

THE ADVOCATE

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MILITARY DEFENSE COUNSEL

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EDITOR'S NOTE

A special note of thanks and appreciation is extended to Captain John M. Nolan who recently departed the Defense Appellate Division to assume a position with the United States Court of Military Appeals. It was only through Captain Nolan's dedication and persistence as Editor-in-Chief that THE ADVOCATE achieved its goal of regular publication while continuing to maintain a high standard of quality. The Editorial Board extends their best wishes to Captain Nolan in his new position.

THE FIELD DEFENSE SERVICES OFFICE:
A NEW SOURCE OF ASSISTANCE FOR THE FIELD DEFENSE COUNSEL

The Judge Advocate General has expressed great interest in the continued improvement in the quality of defense services. A major step in the enhancement process was his direction that a separate Field Defense Services Office be activated within Defense Appellate Division on 1 October 1976.

The mission of this office is to provide a source of defense oriented assistance beyond that presently available from the installation senior defense counsel and the major command senior defense counsel. A primary function of the Field Defense Services Office will be to provide timely responses to telephonic or written requests for assistance on questions of trial tactics and ethical guidance for use at trial. The office will also assume partial responsibility for the continuing legal education of defense counsel, not only through a block of basic class instruction, but also through the presentation of instruction at a semi-annual CLE course for defense counsel and periodic regional defense counsel conferences. The Office will also supplement THE ADVOCATE through prompt dissemination of fresh defense-related information by means of electronic message.

To insure that the Field Defense Services Office performs as designed, it is essential that a two-way avenue for information and feedback be established. One of the major purposes of the regional conferences and field visits is to establish greater personal and professional contact between those officers staffing the Field Defense Services Office and field defense counsel. In order to encourage and facilitate this contact, the Field Defense Services Office will be staffed only by officers who have extensive trial experience and expertise. Field defense counsel are urged to take full advantage of this pool of experienced trial attorneys.

Due to the dependence of the Field Defense Services Office on personal and telephonic contact, full-scale services to overseas commands will not be feasible. Those functions requiring personal contact, such as tactical assistance and regional conferences, will be fulfilled by coordination between the Field Defense Services Office and senior defense counsel in major overseas commands.

A more detailed description of the responsibilities and functions of the Field Defense Services Office may be found in the October issue of The Army Lawyer.

Written inquiries should be directed to Chief, Field Defense Services Office, Defense Appellate Division, U.S. Army Legal Services Agency, Nassif Building, Falls Church, Virginia 22041. Telephone inquiries may be made by calling (Autovon) 289-1390/1391/1392 or (Commercial) (202) 756-1390/1391/1392.

BRUTON -- NOT BURTON
MINIMIZING THE IMPACT OF A
CO-ACCUSED'S CONFESSION IN A JOINT TRIAL

A common problem facing trial defense counsel in a joint trial is the certainty that the prosecution will try to place in evidence the written or oral confession or admission of a co-accused which inculpatates both the accused and co-accused. This article will provide the practitioner with some basic resource material which can be used in support of efforts to minimize or negate the potential for prejudice inherent in the co-accused's confession.

Prior to the case of United States v. Gooding, 18 USCMA 788, 39 CMR 188 (1969), military law, as well as civilian law, held that the confessions of co-accused were admissible in a joint or common trial when accompanied by appropriate cautionary instructions. Della Paoli v. United States, 352 U.S. 232 (1957); United States v. Caliendo, 13 USCMA 405, 32 CMR 405 (1962); United States v. Borner, 3 USCMA 305, 12 CMR 62 (1953). But Gooding, supra, adopted the then-recently-announced rule by the Supreme Court in United States v. Bruton, 391 U.S. 123 (1968), which overruled Della Paoli, supra. In Bruton, the Court held that a confession by a co-accused was not likely to be ignored by the jury and cautionary instructions would be insufficient to protect the accused's Sixth Amendment right to confrontation where the co-accused was not subject to cross-examination. The Court also cited Jackson v. Denno, 378 U.S. 368 (1964), which noted that cautionary instructions cannot always be curative.

