plain View"</u>	13:5:357
	<u>Search and Seizure: A Primer - "Hot Pursuit"</u>	13:3:178
	Search and Seizure: Reasonableness	13:6:454
	Search and Seizure: Plain View	13:5:385
	Search and Seizure: Reasonableness	13:4:307
	Search and Seizure: Expectation of Privacy	13:1:59
38.	Warrant or authority	
	Warrant Requirement: "Good Faith" Exception	13:5:387
	Search and Seizure: Foreign Officials	13:5:374
39.	_____ Power to authorize	
	Search and Seizure: Foreign Officials	13:5:374
	Search and Seizure: Delegation of Authority	13:3:210
	to Order Search	
41.	_____ Hearsay; reliability of informant	
	Search and Seizure: Probable Cause	13:1:59

42.	_____ Form, scope, and execution	
	Search and Seizure: Scope	13:6:446
43.	Standing to object	
	Search and Seizure: Reasonableness	13:6:454
	Search and Seizure: Reasonable	13:6:447
	Search and Seizure: Reasonableness	13:5:375
44.	Consent	
	<u>Search and Seizure: A Primer, Domestic Gate Searches</u>	13:6:422
	Search and Seizure: Reasonableness	13:5:386
	Search and Seizure: Third Party Consent	13:4:312
	Search and Seizure: Lawfulness of Apprehension	13:3:216
45.	Determination of validity	
	Search and Seizure: Foreign Officials	13:5:374
III. PUNISHABLE OFFENSES AND DEFENSES TO CHARGES		
51.	Assault, escape, and resisting arrest	
	Offenses: Attempted Voluntary Manslaughter	13:5:381
	Offenses: Aggravated Assault	13:3:225
	Guilty Plea: Providency	13:3:222
	Offenses: Escape from Correctional Custody	13:2:136
52.	Homicide	
	Offenses: Attempted Murder	13:5:377
53.	Desertion, absence, or missing movement	
	Offenses: AWOL	13:4:302
	Offenses: Authorized Absence	13:2:141
54.	Failure to obey order or regulation	
	Offenses: Violation of Regulation	13:4:302

55.	_____ In general	
	Offenses: Violation of Regulation	13:4:302
	Offenses: Disobedience of NCO	13:2:140
	Burden of Proof: Exceptions to Punitive Regulations	13:1:57
57.	Disrespect toward superior	
	Offenses: Disrespect	13:5:376
58.	Theft, robbery, burglary, or false pretenses	
	Offenses: Wrongful Appropriation	13:5:382
	Offenses: Unlawful Entry	13:5:382
	Offenses: Larceny	13:5:381
	Offenses: Receipt of Stolen Property	13:4:306
59.	General article violations	
	Offenses: Indecent Acts	13:6:451
	Military Judge: Instructions	13:6:439
	Offenses: Arson and Disorderly Conduct	13:2:138
	Offenses: Communication of a Threat	13:2:137
60.	Liquor or drugs, offenses relating to	
	Offenses: Multiplicious	13:5:381
	Offenses: Classification of Cocaine as Narcotic	13:3:230
	Offenses: Multiplicious for Charging	13:3:225
	Offenses: Classification of Cocaine as Habit-Forming Narcotic	13:2:125
61.	Attempts	
	Offenses: Attempted Voluntary Manslaughter	13:5:381
62.	Persons liable; principals and accessories; conspiracy	
	Offenses: Multiplicity	13:6:452
	Offenses: Conspiracy	13:6:444
	Proposed Instruction	13:6:432
	Offenses: Aiding and Abetting	13:5:376
	Offenses: Law of Principals	13:5:369

Proposed Instruction: Accessory After the Fact	13:5:362
Offenses: Solicitation	13:4:306
Evidence: Admissibility	13:4:300
Proposed Instruction: Law of Principals	13:4:292
63. Defenses in general	
<u>Applying the "Mistake of Fact" Defense</u>	13:6:408
Proposed Instruction	13:6:432
64. Mental Incapacity	
Military Insanity Defense	13:4:297
Insanity Defense: Standard of Mental Responsibility	13:3:218
68. Entrapment	
Defenses: Duty to Instruct	13:4:298
69. _____ In general	
<u>A Call for New Entrapment Instruction: Banishing the</u>	13:3:148
<u>"Reasonable Suspicion" Interloper</u>	
Defenses: Duty to Instruct	13:4:298
Proposed Instruction: Entrapment	13:2:114
70. _____ Drug cases	
<u>A Call for a New Entrapment Instruction: Banishing the</u>	13:3:148
<u>"Reasonable Suspicion" Interloper</u>	
Instructions: Entrapment	13:6:456
71. Grant of immunity	
Pretrial Negotiations: Estoppel	13:6:440
Immunity	13:6:438
Pretrial Agreement: Enforceability	13:3:209
72. Limitation of prosecutions	
Defenses: Statute of Limitations	13:1:67

