

T H E A D V O C A T E

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

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WHATEVER HAPPENED TO SPEEDY TRIAL?

It has almost been accepted as hornbook law in the military that once a motion to dismiss for lack of speedy trial is made, the prosecutor has the burden of showing that the delay was not unreasonable. Recent cases, however lead us to believe that this assumption may no longer be true.

In the case of United States v. Hounshell, 7 USCMA 3, 21 CMR 129 (1956) the Court of Military Appeals held that the right to a speedy trial, as guaranteed by the Sixth Amendment and by Articles 10 and 33 of the Code, is a substantial right, a denial of which can be redressed by the trial judge's dismissing the charges against an accused. Thereafter, in United States v. Callahan, 10 USCMA 156, 27 CMR 230 (1959), the Court announced that in determining whether a defendant had been denied a speedy trial, it would look at all the circumstances to see whether the time lapse was due to either purposeful or oppressive design on the part of the prosecution or to a lack of reasonable diligence. In the earlier speedy trial cases the Court of Military Appeals indicated that once the issue is raised, the facts necessary to a proper disposition of the question should be incorporated in the record. See United States v. Wilson, 10 USCMA 398, 27 CMR 472 (1959). See also Speedy Trial in Military Law, 8 AF JAG L. Rev. (No. 3), May-June 1966 at 33.

In United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959) the Court clearly placed the burden on the prosecution to show full circumstances of delay. In Brown the Court held that when it affirmatively appears that officials of the military services have not complied with the requirements of Articles 10 and 33, and the accused challenges this by appropriate motion, the prosecution is required to show that the lapse was not due to purposeful or oppressive design and that the prosecutor exercised reasonable diligence in bringing the case to trial. The law officer's calling on the accused to establish prejudice was held to be prejudicial error.

The Brown decision perhaps represents the ideological apex for the defense in speedy trial cases. Since that case the Court of Military Appeals appears to have diluted the proposition that the burden is on the prosecution to show reasonable diligence until one must wonder if, indeed, the burden has not shifted to the accused to show that he has been prejudiced by delay in the case. In United States v. Tibbs, 15 USCMA 350, 35 CMR 322 (1965), the Court held that a violation of Article 33 by failure to forward charges and allied papers to the general court-martial authority within eight days of the accused's confinement was not ground for reversing a conviction where the record of trial as a whole clearly showed the impracticability of compliance. The Court also found from evidence in the record that the Article 10 requirement that on arrest or confinement immediate steps shall be taken to inform an accused of the specific wrong of which he is accused was complied with when the accused was apprehended in the course of a housebreaking and attempted larceny.

The Tibbs case was decided against the appellant in spite of the law officer's apparent shifting of the burden to the defense to show prejudice. Judge Ferguson vigorously dissented in Tibbs arguing that the majority opinion was directly contrary to the law established in United States v. Brown, *supra*, and United States v. Schalck, 14 USCMA 371, 34 CMR 151 (1964).

The Tibbs decision may not require the defense to show prejudice in a speedy trial case, but it does appear to lighten the prosecution's burden of showing reasonable dispatch. More recent Court of Military Appeals cases, however, do seem to shift the burden to the defense. In United States v. Smith, 17 USCMA 55, 37 CMR 319 (1967), the Court held that the law officer did not err by inquiring whether the accused had been injured in any way by a period of pretrial confinement and by ruling against a defense motion to dismiss without hearing the prosecution's explanation of the delay, because no "serious injury" had been done to the accused by the delay. The Court opined that the actual consequences to the accused of any interruption in the proceedings against him are always relevant, since an apparently satisfactory explanation for a particular

delay might be revealed as unreasonable in the light of specific harm occasioned thereby. Once again Judge Ferguson dissented, indicating his belief that the majority had placed the burden on the defendant to show prejudice in contravention of the principle enunciated in United States v. Brown, supra.

The rationale of the Smith case was again applied in United States v. Parish, 17 USCMA 411, 38 CMR 209 (1968). There, the Court held that the appellant had been prejudiced by the delay between imposition of pretrial confinement and formal charges. Prejudice in the Parish case consisted of the loss of two potential defense witnesses occasioned by delay in the appointment of defense counsel while the accused was in pretrial confinement unable to help himself. Judge Quinn's dissent argued that the appellant was not prejudiced and, hence, the motion to dismiss was properly denied.

The most recent speedy trial cases decided by the Court of Military Appeals are even more explicit in their requirement that the defense establish prejudice. In United States v. Hawes, 18 USCMA 464, 40 CMR 176 (1969), the Court held that even though the record did not indicate that the accused was directly informed of the charges against him at the time of his pretrial confinement, an "omission of that kind is not ground for reversal of an otherwise valid conviction if the accused is not prejudiced." Relying heavily on United States v. Tibbs, supra, the Court in Hawes also held that a failure to comply with the Article 33 mandate that within eight days of the time the accused is placed in confinement a report be made to the general court-martial authority as to the status of the charge does not require reversal in the absence of prejudice. This decision of the Court was unanimous.

In United States v. Przybycien, 17 USCMA 120, 41 CMR 120 (1969), the Court found that the time expended in bringing the accused to trial did not so inordinately prolong the period of pretrial confinement as to deprive him of a speedy trial. In a footnote to its opinion the Court indicated that violations of Articles 10 and 33 would not justify reversal in the absence of

a showing of prejudice. In United States v. Mladjen, 19 USCMA 159, 41 CMR 159 (1969), the Court again held that the steps taken by the Government to bring the charges to trial were not unreasonable or oppressive. And again the Court reaffirmed its position that violations of Articles 10 and 33 are harmless without a showing of actual harm occasioned thereby.