There is virtually no precedent in the military as to the proper procedure for handling the co-accused's confession in a joint prosecution. Prior to the Bruton decision, the Court of Military Appeals held that, in view of the availability of limiting instructions, the proposed use of the statement of one accused which implicated a co-accused did not establish good cause for the severance of a joint trial. United States v. Borner, supra. The Court has not reexamined this holding since the Bruton decision, however, the issue is now pending before the Court in the case of United States v. Pringle, Docket No. 32,181, granted 28 May 1976. The United States Army Court of Military Review has suggested that Bruton imposed a complete bar to a joint trial:

The effect of the new rule announced by the Supreme Court in Bruton v. United States, 391 U.S. 123 (1968), has yet to be determined. Until such time then as

the question is resolved, reason dictates that separate trials of co-accused should be directed where the confession of one is contemplated. United States v. Adkinson, 40 CMR 341 at 343 (ABR 1968).

Similar language can be found in a footnote to subparagraph 13-11f, Department of the Army Pamphlet 27-173, "Military Justice Trial Procedure," 15 October 1973 which notes that in a Bruton situation "the prosecution must forego the use of the confession, or the judge must grant a severance." Id. at 13-20 n.296. In contrast, subparagraph 140b of the Manual for Courts-Martial, United States, 1969 (Revised edition) merely requires the effective deletion of the co-accused's name:

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible against him only or against him and some, but not all, of his co-accused may not be received in evidence unless all references inculcating an accused against whom it is inadmissible are effectively deleted or the maker of the statement becomes subject to relevant cross-examination.

The deletion process, which is commonly referred to as redaction, seems to be the most favored procedure for handling a Bruton problem in the military. Unfortunately, the procedure often amounts to nothing more than the accused's name being "whited out" of the co-accused's statement. As will be seen, this is the least effective, and, from a defense counsel's perspective, least desirable method of complying with Bruton's mandate.

While the federal courts' usual practice is redaction, the deletion process as accomplished by those courts is much more stringent than merely inserting blanks in appropriate places. For example, in United States v. Gay, 522 F.2d 429 (6th Cir. 1975), redaction was held to be effective only after the co-defendant's name was deleted and "my friend" substituted, the jury was instructed to consider the confession only against the person who gave it, and the jury was not permitted to see the confession nor to take it into the jury room. In United States v. Dority, 487 F.2d 846 (6th Cir. 1973), the names of co-defendant were replaced with the words "another party" and the confession was then read to the jury. Even under these circumstances, the court held it was "more than likely the jury had little difficulty in linking the appellant with

the other party" but found the error harmless. 1/ Similarly, in United States v. Trudo, 449 F.2d 649 (2nd Cir. 1971), oral admissions by a co-accused were so redacted that "no reference to any other person or persons was made." Despite such efforts at effective redaction, the potential inadequacy of redaction was amply demonstrated in Serio v. United States, 401 F.2d 989 (D.C. Cir. 1968), where, even after the words "another man" were substituted and the confession was read to the jury, the D.C. Circuit reversed. From this sample of cases, it is apparent that the federal courts, while sanctioning the use of the redaction procedure, are extremely cautious in its execution. 2/

Grave concern for the efficacy of the redaction method was also expressed by the draftsmen of the American Bar Association's "Minimum Standards for Criminal Justice." Prior to the Bruton decision, the standards allowed redaction "only after all references to the moving defendant have been effectively deleted." ABA Standards, Joinder and Severance, §2.3a, (Tentative Draft, 1967). In the commentary to that subsection it was noted:

Editing of the confession is clearly an alternative which will usually be preferred by the prosecution, for in this way the confession can be used against the maker without the added expense of separate trials. There are, of course, instances in which such editing is not possible; the references to the co-defendant may be so frequent or so closely interrelated with references to the maker's conduct that little would be left of the statement after editing.

This is particularly true under the above standard, which requires that "all references to the moving defendant "be" effectively deleted". It is not enough to merely delete his name; if the statement indicates that another unnamed party is involved in the crime, the jury is

1/ Whether or not the Court of Military Appeals will follow federal precedent in applying "harmless error" to ineffective solutions to Bruton problems is not clear. If it does, it will be absolutely vital that defense counsel seek severance of his client's case.

2/ Indeed, the majority opinion in Bruton also expresses concern for the effectiveness of redaction. United States v. Bruton, supra at 134 n.10.

nearly certain to draw the inference that the co-defendant is this party. Moreover, "to substitute false names not sounding fictitious would give co-defendants the benefit of a wholly erroneous favorable inference." (citations omitted).