IV. COURTS-MARTIAL

80.	Classification and composition in general	
	Selection of Trial Fora	13:6:436
	Selection of Trial Fora	13:3:201
81.	_____ Enlisted members; requests	
	Sixth Amendment: Applicability to Military	13:4:308
82.	Trial by military judge alone	
	Selection of Trial Fora	13:3:201
84.	Convening authorities	
	Pretrial Agreement: Enforcement	13:5:370
	Convening Authority: Disqualification	13:5:370
	Petitioning Convening Authority for Specific Relief	13:4:294
85.	Convening and appointment of members	
	Trial: Selection of Members	13:2:126
86.	Military judges	
	<u>The Providency Inquiry: An Examination of Judicial Responsibilities</u>	13:5:333
	<u>Mathews Inquiry</u>	13:5:365
	Military Judge: Recusal	13:3:223
88.	Disqualification of members	
	Voir Dire: Challenge for Cause	13:4:299
92.	Challenges, objections, and waiver	
	Voir Dire: Challenge for Cause	13:4:299
93.	Nature and scope of jurisdiction in general	
	Jurisdiction: Subject Matter	13:6:440
	Jurisdiction: Assimilative Crimes Act	13:6:438

V. PRETRIAL PROCEEDINGS

(A) In General

110. Proceedings in general

Military Judge: Rulings on Motions 13:3:224

112. Depositions and discovery

The Jencks Act: An Introductory Analysis 13:6:391

Evidence: Production of Transcript 13:5:370

Pretrial Lineup: Accused's Entitlement 13:3:230

114. Pretrial restraint or confinement

Excess Confinement 13:5:367

Trial: Speedy Trial 13:4:297

(B) Charges and Specifications and Action Thereon

120. Charges and specifications in general

Offenses: Communicating Insulting Language to Female 13:4:305

121. Sufficiency of allegations

Jurisdiction: Assimilative Crimes Act 13:6:438

Offenses: Perjury 13:4:306

Charges and Specifications: Sufficiency 13:4:304

Charges and Specifications: Sufficiency 13:2:131

122. _____ Particular offenses

Charges and Specifications: Sufficiency 13:6:449

Offenses: Conspiracy 13:6:444

Charges and Specifications: Sufficiency 13:4:304

123. Joinder; multiplicity; inconsistency	
Offenses: Multiplicity	13:6:452
Offenses: Multiplicity	13:6:451
Offenses: Multiplicious	13:5:381
Offenses: Multiplicity	13:4:298
Multiplicious Specifications	13:3:198
Presecutorial Discretion: Unreasonable Multiplication of Charges	13:1:56
124. Amendment	
Charges and Specifications: Amendments	13:3:219
128. Investigation	
Pretrial Agreement: Enforceability	13:6:445
Requests for Preservation of Evidence	13:6:435
129. _____ Counsel during restraint and investigation	
Pretrial Proceeding: Investigation of Charges	13:2:135
130. Referral for trial, re-referral, and withdrawal	
Changes: Withdrawal and Referral	13:6:449
Referral Documents	13:5:364
(C) <u>Arraignment and Plea</u>	
141. Guilty plea in general	
<u>The Providency Inquiry: An Examination of Judicial Responsibilities</u>	13:5:333
<u>The Professional Responsibilities of Defense Counsel in Uncontested Courts-Martial</u>	13:5:318
<u>The Providency Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
<u>The Guilty Plea's Impact on Appellate Review</u>	13:4:236
Guilty Plea: Voluntariness	13:5:379
Issues Waived by Provident Guilty Plea	13:5:354