Finally, in United States v. Pierce, 19 USCMA 225, 41 CMR 225 (1970), the Court held that although the accused was not tried on an AWOL charge until approximately 13 months after termination of his absence, he was not denied his right to a speedy trial where it appeared that, except for 35 days immediately after termination of his absence, the accused was under no restraint and there was no indication that delay impaired his ability to defend himself.

Summarizing the state of the law of speedy trial from the foregoing analysis is no simple matter. However, several observations can be made. The old dictate of United States v. Brown, supra, that where a violation of Articles 10 and 33 is challenged by defense motion, the prosecution must carry the burden of showing reasonable diligence and absence of oppressive design, does not appear to be viable. Rather, it seems that the Court will examine the record as a whole to determine whether the steps taken by the Government to bring the accused to trial were unreasonable or oppressive. Although the Court has not specifically so held, as a practical matter, except in extreme cases, a defendant will have to show prejudice to carry his motion to dismiss. Clearly, technical violations of Articles 10 and 33 are not grounds for dismissal of charges absent a showing of specific harm occasioned thereby. Whether the Court of Military Appeals is placing an initial burden upon the defense to show prejudice in connection with a motion to dismiss for denial of speedy trial or whether the Court is merely allowing the defense to show that an otherwise reasonable pretrial delay is unreasonable and oppressive by virtue of specific harm is unclear. What is clear, however, is that trial defense counsel can no longer be content to raise the issue and require the prosecution

to justify pretrial delay. Trial defense counsel should treat the matter as if he had the burden of showing actual prejudice and, wherever possible, should present evidence of such prejudice in connection with his motion to dismiss.

SCIENTIFIC EVIDENCE OF INTOXICATION*

Medical and scientific evidence is often used in addition to, or in lieu of, lay evidence to prove intoxication. In order to aid the defense attorney in presenting or attacking evidence of this sort, we offer defensive approaches to evidence of "clinical" observations of drunkenness and to laboratory measurements of the alcohol contents of body fluids or breath.

"Clinical" symptoms of drunkenness, (e.g. slurred speech, reeking breath, staggering gait, bloodshot eyes) are those sensory elements of drunkenness known to common experience. A witness need have no special training to be capable of observing these characteristics. Even if the witness is a medical doctor who can characterize his observations of these symptoms as "clinical", the basic nature of the evidence is not changed. Often, an experienced policeman will be as qualified as a medical doctor with respect to making "clinical" observations of drunkenness. Moreover, the exposure of people generally to drunkards is common enough that it is hard to imagine a court refusing to hear a lay witness testify as to the drunkenness of another.

Many of the clinical symptoms of drunkenness, however, are also symptoms of other pathological conditions. See Donigan, Chemical Tests and the Law (1966). For example, the following symptoms of drunkenness are associated with these various other diseases and physical conditions:

1. Acetone Odor of Breath (a fruity odor that can be mistaken for the odor of alcohol) can be symptomatic of stomach ulcers, diabetes, food poisoning or a brain concussion.

*/This article was prepared by CPT David D. Knoll, JAGC Fellow, U.S. Army In-Service Professional Training Program in Forensic Medicine, Armed Forces Institute of Pathology.

2. Ataxia (failure of muscular coordination) may also reveal the presence of Huntington's Chorea, "St. Vitus dance", labyrinthitis (an infection of the inner ear), pernicious anemia, and spinal cord lesions.

3. Delirium can be the result of blood loss, brain concussion, diabetes, or uremia.

4. Drowsiness is symptomatic of acute anemia, brain concussion, diabetes, or uremia.

5. Flushed Face can be the product of acne rosacea (chronic inflammation of the face and nose), apoplexy (stroke), diabetes, epilepsy, or indigestion.

6. Speech Disorders can be symptomatic of adenoids, cleft palate, facial paralysis, infection of the tongue, migraine, or multiple sclerosis.

7. Vertigo (dizziness) may reveal the presence of a cerebral tumor or syphilis, anemia, multiple sclerosis or eyestrain.

This list is, of course, not exhaustive, and counsel should consult a pathologist for more detailed information when a case involves evidence of drunkenness by "clinical" observation. During the cross-examination of a medical expert who has diagnosed a person as drunk on the basis of gross "clinical" observations, counsel should ask whether the witness has excluded the possibility that other pathological conditions may be the cause of specific symptoms used to diagnose these other conditions, whether he actually performed those tests, and if not, how he could be certain that drunkenness, and not some other condition, was operating to produce the symptom.

When a lay witness testifies that a person was drunk, he, too, should be questioned about his acquaintance with the other pathological conditions which can cause the symptoms on which he bases his conclusions. If he does not know all the ways these symptoms can be caused, he

should be forced to so admit, and his conclusion should be subjected to challenge. Needless to say, if the witness has other objective evidence of inebriation, such as having seen the person consume great quantities of liquor, this line of cross-examination is not recommended. Often, however the physician will not have such evidence.

Evidence of drunkenness can also be presented by laboratory analysis of the alcohol content of body fluids (blood and urine) and breath.

In most cases, alcohol is ingested into the body by drinking. It is absorbed rather slowly through the stomach wall into the capillary circulation, but the rate of absorption increases rapidly as the stomach contents are emptied into the small intestine. The length of time required for alcohol to be absorbed completely into the bloodstream depends upon a number of factors, such as the amount and nature of food already in the stomach (fats and sugars will slow absorption), the amount and strength of the liquor consumed, and the permeability of the stomach and intestine. Thus, on an empty stomach, complete absorption may take place in as little as thirty minutes. If food is present, it may take as long as three or four hours.