Following the Bruton decision, an amended standard was proposed and approved as a solution to the problem:

2.3 Severance of defendants.

(a) When a defendant moves for a severance because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not admitted into evidence;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the confession will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) * * *

(c) * * *

ABA Standards, Joinder and Severance §2.3(a)
(Approved Draft, 1968).

It should be noted that the approved standard deleted the requirement that all inculpatory references be "effectively deleted" but added that the confession, as deleted, "will not prejudice the moving defendant." In supplementary commentary, the reason for the change was made evident:

. . . . The change in the language of section 2.3(a)(ii) is only intended to give greater emphasis to the fact that courts must exercise great caution in permitting the prosecution to elect the deletion alternative. Given the decision in Bruton, it can be anticipated that the effectiveness of deletions will be more frequently challenged. In a great many cases the deletion alternative simply will not be available, as it will be impossible to remove all references to participation of another person in the crime without changing materially the substances of the statement. . . .

The standard provides that the prosecuting attorney is to elect one of three courses when the defendant moves for a severance because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him. This does not mean that it is for the prosecutor to decide, when he elects joint trial with a edited version of the statement, that the statement can be edited as required by section 2.3(a)(ii). This is a matter for the court to pass upon, and if the court rules that the requirements of section 2.3(a)(ii) cannot be met, then the prosecutor would have to elect one of the two remaining alternatives: joint trial at which the statement is not admitted into evidence; or severance of the implicated defendant.

At least one state court system, New York, does strictly adhere to the practice suggested by the ABA Standards. The New York Court of Appeals, while allowing the use of a redacted confession at a joint trial, places a heavy burden on the prosecution to redact the confession in a truly effective manner. See, People v. Boone, 22 NY 2d 476, 293 NYS 2d 287, 239 N.E. 2d 885 (1968). Under New York case law "effective redaction" means that all references to the co-accused or to the fact that there were other participants or associates in the enterprise are eliminated. People v. Baker, 23 NY 2d 307, 296 NYS 2d 745, 244 N.E. 2d 232 (1967); People v. Jackson, 22 NY 2d 446, 293 NYS 2d 265, 239 N.E. 2d 869 (1968); People v. Burrelle, 21 NY 2d 265, 287 NYS 2d 382, 234 N.E. 2d 431 (1967); People v. Cavanaugh, 48 AD 2d 949, 369 NYS 2d 214 (1975). If such redaction is not possible, severance is mandatory.

In contrast, the federal courts do not appear to shift such a heavy burden to the prosecution where a severance is sought in lieu of redaction. Under Rule 14 of the Federal Rules of Criminal Procedure, the defendant has the "difficult" burden of demonstrating prejudice and must show more than the fact that a separate trial might offer him a better chance of acquittal. See United States v. Companale, 518 F.2d 352 (9th Cir. 1975). There is federal case law, however, which suggests that the burden does lie with the prosecution. United States v. Deegen, 268 F. Supp. 580, 583-578 (1967).

Avoiding Redaction

The ultimate goal of a defense counsel faced with the prospect that a co-accused's statement incriminating his client will be introduced into evidence is to secure the severance of his client's case from the joint prosecution. Should severance prove unobtainable, defense counsel's secondary goal is to insure that the co-accused's statement is admitted without any incriminating references to his client. The basic strategy for the attainment of either goal is to convince the military judge that severance is a right, subject only to the government's ability and willingness to effectively redact the co-accused's confession.

Prior to trial, defense counsel should first determine whether the prosecution intends to use a co-accused's statement and whether the co-accused intends to testify on the merits. 3/ If the statement will be introduced and the co-accused does not plan to testify, a motion for appropriate relief under paragraph 69d of the Manual, supra, should be made at an Article 39(a) session. 4/ Paragraph 69d provides that in a

3/ In U.S. v. Taylor, Docket No. 32,510, COMA recently specified the issue of whether the subsection of the co-accused to cross-examination avoids the Bruton problem. See People v. Arunda, 407 P.2d (1965); U.S. v. Guajardo-Melendez, 401 F.2d 35 (7th Cir. 1968).