142. Providency or validity in general; voluntariness	
<u>The Providence Inquiry: An Examination of Judicial Responsibilities</u>	13:5:333
<u>The Providence Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
<u>The Guilty Plea's Impact on Appellate Review</u>	13:4:236
Guilty Plea: Providence	13:6:447
Guilty Plea: Providence	13:6:446
Guilty Plea: Voluntariness	13:5:379
Guilty Plea: Providency	13:4:301
Pretrial Agreement: Waiver Clause	13:2:124
Guilty Plea: Impact of Evidentiary Rulings on Voluntariness	13:1:56
144. Mental capacity	
Mental Capacity: Competence to Stand Trial	13:2:142
145. Violation of Rights; illegal evidence	
Guilty Plea: Voluntariness	13:5:379
146. Factual basis for guilty plea	
<u>The Providence Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
<u>The Guilty Plea's Impact on Appellate Review</u>	13:4:236
Offenses: Indecent Acts	13:6:451
Defenses: Innocent Possession	13:5:379
147. _____ Particular cases	
Defenses: Innocent Possession	13:5:379
148. _____ Inconsistent statements or evidence	
<u>Applying the "Mistake of Fact" Defense</u>	13:6:408
<u>The Providence Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
Defenses: Innocent Possession	13:5:379
Guilty Plea: Providency	13:3:222
Guilty Plea: Providence	13:3:211
Guilty Plea: Providence	13:3:206
Guilty Plea: Providence	13:3:205
Guilty Plea: Providency	13:2:127

150. Pretrial agreement

Pretrial Agreement: Validity	13:6:452
Pretrial Agreement: Interpretation	13:6:452
Guilty Plea: Providence	13:6:447
Guilty Plea: Providence	13:6:446
Pretrial Agreement: Enforceability	13:6:445
Sentence: Disparity Among Coactors	13:6:442
Pretrial Negotiations: Estoppel	13:6:440
Immunity	13:6:438
Pretrial Agreement: Enforcement	13:5:370
Pretrial Agreements	13:5:363
Convening Authority's Action: Sufficiency	13:4:304
Pretrial Agreements: Effect of Appellate Review	13:4:304
Guilty Plea: Providency	13:4:301
Pretrial Agreement: Enforceability	13:3:217
Pretrial Agreement: Waiver of Rights	13:2:134
Effect of Pretrial Agreement: Military Judge's Inquiry	13:1:63
Pretrial Agreement: Withdrawal by Convening Authority	13:1:61
Prior Misconduct Stipulations and Pretrial Agreements	13:1:53
Drafting Pretrial Agreements	13:1:52

151. Inquiry, advice, and warnings; determination of validity

<u>The Providency Inquiry: An Examination of Judicial Responsibilities</u>	13:5:333
<u>The Providence Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
Guilty Plea: Providence	13:6:447
Guilty Plea: Providence	13:6:446
Guilty Plea: Providency	13:4:301
Guilty Plea: Providence Inquiry	13:2:136
Effect of Pretrial Agreement: Military Judge's Inquiry	13:1:63

152. _____ Effect of deficiency

<u>The Providence Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
Guilty Plea: Providence	13:4:301
Guilty Plea: Providence Inquiry	13:2:137
Guilty Plea: Providence Inquiry	13:2:136
Guilty Plea: Providence Inquiry	13:1:66

153. Effect of guilty plea; waiver of objections and defenses	
<u>The Providence Inquiry: A Guilty Plea Gauntlet?</u>	13:4:251
<u>The Guilty Plea's Impact on Appellate Review</u>	13:4:236
Guilty Plea: Voluntariness	13:5:379
Issues Waived by Provident Guilty Plea	13:5:354
Guilty Plea: Providence	13:4:301
Guilty Plea: Providence	13:3:222
Pretrial Agreement: Enforceability	13:3:209

VI. EVIDENCE AND WITNESSES

160. Evidence in general; judicial notice	
Evidence: Admissibility	13:4:300
161. Presumptions and burden of proof	
<u>Burdens of Proof, Persuasion and Production: A Thumb on the Scales of Justice?</u>	13:1:24
Burden of Proof: Exceptions to Punitive Regulations	13:1:57
162. Admissibility and effect in general	
Evidence: "Fresh Complaint"	13:4:301
164. Documentary evidence; photographs	
Evidence: Authentication	13:3:221
Evidence: Admissibility of Record of Nonjudicial Punishment	13:2:221
Sentencing: Completeness of Documentary Evidence Introduced by the Prosecution	13:1:55
165. Other offenses and character of accused	
Character Evidence: Admissibility	13:5:384
Evidence: Opinion and Reputation	13:4:309
Evidence: Admissibility of Prior Convictions	13:4:309
Evidence: Consideration of Law-Abiding Character	13:3:227
Evidence: Admissibility of Airman Performance Report	13:3:214