Once absorbed into the bloodstream, the alcohol is distributed throughout the water compartments of the body. Therefore, bone, fat, and hair, having low water content, will have a low alcohol content as compared to the rest of the body. Tissues such as the brain and liver will have a correspondingly higher concentration of alcohol. Elimination of the alcohol from the body commences immediately, by process of oxidation and excretion. Most of the alcohol (about 95%) is oxidized--that is, changed by the body into acetic acid, and, finally, carbon dioxide and water. The remainder stays unchanged until excreted in the breath, urine or perspiration. The time required for complete elimination of alcohol from the body also varies, depending upon the size of the individual, his general

state of health, and the amount of alcohol consumed. The usual rate is about 15 to 20 milligrams percent per hour.

The methods for reporting blood alcohol levels are not uniform throughout the United States, and thus may be a source of some confusion for counsel. The method usually used by US Army laboratories is to express alcohol levels in terms of milligrams (mg) per 1 milliliter (ml) of blood--for example, 1 mg of ethanol per 1 ml of blood. This is a weight to volume reporting procedure, and simplifies the calculation of the laboratory, since the blood is usually put into the test system by measuring it in a calibrated glass tube (pipette).

In most legal and law enforcement literature, the amount of alcohol per 100 ml of blood is used. For example, 1 mg per 1 ml becomes 100 mg per 100 ml, when multiplied by 100. A short-hand method is used in speaking, and frequently in writing; thus, 100 mg per 100 ml becomes 100 mg % blood alcohol, read as: "100 mg percent of blood alcohol."

In the civilian community, percentage figures are commonly used. For example, 100 mg % becomes a blood alcohol level of 0.1%. This is calculated as follows:

$$100 \text{ mg} = .1 \text{ gram (gm)}$$

$$\frac{.1 \text{ gm of alcohol}}{100 \text{ ml of blood}} \times 100 \text{ (to convert to \%)} = \text{of alcohol.}$$

$$1 = 0.1\% \text{ blood alcohol}$$

Almost 300 tests have been developed and used for the determination of the presence and amount of ethyl alcohol (ethanol) in blood, body fluids and body tissues. While most of these tests are no longer used, they still confuse the literature and lend complexity to a relatively simple subject. See Committee on Medicolegal Problems, AMA, Alcohol and the Impaired Driver. (1968).

Most tests for alcohol in blood and tissue are based upon three different principles:

1. Oxidation-reduction reactions. A chemical agent is used to oxidize the ethanol in the blood to a predetermined end point. The test measures how much the reagent is reduced by the process, and the results are compared with predetermined standards to arrive at a blood alcohol level.

2. Enzymatic methods using the enzyme, alcohol dehydrogenase. This is really a reduction method, using an enzyme to attack and reduce the ethanol. The test measures the amount of the reduced compound, DPN.

3. Gas chromatographic methods. This device measures the physical properties of a vapor or distillate, e.g., direct measurement of the ethanol.

The oxidation-reduction methods for blood alcohol levels have been used for many years, and while non-specific for alcohol (they measure other substances as well), they are reliable when properly performed and controlled. If procedures are used in conjunction with the test which remove interfering substances (the substances which cause nonspecific reactions), they are excellent.

The method described in the US Army Manual, TM 8-227-6, 1964, Laboratory Procedures in Clinical Chemistry and Urinalysis, designated the Micro-diffusion Method of Leifiet, is an oxidation-reduction procedure. It suffers because no procedure is incorporated for removing interfering substances; thus, it is a test for total reducing substances in the blood and not for ethyl alcohol alone.

A large group of tests which generally rely upon the oxidation-reduction principle analyze a sample of breath rather than a sample of blood. These "breath-o-lizer" tests are used primarily by law enforcement officers. Since the breath alcohol level is proportionate to the blood alcohol over a wide range, they are very accurate methods. The problem of interfering

substances is insignificant because these substances are not vaporized to any appreciable extent; and thus, they appear in the breath in insignificant concentrations. The results obtained by a well-trained, knowledgeable technician are generally reliable.

The more recently developed enzymatic test is considerably more specific, and is not affected by the large number of interfering substances that react in the oxidation-reduction tests. Those oxidation-reduction tests which do not incorporate a means for removing interfering substances should be used only as screening tests, and the enzymatic test should be performed as a corroborative test on all specimens of medicolegal importance.

The gas chromatographic methods are specific and are, without question, the methods of choice. They are not affected by nonspecific interfering substances. They are included in the methods used at the Armed Forces Institute of Pathology on all aircraft accident cases. Unfortunately, the cost of the apparatus at present usually limits their use to large toxicology laboratories. Such laboratories perform sufficient numbers of examinations to justify the cost of this exceedingly reliable, simple and accurate method.

In the evaluation of the reliability of all blood alcohol determinations, counsel should carefully investigate the following before accepting the blood alcohol level as valid:

1. Was the blood sample taken using a new or chemically clean syringe and needle or vacuum blood container and needle?
2. How was the skin prepared before taking the sample? Be sure that alcohol, acetone, methyl alcohol, tincture of green soap (containing alcohol), etc., were not used in preparing the skin.
3. Was the container labeled before or immediately after the specimen was drawn? Investigate carefully to

be sure there was no chance for the specimen to be mixed up with another. Counsel might be surprised how often this occurs.

4. Was the chain of custody correct? Don't accept it at face value.

5. What was the method for storing the specimen? Was the place for storage (such as a refrigerator) locked and properly refrigerated? Does a log book exist?