4/ Counsel should note that Bruton applies only to inadmissible hearsay statements of co-accused. See Dutton v. Evans, 400 U.S. 74 (1970) - Bruton will not apply to a statement admissible pursuant to a hearsay exception for co-conspirator's statements made during the concealment phase of the conspiracy. See also United States v. Newman, 49 CMR 676 (ACMR 1974) - statement of co-accused admissible as a spontaneous exclamation; United States v. Kelley, 526 F.2d 615 (8th Cir. 1975) - co-accused's oral statement implicating the accused admissible as declaration against penal interest; McLaughlin v. Vinzant, 522 F.2d 448 (1st Cir. 1975) - co-accused's oral statement admissible as an excited utterance or spontaneous exclamation. An analysis of these cases and the cases cited therein indicates that these exceptions do not involve the type of confession or oral admission which is the result of interrogation by police officers but rather co-accused's statements made prior to, or contemporaneously with, the commission of the offense.

joint trial, a motion for severance should be granted on a showing of "good cause" and that a "common ground" establishing such cause in "that the evidence as to the other accused will in some manner prejudice his [the accused's] defense." Counsel should argue that the confrontation problem presented by the introduction of the co-accused's confession entitles him to a severance as a matter of right. The dicta from United States v. Adkinson, supra, and the commentary in DA Pam 27-173, supra, can be cited in support of the proposition that severance is mandatory in Army courts-martial. Trial counsel will probably oppose severance on the grounds of the additional expense of two trials and the possible inconvenience to his witnesses. Redaction of the co-accused's confession will be proposed as the government's solution to the confrontation problem; a solution the judge may view with favor.

If it is apparent that the judge will not grant the severance, defense counsel should consider a motion for appropriate relief in the nature of having separate juries impaneled to hear each co-accused's case. This procedure, which was followed in United States v. Sidman, 470 F.2d 1158 (9th Cir. 1973), is expressly designed to solve the confrontation problem with a minimum of expense and inconvenience to the government and its witnesses. The procedure requires both juries to be present when testimony relevant against both is presented, but one jury is excused when the co-accused's confession is admitted into evidence. Cf. United States v. Crane, 499 F.2d 1385 (6th Cir. 1974). These procedures, followed in Sidman and Crane, offer defense counsel a degree of flexibility in resisting the redaction alternative. Counsel should note, however, that these procedures, while tolerated, were not endorsed by the Circuit Courts and their opinions should be closely examined for a review of potential problems.

If all of the foregoing motions are denied by the military judge and he indicates that he will allow the government to use a redacted confession, defense counsel should insist upon effective redaction which eliminates from the co-accused's confession all reference to the accused and even to the existence of other participants in the offense. It should be noted that while paragraph 140b of the Manual, supra, may countenance redaction, it explicitly requires that "all references inculcating an accused against whom it is inadmissible be effectively deleted." While what constitutes "effective deletion" has not been defined in the military, that term should be compared with the redaction standards set forth in Section 2.3 of the ABA Standards, Joinder and Severance, supra, and practiced by the New York courts. With reference to those authorities, counsel should argue that the court should exercise great caution in permitting the prosecution to use redaction

and that the burden is on the government to effectively redact the confession or forego its use. The judge's attention should be drawn to the point that both the ABA and New York require editing of the confession to the extent that there is not even a reference to an unnamed participant in the offense. See also United States v. Trudo, supra.

If the judge agrees to require redaction to the extent that all references to other participants are deleted, defense counsel has achieved at least his secondary goal. The primary goal of severance may still be attainable, however, if counsel for the confessing co-accused objects that the redacted confession prejudices his client by presenting a distorted picture of the scope of his involvement in the offense. The supplementary commentary to Section 2.3 of the ABA Standards, supra, illustrates this possible prejudice as follows;

Illustrative is the confession involved in State v. Montgomery, 157 N.W. 2d 196 (Neb. 1968), where defendant A confessed that he participated in a robbery with defendant B but said that he did so because he was forced to do so by defendant B, if all references to defendant B (or indeed, to the existence of another participant which the jury would take to be defendant B) were deleted, the substance of A's confession would be changed to his disadvantage.

Such an objection by counsel for the confessing co-accused places the judge in a dilemma; he has agreed that effective redaction is necessary to protect one co-accused yet the confessing co-accused objects that the very same redaction procedure has prejudiced him. Under these circumstances, the judge would be hard pressed not to grant a renewed motion for a severance. As an alternative, the trial counsel might be persuaded not to use the co-accused's confession at all.

If defense counsel is unsuccessful in securing a severance and the judge rules that he will not require elimination of all references to other participants, efforts can still be made to minimize the impact of the introduction of the co-accused's confession. At a minimum, counsel should insist that his client's name be deleted and "my friend" or "other party" be substituted. See United States v. Gay, supra, United States v. Dority, supra, Serio v. United States, supra. Under no circumstances, should defense counsel acquiesce to a procedure whereby blanks are substituted for his client's name and then the confession handed to the court members for their perusal during deliberations.