166. Illegally obtained evidence	
Warrant Requirement: "Good Faith" Exception	13:5:387
Search and Seizure: Collaboration with Foreign Officials	13:3:208
167. Hearsay; declarations of codefendants or coconspirators	
Evidence: Hearsay	13:6:455
Evidence: Admissibility	13:4:300
"Sanitizing" Testimony	13:4:294
Evidence: Admissibility of Co-Accused's Confession	13:2:141
168 Identification evidence	
Telfaire Instructions	13:6:436
Evidence: Photographic Lineup	13:1:69
Identification Evidence: Out of Court Hearing	13:1:67
169 Admissions, declarations, and confessions by accused	
Evidence: Admissibility	13:6:440
Offenses: Disrespect	13:5:376
Right to Counsel: Waiver	13:4:312
Rights Warnings: Waiver	13:4:310
170 _____ Effect of illegal detention or illegally-obtained evidence	
Evidence: Admissibility	13:6:445
Evidence: Admissibility	13:6:440
Trial Counsel: Closing Argument	13:6:438
Search and Seizure: Warrant Requirement	13:3:229
Article 31(b): Applicability	13:3:219
Search and Seizure: Lawfulness of Apprehension	13:3:216
Apprehension: Probable Cause	13:3:204
Excluding Voluntary Confessions	13:2:120

171. _____	Right to counsel; warnings	
	<u>Covert Agents and the "Undercover"</u>	
	<u>Exception to Article 31(b) UCMJ</u>	13:3:161
	Right to Counsel: Waiver	13:6:454
	Right to Counsel: Waiver	13:6:453
	Fifth and Sixth Amendment Rights:	
	Invocation	13:6:450
	Offenses: Disrespect	13:5:376
	Right to Counsel: Waiver	13:4:312
	Rights Warnings: Waiver	13:4:310
	Rights Warnings: Waiver	13:3:231
	Psychiatric Examination: Right to Counsel	13:3:229
	Custodial Interrogation: Waiver of	
	Right to Counsel	13:3:227
	Confessions: Voluntariness	13:2:137
	Offenses: Disrespect to NCO	13:2:136
	Trial: Right to Consult with Counsel	
	During Recess	13:1:69
	Investigation: Right to Counsel	13:1:68
173. _____	Determination of admissibility; evidence	
	Fourth Amendment: Seizure	13:6:451
	Fifth and Sixth Amendment Rights: Invocation	13:6:450
	Evidence: Admissibility	13:6:445
	Rights warnings: Waiver	13:3:231
	Search and Seizure: Collaboration with	
	Foreign Officials	13:3:208
174.	Opinion evidence; expert testimony	
	Evidence: Expert Testimony	13:6:455
	Evidence: Admissibility of Expert Testimony	13:3:206
175.	Weight and sufficiency	
	Search and Seizure: Articulate Suspicion	13:2:139

176.	_____ Jurisdiction	
	Jurisdiction: Subject Matter	13:6:440
	Jurisdiction: Assimilative Crimes Act	13:6:438
	Military Judge: Rulings on Motions	13:3:224
	Jurisdiction: Standard of Proof	13:2:130
177.	_____ Assault, escape, and resisting arrest	
	Offenses: Attempted Voluntary Manslaughter	13:5:381
178.	_____ Homicide	
	Offenses: Attempted Voluntary Manslaughter	13:5:381
	Offenses: Attempted Murder	13:5:377
179.	_____ Desertion, absence, or missing movement	
	Offenses: AWOL	13:4:302
180.	_____ Failure to obey order or regulation	
	Offenses: Violation of Regulation	13:4:302
181.	_____ Theft, robbery, burglary, or false pretenses	
	Offenses: Multiplicity	13:6:452
	Offenses: Robbery	13:6:444
	Offenses: Wrongful Appropriation	13:5:382
	Offenses: Unlawful Entry	13:5:382
	Offenses: Larceny	13:5:381
	Offenses: Receipt of Stolen Property	13:4:306