6. What were the procedures for transferring the specimen from the storage container to the individual who performed the examination?

7. What method was used for the blood alcohol determination, and what were the qualifications of the individual who performed the test? Make sure that whole blood, not serum or plasma, the liquid portion of the blood, was used. The result will be approximately 10% higher if plasma or serum were used.

8. Were positive and negative controls run simultaneously with the determination? Positive controls must be performed to assure that the method is detecting alcohol according to the previous calibration of the instrument, and the calibration curve used to read the alcohol level. The negative controls assure that the test is not giving a false positive reaction.

9. Were the tests run in duplicate, and were positive reactions with nonspecific oxidation-reduction tests repeated using the specific enzymatic or gas chromatographic tests? These test procedures must also be controlled.

10. The breath test should be investigated to determine the qualifications of the officer performing the test, and whether or not the apparatus was operated accordingly to the instructional manual supplied with the instrument. Be sure that an adequate time elapsed between the last intake of alcohol and the time the test was performed. At least 15 minutes must elapse or a false reading (high) will result.

11. If urine was used, be sure that the bladder was emptied, the specimen discarded, and a new specimen collected during the next 15 or 30 minutes, followed by a second specimen in approximately 30 minutes. Remember that urine alcohol is, on the average, approximately 30% higher than blood alcohol, with a range of 18-50% higher.

Counsel's objective, should be, in all of these cases, to determine whether or not a reliable examination was performed on a properly identified specimen under controlled conditions.

RECOMMENDATIONS FOR RETENTION: LOST OPPORTUNITIES

Effective representation by defense attorneys at trial requires that all favorable information beneficial to an accused be brought to the attention of the court and the convening authority. Yet in many cases written recommendations by commanding officers that soldiers be retained in the service lie dormant in the allied papers, and they are never brought to the attention of either the court or convening authority.

Although it is true that Paragraphs 32f(4)(e) and 33i of the Manual for Courts-Martial, United States, 1969 (Revised edition) require the forwarding of such recommendations for disposition once they have been made, and Paragraph 35c directs staff judge advocates to place them in their pretrial advices to convening authorities, it is not uncommon for staff judge advocates to be either unaware of, or to ignore, this requirement. When these Manual requirements are violated by staff judge advocates, military courts have searched for specific prejudice in individual cases.

An omission of a retention recommendation from the pretrial advice can result in prejudicial error in an appropriate case. In United States v. Stacy, No. 421764, CMR (6 May 1970), a case involving wrongful possession of marihuana and a stimulant drug, the court stated:

Had the unit commander's evaluation of the appellant been disclosed to the convening authority in the staff judge advocate's pretrial advice, "it is not beyond the realm of reason" that the convening authority might have referred this case to a court without jurisdiction to adjudge a punitive discharge. (Ms. Op. at 4).

The court in Stacy reduced the sentence adjudged by general court-martial to confinement at hard labor for six months, and partial forfeitures for the same period. This remedy resulted in the appellate court producing the same result as if the convening authority had referred the case to a special court-martial without punitive discharge authority.

It is more common, however, for the appellate courts to combine the failure to mention the retention recommendation in the pretrial advice with the same omission in the post-trial review and then accord relief on the sentence. For example, in United States v. Seabrooks, No. 418494 (ABR 8 August 1968) the court noted the omission in the pretrial advice and then set aside the adjudged punitive discharge saying:

This error [omission in pretrial advice] was further compounded when no mention of this recommendation was made in the post-trial review. (Ms. Op. at 2).

Other remedies have been granted. In United States v. Gonzalez, No. 418154 (ABR 9 August 1968) and United States v. Irwin, No. 420960 (ABR 19 December 1969) a new post-trial review and action were ordered, while a reduction of confinement by eighteen months was the remedy accorded in United States v. Armes, 40 CMR 662 (ABR 1968).

Defense attorneys must be aware, however, that prejudice will not be found in every case. Thus in United States v. Johnson, 40 CMR 407 (ABR 1968), rev'd on

other grounds, 18 USCMA 436, 40 CMR 148 (1969) and United States v. Skaggs, 40 CMR 344 (ABR 1968), where each appellant had a prior conviction by court-martial, the error was considered harmless. And if the offenses involved are considered particularly serious, often no relief will be accorded. United States v. Weaver, No. 422050, ___ CMR ___ (25 March 1970).

The United States Court of Military Appeals was faced with this problem in the recent case of United States v. Rivera, 20 USCMA 6, 42 CMR 198 (1970). While the court ordered a new post-trial review and action in this case, the case merits close reading by defense attorneys as Chief Judge Quinn only concurred in the result because "the accused's combat record is so substantial as to justify unusual caution in assessment at this level of review of the effect of the staff judge advocate's omission." Id. at 8, 42 CMR at 200. In addition, Judge Darden dissented pointing out that the trial defense attorney has a right to examine the pretrial advice, United States v. Beatty, 10 USCMA 311, 27 CMR 385 (1959), and as there was no objection during the trial, this issue was waived on appeal. He also recommended that the defense introduce favorable recommendations into evidence in mitigation rather than rely upon the staff judge advocate to make the matter of record.

It is anticipated that whether Rivera will be limited, as Chief Judge Quinn appeared to indicate, to soldiers with outstanding combat records will be answered in United States v. Boatner, No. 23,396 (COMA petition granted 21 October 1970). Boatner does not have a combat record, but he is a first offender with no prior nonjudicial punishments and the offense involved is merely absence without leave.

If staff judge advocates violate the Manual provisions requiring retention recommendations to be included in the pretrial advice, then defense attorneys should in those cases request the convening authority

to reconsider the decision to refer the case to trial by either a general court-martial or special court-martial with bad conduct discharge authority. At trial, all prior favorable recommendations should be introduced into evidence, and after trial they should be forwarded in an Article 38(c) brief for consideration by the convening, and higher, authority. Perhaps the greatest failure of trial defense attorneys in this area has been their passivity. Although this error has been in numerous cases, not once in recent years has a trial defense attorney submitted an Article 38(c) brief complaining of the error.

GUILTY PLEA PROCEDURE--DOES THE COURT OF MILITARY APPEALS STAND ALONE?

Since the Supreme Court has now ruled that a defendant need not admit his guilt in order to plead guilty [North Carolina v. Alford, 39 U.S.L.W. 4001 (U.S. 23 November 1970)], the Court of Military Appeals now stands as one of the few tribunals still requiring that admission before a plea will be accepted. In United States v. Care, 18 USCMA 535, 40 CMR 247 (1969), the Court of Military Appeals, purporting to apply the standards which the Supreme Court enunciated in Boykin and McCarthy, ruled that before a guilty plea can be accepted, the trial judge must "question the accused about what he did or did not do, and what he intended." Presumably if a defendant denied committing the offense, his plea is to be rejected.

Over a year ago, we noted that the judges in Care may have misread McCarthy and Boykin, and overlooked the Advisory Committee Notes to Rule 11, Fed. R. Crim. P. which makes it quite clear that an admission of guilt is not required before a plea can be accepted. See, e.g., McCoy v. United States, 363 U.S. 306 (D.C. Cir. 1966). There are cases, we said, wherein the accused may be reluctant to describe his involvement in the criminal scheme, but where he still may have a legitimate right to plead guilty. See THE ADVOCATE September 1969, p. 7.

The Alford decision implies that Care requires too much from a defendant:

[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly, consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

That a factual basis is required before a guilty plea can be accepted does not mean, as the Court of Military Appeals apparently assumed, that the basis must be established from the mouth of the accused. It may be shown equally as well by a proffer of evidence from the government, a stipulation, or a pretrial investigation report. The Supreme Court has reiterated that all that is constitutionally required before a plea can be accepted is an indication that the plea is knowingly, intelligently and voluntarily entered with full understanding of its consequences.

Although it may for a time result in fewer reversals of convictions on appeal, Alford represents a reasonable solution to a vexing problem. The requirement that the judge force the guilty-pleading defendant to explain his conduct out of his own mouth led to abuses. On occasion, judges would elicit from the accused evidence of complicity in a host of criminal activities not charged, but still forming part of the factual basis of the plea. In our view, an accused should have a right to plead guilty, knowingly and intelligently, without at the same time being forced to expound on his criminal activities or expertise.

"DROPSY" TESTIMONY

A New York judge has judicially recognized for what it was, the often fallacious testimony of police officers who testify time after time that narcotics were seized after being "dropped" by the defendant. Judge Irving Younger of the Criminal Court of New York City, writing in People v. McMurty, 314 N.Y.S.2d 194 (1970), called this evidence "dropsy" testimony, and noted that it is almost always suspect. After Mapp v. Ohio, 367 U.S. 643 (1961), the judge wrote, the number of cases in which the arresting officer testified that the narcotics were picked up after having been "dropped" by the defendant increased almost 70 per cent. After Mapp, he said, "the police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, the search is reasonable and the evidence is admissible."

In the McMurty case, the defendant testified candidly: "I saw Patrolman Frisna coming toward me. I knew that I had a container of marihuana in my pocket. I also knew, after twelve years of involvement with drugs and four or five prior convictions, that illegal search and seizure was my only defense. The last thing I would do is drop the marihuana to the ground."

We have not noticed a plethora of "dropsy" cases in the military, primarily because most narcotics cases in the military rest on barracks searches rather than searches of the person. Counsel should be alert, however, to "dropsy" testimony when it appears, and should stand ready to cross-examine vigorously in those cases.

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 * It is demeaning for the
 * defense attorney to refer to his
 * client as "the accused" or as
 * "the defendant". Appellations
 * such as these tend to depersona-
 * lize your client. Good defense
 * tactics on the other hand call
 * for humanizing the client and
 * making him appear to the jury
 * as a real person with human
 * problems and frailties. Thus,
 * the defense counsel should try
 * always to refer to his client
 * as "Specialist Smith or Private
 * First Class Jones." First names
 * are artificial and cloying, and
 * should be avoided.
 *

*
 * The defense counsel should
 * also try to identify himself
 * with his client's cause during
 * the trial, in order to transfer
 * the jury's good will from him
 * to his client. Counsel should
 * periodically confer with his
 * client throughout the trial, and
 * should try not to abandon him
 * during a recess simply to chat
 * amicably with the opposition.
 *

*
 * Finally, the defense
 * counsel should always appear
 * neat and crisp, and should
 * maintain a proper military
 * bearing during the trial. This
 * attitude, coupled with a measure
 * of respect for your client as
 * a person will help identify
 * your client with traits which
 * the military court members
 * consider important, and will
 * help shape their attitudes toward
 * him.
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THE MISCELLANEOUS DOCKET

Petitioner sought a writ of mandamus directing the Secretary of the Navy and The Judge Advocate General of the Navy to dismiss charges against him or to vacate his sentence and conviction. He was originally tried and convicted of, inter alia, lewd and lascivious conduct with an enlisted man. He successfully petitioned for a new trial on the ground that the two prosecution witnesses had admitted knowing each other, contrary to their testimony at trial. [United States v. Whitely, 18 USCMA 20, 39 CMR 20 (1968).] Prior to the commencement of the new trial, one of the witnesses committed suicide. Petitioner's motion to dismiss and to strike the witness' prior testimony were denied. The petitioner was again convicted. Before pursuing his normal appellate rights, the petitioner sought to obtain extraordinary relief from the Court of Military Appeals. His petition was denied without prejudice to raise the issue on direct appeal. Whitely v. Chafee, COMA Misc. Docket No. 70-61, (26 October 1970).