182. _____	Liquor or drugs, offenses related to	
	Offenses: Classification of Cocaine as Narcotic	13:6:457
	Offenses: Multiplicious	13:5:381
	Offenses: Aiding and Abetting	13:5:376
	Offenses: Classification of Cocaine as Narcotic	13:3:230
183. _____	Miscellaneous offenses	
	Offenses: Conspiracy	13:6:444
	Offenses: Adultery	13:5:380
184. _____	Defenses	
	<u>Applying the "Mistake of Fact" Defense</u>	13:6:408
	<u>A Call for a New Entrapment Instruction:</u>	
	<u>Banishing the "Reasonable Suspicion" Interloper</u>	13:3:148
	Right to Counsel: Pretrial Psychiatric Examination	13:6:453
	Proposed Instruction	13:6:432
	Insanity	13:4:297
185.	Witnesses in general	
	Defense Counsel: Inadequacy	13:5:371
	Military Judge: Abuse of Discretion	13:4:297
186.	Compulsory process; refusal to appear or testify	
	Sixth Amendment: Exclusion of Evidence	13:6:457
	Offenses: Conspiracy	13:6:444
	Trial: Striking of Testimony	13:2:135
	Witness: Compulsory Process	13:2:124
	Preserving Testimony of Witness Invoking Privilege Against Self-Incrimination	13:2:117
187.	Competency of witnesses	
	Witnesses: Competency Determination	13:1:66

189.	<u>Self-incrimination</u>	
	<u>Ethics Round Table</u>	13:6:429
190.	Immunity or agreement; informers	
	Pretrial Negotiations: Estoppel	13:6:440
	Immunity	13:6:438
	Convening authority: Disqualification	13:5:370
	Confidential Informants	13:5:364
	Petitioning Convening Authority for Specific Relief	13:4:294
191.	Examination of witnesses	
	Petitioning Convening Authority for Specific Relief	13:4:294
	Insuring Qualifications of Interpreters	13:1:54
192.	Cross-examination	
	Evidence: Opinion	13:6:456
	Witnesses: Impeachment	13:5:384
	Evidence: Production of Transcript	13:5:370
193.	Impeachment and corroboration	
	<u>The Jencks Act: An Introductory Analysis</u>	
	Evidence: Hearsay	13:6:455
	Character Evidence: Admissibility	13:5:384
	Witnesses: Impeachment	13:5:384
	Pretrial Lineup: Accused's Entitlement	13:3:230
	Evidence: Admissibility of Witness'	
	Personality Disorder	13:3:221
	Evidence: Admissibility of Airman	
	Performance Report	13:3:214

193. (cont'd)	
Attacking the Credibility of the Prosecutrix in Rape Cases	13:1:52

VII TIME FOR TRIAL AND CONTINUANCE

200. Time in general; speedy trial	
<u>Demonstrating Prejudice in "Speedy Trial" Cases</u>	13:2:89
Trial: Speedy Trial	13:4:297
201. Length of delay in general	
<u>Demonstrating Prejudice in "Speedy Trial" Cases</u>	13:2:89
202. Delay in perferring or forwarding charges	
<u>Demonstrating Prejudice in "Speedy Trial" Cases</u>	13:2:89
203. Computation and accountability	
<u>Demonstrating Prejudice in "Speedy Trial" Cases</u>	13:2:89
204. Period of restraint or restriction	
Trial: Speedy Trial	13:4:297
206. Excuses for delay; diligence	
Trial: Speedy Trial	13:4:297
211. Motions and determination thereof	
Guilty Plea: Providence	13:6:447
213. Objections to delay and waiver	
<u>Demonstrating Prejudice in "Speedy Trial" Cases</u>	13:2:89

214. Continuance

<u>Demonstrating Prejudice in "Speedy Trial" Cases</u>	13:2:89
Judge: Denial of Continuance	13:6:456
Trial: Request for Continuance	13:3:216
Trial: Continuance	13:2:134

VIII Trial

224. Place of trial; change of venue

Witness: Compulsory Process	13:2:124
-----------------------------	----------

226. Custody and restraint of accused

Trial: Presence of Guards in Courtroom	13:6:457
Excess confinement	13:5:367

228. Statements and conduct of military judge

<u>Ethics Round Table</u>	13:6:429
Sentencing: Evidence in Aggravation	13:5:383
Military Judge: Usurption of Fact-Finder's Function	13:5:380
Military Judge: Impartiality	13:5:212

229. Trial counsel

<u>Ethics Round Table</u>	13:6:429
<u>Sentencing Arguments: Defining the Limits of Advocacy</u>	13:4:268
Trial Counsel: Conduct	13:6:458
Trial Counsel: Misconduct	13:2:128