In Marks & Burgett v. Berg, COMA Misc. Docket No. 70-62 (21 October 1970), petitioners sought habeas corpus relief following their convictions for house-breaking and larceny. Following their trial and acquittal for larceny in a federal court, they were tried by the military on charges arising out of the same general transaction. The military judge dismissed the charges on the ground of collateral estoppel, but was directed to reconsider his decision by the convening authority. The petition was summarily denied by the Court.

At an Article 39(a) session, petitioner moved for a remand of the charges in his case to the convening authority for a new pretrial advice by the staff judge advocate. He cited the failure of the staff judge advocate to inform the convening authority that certain prosecution witnesses had made conflicting statements

and that certain key prosecution witnesses were accomplices. Following denial of the motion by the military judge, the petitioner sought a writ of mandamus in the Court of Military Appeals directing the military judge to grant the relief requested. The petition was denied because there was no showing that the Court's power, or that of any other reviewing authority, would be adversely affected by the ruling below. Nor was there any indication that the petitioner would be impeded in his defense. Higdon v. United States, COMA Misc. Docket No. 70-63 (4 November 1970).

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

CONSCIENTIOUS OBJECTORS -- VALIDITY OF ADMINISTRATIVE DECISION -- The accused, charged with willful disobedience of an order, moved to dismiss the charge on the ground that the order grew out of an unlawful act of the government--a denial of administrative due process in processing the accused's application for conscientious objector status. The military judge refused to hear the motion or receive evidence stating that he would submit the matter to the court-martial as a factual issue. The military judge did not allow the defense to introduce the accused's application into evidence and restricted the defense counsel's examination of several witnesses on this issue, ruling that the witnesses' assertions that they had complied with the regulation closed the matter. The military judge prior to instructions ruled that the matter raised by the defense was not in issue. The Court of Military Review, sitting en banc, stated that the legality of an order presents ordinarily only a question of law for the exclusive determination of the trial judge. Citing United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969), the Court noted that when the validity of an order depends upon the validity of the Secretary of the Army's decision, this decision and the acts of subordinates leading up to the Secretary's action are within the scope of "judicial responsibility." The Court indicated that the actions of the trial judge in the instant case

precluded judicial determination of this issue. The Court remanded the case for further proceedings under Article 39(a), Uniform Code of Military Justice, in which a military judge would hear the respective contentions of the parties on the question of the legality of the order. The military judge was directed to permit the presentation of witnesses and evidence and to enter findings of fact and conclusions of law. United States v. Larson, No. 421626 (ACMR 26 October 1970) (En Banc). Note: This case has been certified to the Court of Military Appeals by The Judge Advocate General.

DEFENSE COUNSEL -- INADEQUATE REPRESENTATION OF ACCUSED --
The accused pleaded not guilty to unauthorized absence and the plea was characterized by the Court of Military Review as a "sham plea of not guilty entered in unauthorized absence cases solely to avoid compliance with the mandate of the Court of Military Appeals enunciated in United States v. Care, 18 USCMA 535, 40 CMR 247 (1969)." In this case, the defense counsel stated: "We are pleading not guilty even though we are not contesting it, with the view that it will save the government time and money and the possibility of a reversal, considering the long involved inquiry into the providency of a guilty plea. . . ." The Court of Military Review cited its opinion in United States v. Clevenger, CMR (ACMR 1 October 1970), in which it stated that a military policy that affirmatively encourages an accused to forsake his privilege to plead guilty for purposes of expediency is improper and erroneous. A plea of guilty is a mitigating factor in determining sentence and has become an accepted principle in military trials for years. It is a factor to be considered not only by the sentencing body, but by the convening authority in acting upon the sentence. The Court, in the instant case, stated that the defense counsel's concern with saving the government "time and money" and avoiding the "possibility of reversal" amounted to "an abandonment of his role as appellant's advocate and the assumption of a position wholly incompatible with his

duties and responsibilities as a defense counsel." In this case, the appellant expressed a desire to return to duty, had a prior unblemished record of 18 months' service, and stated the reasons which prompted his absences. The Court held that the appellant had not received "the trial representation to which he was entitled" and reversed the conviction. United States v. Schoolcraft, No. 424247 (ACMR 17 November 1970).

FINANCIAL INABILITY TO COMPLY WITH ORDER -- NECESSITY FOR INSTRUCTION -- The accused was charged with several offenses including willful disobedience of an order to get a haircut. His company commander testified that the accused claimed he had no money and refused a loan or gift of sufficient funds. The accused, although he testified on some of the offenses, did not mention any financial inability to comply with the order. The military judge denied the defense counsel's request for an instruction on the defense of financial impossibility. The Court of Military Review held that the appellant's theory of defense should have been submitted to the court although the issue was raised only by prosecution testimony. United States v. Barela, No. 422139 (ACMR 17 November 1970).