230. Counsel for accused

<u>The Professional Responsibilities of Defense Counsel in Uncontested Courts-Martial</u>	13:5:318
Professional Responsibility: Accused's Falsification of Testimony	13:5:373
Defense Counsel: Inadequacy	13:5:371

230. (cont'd)		
	Appellate Review: Duty to Raise Noted Issues	13:5:368
	Responding to Allegations of Ineffective	
	Representation	13:4:295
231. _____	Choice of counsel; appointment and protection	
	of right	
	<u>Ethics Round Table</u>	13:3:184
	Judge: Denial of Continuance	13:6:456
	Right to Counsel: Pretrial Psychiatric	
	Examination	13:6:453
	Right to Counsel	13:6:433
	Trial: Right to Consult with Counsel	
	During Recess	13:1:69
232. _____	Adequacy of representation; multiple representation	
	<u>Ethics Round Table</u>	13:6:429
	<u>Ethics Round Table</u>	13:3:184
	Conflict of Interest: Former Defense Counsel	13:6:455
	Post-Trial Review: Service	13:6:452
	Instructions: Failure to object	13:5:373
	Professional Responsibility: Accused's Falsification of	
	Testimony	13:5:373
	Defense Counsel: Inadequacy	13:5:371
	Appellate Review: Duty to Raise Noted Issues	13:5:368
	Responding to Allegations of Ineffectiveness	13:2:116
	Burden of Proof: Exceptions to Punitive Regulations	13:1:57
233. Mental capacity, determination of		
	Right to Counsel: Pretrial Psychiatric Examination	13:6:453
	Military Judge: Usurpation of Fact-Finder's Function	13:5:380
	Insanity Defense: Standard of Mental Responsibility	13:3:218
	Mental Capacity: Competence to Stand Trial	13:2:142

234. Reception of evidence; confrontation with witnesses	
Military Judge: Abuse of Discretion	13:4:297
"Sanitizing" Testimony	13:4:294
Instructions: Curative	13:2:125
236. Argument and conduct of counsel	
<u>Sentencing Arguments: Defining the Limits of Advocacy</u>	13:4:268
Trial Counsel: Conduct	13:6:458
Trial Counsel	13:6:438
Military Judge: Impartiality	13:3:212
Evidence: Assertion of Fourth Amendment Rights	13:1:70
237. Instructions	
Military Judge: Instructions	13:6:439
Military Judge: Instruction	13:5:376
Instructions: Lesser-included officers	13:5:372
Accessory After the Fact	13:5:362
Evidence: Admissibility	13:4:300
Defenses: Duty to Instruct	13:4:298
Law of Principals	13:4:292
238. _____ Duty to instruct; evidence raising issues	
Offenses: Adultery	13:5:380
Military Judge: Usurpation of Fact-Finder's Function	13:5:380
Instructions: Lesser-Included Offenses	13:5:372
Accessory After the Fact	13:5:362
Military Judge: Duty to Instruct	13:4:305
Evidence: Admissibility	13:4:300
Defenses: Duty to Instruct	13:4:298
Law of Principles	13:4:292
Military Judge: Duty to Instruct	13:3:223
Military Judge: Duty to Instruct	13:3:212
Burden of Proof: Exceptions to Punitive Regulations	13:1:57

239.	_____	Included Offenses	
		Instructions: Lesser-Included Offenses	13:5:372
		Offenses: Aggravated Assault	13:3:225
240.	_____	Defenses	
		<u>A Call for a New Entrapment Instruction: Banishing the</u>	
		<u>"Reasonable Suspicion" Interloper</u>	13:3:148
		Instructions: Entrapment	13:6:456
		Proposed Instruction	13:6:432
		Military Judge: Duty to Instruct	13:3:212
		Insanity	13:3:148
		Burden of Proof: Exceptions to Punitive Regulations	13:1:57
241.	_____	Instructions on evidence	
		Telfaire Instructions	13:6:436
		Instructions: Failure to Object	13:5:373
		Instructions: Lesser-Included Offenses	13:5:372
		Evidence: Admissibility	13:4:300
		Military Judge: Duty to Instruct	13:3:212
		Paid Informant Instructions	13:2:116
		Burden of Proof: Exceptions to Punitive Regulations	13:1:57
242.	_____	Sufficiency or propriety; error cured by other instructions	
		Accessory After the Fact	13:5:362
		Offenses: Solicitation	13:4:306
		Law of Principals	13:4:292
		Military Judge: Duty to Instruct	13:3:215
		Instructions: Curative	13:2:125

243. _____	Requests and objections	
	Military Judge: Instructions	13:6:439
	Proposed Instruction	13:6:432
	Military Judge: Instruction	13:5:376
	Instructions: Failure to Object	13:5:373
	Defenses: Duty to Instruct	13:4:298
	Law of Principals	13:4:292
244.	Deliberation and voting	
	Findings: Deliberations	13:6:439
	Telfaire Instructions	13:6:436
	Verdict: Impeachment by Members' Affidavits	13:3:227
	Trial: Court Members' Misconduct	13:2:129
245.	Verdict and findings; impeachment	
	Findings: Finality	13:6:450
	Verdict: Impeachment by Members' Affidavits	13:3:227
	Military Judge: Duty to Issue Special Findings	13:3:213
246. _____	Revisions and reconsideration	
	Findings: Finality	13:6:450
	Verdict and Findings: Finality	13:2:140
247.	New Trial	
	<u>New Trial Petitions Under Article 73, UCMJ</u>	13:1:2
	Appellate Review: <u>New Trial Petitions</u>	13:6:443
248.	Objections and waiver	
	Instructions: Failure to Object	13:5:373
	Issues Waived by Provident Guilty Plea	13:5:354

IX SENTENCE

261. Presenting evidence; matters in mitigation,
extenuation, or aggravation

Evidence: Sentencing	13:6:443
Sentencing: Rebuttal Evidence	13:5:383
Sentencing: Evidence in Aggravation	13:5:383
Evidence: Admissibility of Prior Convictions	13:4:304
Evidence: Admissibility of Prior Conviction	13:3:220
Evidence: Admissibility of Prior Convictions	13:3:220
Defense Witnesses: Testimonial "Surprises"	13:3:197
Admissibility of Aggravation in Contested Cases	13:3:196
Presentencing Evidence: Previous Convictions	13:1:62
Evidence: Admissibility of Reprimand	13:1:58
Sentencing: Completeness of Documentary Evidence Introduced by the Prosecution	13:1:55
Presenting Favorable Sentencing Evidence	13:1:50

262. _____ Other misconduct in general

Evidence: Sentencing	13:6:443
Sentencing: Rebuttal Evidence	13:5:383
Evidence: Admissibility During Sentencing	13:2:130
Sentencing: Applicability of Article 31 UCMJ	13:2:123
Evidence: Admissibility of Reprimand	13:1:58

263. _____	Convictions without counsel	
	Evidence: Admission of Summary Court-Martial Conviction	13:5:379
	Admissibility of Prior Summary Court-Martial Convictions	13:5:366
	Previous Convictions: Summary Court-Martial	13:1:66
	Presentencing Evidence: Previous Convictions	13:1:62
264. _____	Non-judicial punishment	
	Evidence: Admission of Summary Court-Martial Conviction	13:5:379
	Admissibility of Prior Summary Court-Martial Convictions	13:5:366
	<u>Mathews Inquiry</u>	13:5:365
	Evidence: Records of Nonjudicial Punishment	13:4:305
	Vacation of Suspension: Right to Counsel	13:4:299
	Evidence: Admissibility of Record of Nonjudicial Punishment	13:3:221
	Presentencing Evidence: Vacation of Nonjudicial Punishment	13:1:64
265.	Presentencing argument	
	<u>Sentencing Arguments: Defining the Limits of Advocacy</u>	13:4:268
	Sentence: Improper Argument	13:3:204
266.	Military judge's role; instructions	
	Sentencing: Instructions	13:5:383
	Sentencing: Evidence in Aggravation	13:5:383
	Evidence: Admission of Summary Court-Martial Conviction	13:5:379

266. (cont'd)		
	Military Judge: Duty to Instruct	13:4:305
	Instructions: Sentencing	13:3:222
	Sentencing: Consideration of Accused's Perjury	13:2:126
267. Nature and extent of punishment; maximum punishments		
	Sentence: Limitation of Punishment	13:6:454
	Evidence: Admissibility of Prior Conviction	13:3:220
	Military Judge: Duty to Instruct	13:3:213
	Sentence: Maximum Punishment	13:2:138
268. Separate or multiple offenses		
	Sentence: Multiplicious Offenses	13:1:65
269. Effect of pretrial agreement		
	Sentence: Disparity Among Coactors	13:6:442
270. Construction and operation of sentence; effective date		
	Pretrial Agreement: Interpretation	13:6:452
271. Execution of sentence		
	Anti-Deficiency Act Violations	13:6:435
	Post Trial Confinement	13:6:433
	Appellate Leave	13:6:433
272. Objections and waiver		
	Evidence: Sentencing	13:6:443
	Admissibility of Prior Summary Court-Martial Convictions	13:5:366
	<u>Mathews Inquiry</u>	13:5:365
	Evidence: Records of Nonjudicial Punishment	13:4:305
	Evidence: Admissibility of Prior Convictions	13:4:304