IDENTIFICATION -- ONE MAN "SHOWUP" IN HOSPITAL -- The defendant in an assault case was exhibited by the police to the victim of the beating while the latter was in a hospital awaiting treatment. The victim was in no danger of dying or losing consciousness. The Pennsylvania Superior Court held that such a "showup" was improper. The Court indicated that the closer the confrontation between victim and suspect to the time of the crime, the greater the likelihood that the witness can recall the image of the accused. "Similarly, the less the environment of the criminal episode has changed, the fewer the extraneous factors of suggestion that adhere to any confrontation between victim or witness and suspect." The Court noted that, when an identification takes place at a hospital, the victim no longer has the scene clearly in view; the background has changed, the lighting is different, and

the suspect is more vivid against the bland walls. Further, the fact that the police thought enough of the suspect to take him to the hospital bears on the victim's mind. "In short, the possibility of both suggestion and misidentification increase perceptibly." The Court indicated that where the victim is not in extremis, there is no reason not to wait until a formal line-up with counsel can be arranged either at the hospital or at the police station. The Court held that a rehearing was necessary to determine if the victim's in-court identification was tainted by the unlawful out-of-court identification. Commonwealth v. Hall, ___ A.2d ___ (Pa. Super. Ct. 18 September 1970); 8 Crim. L. Rep. 2046.

LINEUPS -- RIGHT TO COUNSEL -- An officer, who was assaulted by an unknown assailant, conducted, prior to any arrest, several lineups for the various witnesses to the assault and several witnesses identified the accused. The last of the witnesses, a Miss C, subsequently identified the accused in court. The accused was never advised of his right to counsel at any of these out-of-court lineups. The Court of Military Review rejected the arguments that United States v. Wade, 388 U.S. 218 (1967), did not apply to a self-help, private identification as distinguished from official actions, and that the accused's Wade rights had not been triggered at the time of the lineup. Although none of the personnel associated with the lineup were assigned to law enforcement duties, the Court held that a lineup, like a search, by one having direct disciplinary power over the accused is one under the authority of the United States. "The danger to the accused from impromptu identifications arranged by commanders is as great as from those arranged by investigative personnel." The Court noted that most civilian criminal courts appear to require an arrest prior to reaching the Wade threshold, but stated that, in the military, Wade rights are triggered "at that point in time in a criminal investigation when it ceases to be a general investigation and focuses on a suspect . . . that moment when the evidence crystallizes and tends to incriminate a particular individual." United States

v. Webster, 40 CMR 627, 634 (ACMR 1969). The Court stated that this rule is "more in keeping with the necessities and peculiarities of the military community where control and direction is executed under many circumstances far short of arrest." The Court held that the accused was a suspect when he was displayed before Miss C and his right to counsel was fully applicable at that point in time. The Court ruled though that Miss C's in-court identification was not tainted by the constitutionally defective lineup. United States v. Holmes, ___ CMR ___ (ACMR 23 October 1970).

POSSESSION OF MARIHUANA -- SUFFICIENCY OF THE EVIDENCE -- Police, with a search warrant, conducted a search in D's home for marihuana and narcotic drugs. The defendant and D were sitting in the living room, but were not smoking, when the police arrived. On a coffee table between them and in front of the defendant was an ash tray with three smoked cigarettes or cigarette butts, two packages of cigarette papers and loose greenish material and seeds. Under the couch on which the defendant was sitting and close to his feet was an open plastic bag containing similar material. On a table across the room from the defendant were three open plastic bags with more of this same substance. In the bedroom, a partially smoked home-rolled cigarette was found. The cigarettes and plastic bags all were found to contain marihuana. The defendant testified that D asked him to repair a television antenna, that he had been in D's home for about twenty or thirty minutes, and that he visited D frequently. He denied smoking any marihuana and denied having any knowledge that marihuana was there or that he had any connection with it. The Tennessee Court of Criminal Appeals held that the defendant's testimony was not impeached or rebutted and that the evidence did not support the verdict of guilty of possession of marihuana. Dishman v. State, ___ S.E.2d ___ (Tenn. Crim. App. 25 September 1970); 8 Crim. L. Rep. 2064.

PRETRIAL ADVICE -- IMPARTIAL APPRAISAL OF CASE -- The charge of unauthorized absence against the accused was originally

referred to a non-BCD special court-martial and the appellant submitted a discharge for the good of the service. The staff judge advocate, in advising the convening authority on the discharge, recommended that it be disapproved and that the charges be withdrawn and submitted to an Article 32 investigation. In this recommendation, the staff judge advocate, with an unsupported statement that the accused "has absolutely nothing going for him by way of extenuation and mitigation," indicated that the appellant should be tried by general court-martial. After the Article 32 investigation, the staff judge advocate, in his pretrial advice, recommended that an escape from custody charge be dismissed for lack of evidence and that the AWOL charge be referred to a general court-martial which it was. At the trial, a stipulation of fact was introduced which quoted the staff judge advocate as stating: "Although we can't prove it, we know he escaped and that is why we are sending it to a GCM." The Court of Military Review held that the accused was denied a fair and impartial pretrial appraisal of his case as required by Article 34, Uniform Code of Military Justice, in view of the staff judge advocate's stated views evidencing his predisposition to trial of the accused by a general court-martial and the stipulated statement attributed to him as to why the charge was referred to a general court-martial. The Court stated that, in fulfilling his statutory responsibility, the staff judge advocate must act "impartially and independently" and it is incumbent upon him "to use his intelligence and experience to keep from becoming at one stage of the proceedings so personally involved in the outcome as to preclude him from acting at a latter stage." The Court held that the accused was prejudiced to the extent that he was subjected to a more severe sentence than could have been imposed had he been tried by a special court-martial as originally planned. United States v. Danforth, No. 423971 (ACMR 9 November 1970).

RESIGNATION IN LIEU OF COURT-MARTIAL -- EFFECT ON COURT-MARTIAL -- Subsequent to the trial and conviction of the

accused and approval of his sentence by the convening authority, the Under Secretary of the Army accepted the accused's resignation for the good of the service "in lieu of trial," and directed that a general discharge under honorable conditions be issued. The resignation had been submitted a month and a half prior to the court-martial but the convening authority did not forward the resignation to Department of the Army until a week after the court-martial. The Court of Military Review held that acceptance of the resignation and issuance of the general discharge abated the court-martial proceedings. The Court noted that several decisions of the Court of Military Appeals, although not directly in point, indicated a philosophy of continuing appellate jurisdiction despite a discharge. However, in the instant case, the Court indicated that the resignation stemmed from the existence of the charges. The Court concluded that both the Secretary of the Army and the accused mutually understood that the acceptance of the resignation would constitute an action in lieu of trial. "Under these circumstances, we deem that the interests of justice require that the proceedings be abated." The Court therefore dismissed the charges stating that it was exercising its "inherent power" to "oversee the administration of criminal justice" in the Army. A concurring judge stated: "[I]f the accused is in fairness, equity, and good conscience to receive the benefits of his understanding with the Secretary we must set aside the findings and sentence and order the charges dismissed." United States v. Gwaltney, No. 421928 (ACMR 26 October 1970). Note: This case has been certified to the Court of Military Appeals by The Judge Advocate General.

SEARCH AND SEIZURE -- CONSENT OF ACCUSED -- The Court of Military Review, in holding that an accused consented to a search of an automobile, offered several guidelines regarding the issue of consent. The Court indicated that the prosecution's burden of establishing consent by clear and convincing evidence is "especially heavy" when the consenter is in custody or under arrest. This

burden cannot be satisfied by showing no more than acquiescence to authority. A denial of guilt by a suspect mitigates against a finding of consent on the basis that a rational individual who denies guilt would not willingly permit a search in which incriminating evidence is certain to be discovered. Conversely, when a purported consentor assists in the search by voluntarily furnishing a key or directing the officers to the contraband, consent is more likely to be found. The Court also noted that, when dealing with consent to an otherwise unlawful search, courts indulge every reasonable presumption against a waiver of fundamental constitutional rights. In regard to warning the accused prior to obtaining his consent, the Court noted that no specific form of constitutional warning is required. The Court, however, stated that resolution of the issue of consent "could be greatly alleviated if police authorities insured: (1), that consent be obtained in writing from those accused or suspected of crimes whenever the circumstances permit; (2), that the writing contain a recitation to the effect that no search can be conducted without consent, if such, be the case, and that discovered items might be used against the consentor; (3), that every effort be made to avoid trickery or threats; and (4), that, when practicable, more than one person witness the written or verbal consent." United States v. Holler, ___ CMR ___ (ACMR 3 November 1970).

SENTENCING -- UNSWORN STATEMENT BY ACCUSED -- The defense counsel, after findings, read an unsworn statement of the accused in which the accused requested to be discharged from the service in order to care for his mother. After arguments, the military judge, with the accused's acquiescence, questioned the accused, concluding with the observation: "Oh, I see, You don't feel any obligation to serve your country, huh?" The Court of Military Review held that it was error for the military judge, or a trial counsel, to question an accused who makes an unsworn statement in extenuation

and mitigation regardless of the interrogator's motives. (Paragraph 75c(2), Manual for Courts-Martial, United States, 1969 (Revised edition)). One exception is that the military judge can determine the previously unexpressed desires of an accused if his counsel argues for a punitive discharge. In the instant case, the Court found no prejudice and affirmed the conviction and the sentence. The Court noted, however: "[I]f trial judges continue to invade the accused testimonial rights, ad hoc reviews of this nature may prove inadequate to the task. In that event, other remedies may be necessary. See United States v. Donohew, 18 USCMA 149, 39 CMR 149 (1969); United States v. Bowman, USCMA, CMR (6 November 1970)." United States v. Hayworth, No. 424296 (ACMR 24 November 1970).

SENTINEL OFFENSES -- SUFFICIENCY OF THE EVIDENCE -- The accused was charged with being drunk on post as a sentinel in violation of Article 113, Uniform Code of Military Justice. The testimony indicated that four men were charged with the responsibility of manning a particular bunker in Vietnam and were to remain at this site during the hours prescribed. However, the sentry duty was to be performed in shifts. The Court of Military Review noted that the prosecution had not established for the record the special orders, if any, or operational procedures which governed the conduct and activities of the guard personnel. One of the four individuals on guard duty testified that the accused reported to his assigned bunker, but left before the scheduling of the shifts for duty, which, apparently, were accomplished informally by the individuals at the particular bunker. The Court therefore held that it could not be said that the accused was ever "on post as a sentinel." The Court stated that Article 113 defines a very serious offense, one which is capital in time of war. It governs conduct only of those whose sentinel duties "require constant alert at the time of the alleged violation, not every member of a guard or watch." The

Court further noted that parade ground precision or extended formality in the posting of combat sentinels was not required. However, it was required that the officer or noncommissioned officer of the guard, or written instructions inform the accused of his post, its limits, responsibility, and duration. The Court, in the instant case, affirmed the lesser included offense of drunk on duty in violation of Article 112, Uniform Code of Military Justice. United States v. Crane, No. 421844 (ACMR 16 October 1970).

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* The December issue of THE *
* ADVOCATE will be devoted *
* entirely to a critical *
* survey of the decisions *
* of The Court of Military *
* Appeals issued during its *
* October 1969 Term. *
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