X RECORD

280. Preparation and authentication in general

Record of Trial: Corrections 15:5:372

281. Verbatim record

Trial: Verbatim Record 15:4:299

282. Sufficiency to permit review

Record of Trial: Corrections 15:5:372

Trial: Verbatim Record 15:4:299

XI REVIEW OF COURTS-MARTIAL

(A) Initial Action on Record

290. Review or approval by convening authority

Excess Confinement 15:5:367

Convening Authority's Action: Sufficiency 15:4:304

Pretrial Agreements: Effect of Appellate Review 15:4:303

Guilty Plea: Providency 15:4:301

Petitioning Convening Authority for Specific Relief 15:4:294

Convening Authority: Duty to Follow

291. Disqualification of convening authority

Convening Authority: Disqualification 13:5:370

Convening Authority: Disqualification 13:1:60

292. Time for proceedings

Expeditious Post-Trial Processing 13:3:199

Post-Trial Review: Delay in Taking Final Action 13:2:134

294.	_____ Disqualification of officer	
	Staff Judge Advocate: Disqualification	13:5:384
295.	_____ Sufficiency; matters considered or omitted	
	Post-Trial Review: Adequacy	13:5:382
	Offenses: Aiding and Abetting	13:5:376
298.	_____ Matters affecting sentence; clemency	
	Post-Trial Review: Service	13:6:452
	Sentence: Disparity Among Coactors	13:6:442
299.	_____ Incorrect or misleading advice, opinion, or statement	
	Post-Trial Review: Adequacy	13:5:382
300.	_____ Hearing; opportunity for rebuttal	
	Post-Trial Review: Service	13:6:452
	Post-Trial Review: Rebuttal	13:4:307
	Post-Trial Review: Service on Substitute Counsel	13:3:226
	Post-Trial Review: Service	13:2:131
301.	_____ Determination or relief; approval; matters considered	
	Convening Authority: Duty to Follow Judicial Instructions	13:3:220

(B) Further Review

310. Courts of Military Review and Office of Judge Advocate General	
Article 69 Appeals	13:6:434
Guilty Plea: Providency	13:3:222
311. Appellate counsel	
Appellate Review: Duty to Raise Noted Issues	13:5:368
Excess Confinement	13:5:367
Appellate Review: Duty to Raise Noted Issues	13:4:298
Responding to Allegations of Ineffective Representation	13:4:295
313. Preservation of grounds of review	
<u>The Guilty Plea's Impact on Appellate Review</u>	13:4:236
Issues Waived by Provident Guilty Plea	13:5:354
Appellate Review: Duty to Raise Noted Issues	13:4:295
Pretrial Agreement: Enforceability	13:3:209
314. _____ Admission or exclusion of evidence	
Evidence: Admissibility of Airman Performance Report	13:3:214
317. Record and proceedings not in record	
Guilty Plea: Providency	13:3:222
318. Scope of review in general	
Appellate Review: Abuse of Discretion in Denying Clemency	13:1:55
320. Questions of fact	
Evidence: Admissibility	13:6:445

321. Harmless error		
	Evidence: "Fresh Complaint"	13:4:301
322. _____	Pretrial proceedings	
	<u>The Jencks Act: An Introductory Analysis</u>	13:6:391
	Offenses: Multipliciousness for Charging	13:3:225
323. _____	Evidence	
	Evidence: "Fresh Complaint"	13:4:301
324. _____	Trial matters	
	Instructions: Reasonable Doubt	13:2:125
329. _____	Affirmance; included offenses	
	Charges and Specifications: Sufficiency	13:6:449
332. _____	Remand; rehearing	
	Guilty Plea: Providency	13:3:222
333. Review by Court of Military Appeals, matters peculiar to		
	Appellate Review: Article 69, UCMJ	13:6:439
	Petitions to the Court of Military Appeals	13:6:434
	Appellate Review: Duty to Raise Noted Issues	13:5:368