Whether redaction consists of elimination of all references under the ABA Standards or the less desirable substitution of blanks, counsel should insist that the confession be read to the jury rather than given to them for their deliberation. Otherwise, it would be a natural and easy process for the court members to fill the blank spaces with the names of the nonconfessing co-accused. Also, whenever a redacted confession is introduced in a joint prosecution, counsel should request an instruction to the effect that the court members are to consider it only against the speaking party. Finally, whenever the judge allows the prosecution to introduce a co-accused's confession which is not fully redacted to the extent it eliminates references to the existence of other participants, counsel should be particularly vigilant for any testimony which might identify his client as the "other party" in the redacted confession. If such testimony is heard by the jury, counsel should move for a mistrial on the grounds that the redaction has been compromised and the Bruton rule violated.

Conclusion

Counsel should recognize that even under the stringent ABA Standards, severance is the mandatory solution to a Bruton problem only when the co-accused's statement cannot be effectively redacted so as not to prejudice the accused. Thus, defense counsel may not be able to secure a severance in every case. Yet, by taking a strong position in favor of severance in every case, defense counsel will place heavy pressure upon the prosecution and judge to scrupulously edit the co-accused's statement to eliminate all incriminating references to his client.

* * *

THE NEUTRAL AND DETACHED MAGISTRATE
REQUIREMENT OF THE FOURTH AMENDMENT --
-- A DIFFERENT AVENUE FOR LITIGATION OF
SEARCH AND SEIZURE CASES

There are obvious differences in criminal investigations and prosecutions as between civilian and military jurisdictions. Military defense counsel may be prone to accept these differences as mere peculiarities of military law rather than to litigate their validity. Such is the case with the military's practice of allowing commanding officers, upon showings of probable cause,

to authorize searches of places and personnel within their control. Many defense counsel, when faced with the fruits of such a search, expend great energy in attacking the probable cause which served as the basis for the search. However, there is seldom any effort made to demonstrate that the officer who authorized the search was not legally qualified to do so because of his lack of neutrality.

The participation of a magistrate in the issuance of a warrant has become an accepted premise of Constitutional law. The classic explanation of the policy was set forth in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government agent.

The requirement for the issuance of a search warrant by a magistrate is so fundamental that non-compliance must necessarily result in a per se ruling of unconstitutionality. Thus, even though law enforcement officers may be in possession of evidence sufficient to constitute probable cause, the fruits of a warrantless search are rendered inadmissible by the failure to secure a warrant. Katz v. United States, 389 U.S. 347 (1967).

Other opinions of the Supreme Court have made it clear that the warrant requirement cannot be circumvented by the securing of a warrant from an official of the executive branch who performs law enforcement duties. In Mancusi v. De Forte, 392 U.S. 364 (1968), the Court held that a subpoena duces tecum issued by a prosecuting attorney could not qualify as a search warrant since

that official was not a neutral and detached magistrate. Similarly, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court struck down a search warrant issued by the state attorney general who personally directed the investigation and later became chief prosecutor. In examining a wiretap authorized by the Attorney General of the United States, the Court, in United States v. United States District Court, Eastern Michigan, 407 U.S. 297, 317 (1972), declared:

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute [citation omitted]. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgement, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

To date, the Supreme Court's most detailed explanation of who may serve as a neutral and detached magistrate is found in Shadwick v. City of Tampa, 407 U.S. 345 (1972). In that case the Court held that municipal court clerks, who were authorized by city charter to issue arrest warrants, qualified as neutral and detached magistrates for Fourth Amendment purposes. Shadwick states that an issuing magistrate must meet two tests. First, he must be neutral and detached. Secondly, he must be capable of determining the existence of probable cause. Id. at 350. Clearly, a magistrate need not be a judge or lawyer although such may be desirable. Id. at 353. However, "...whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." Id. at 350.

Paragraph 152, Manual for Courts-Martial, United States, 1969 (Revised edition), states that a commanding officer may, upon a showing of probable cause, authorize the search of property or persons which are situated in a place under the control of that officer. The Court of Military Appeals has repeatedly upheld the legality of this procedure. e.g., United States v. Sam, 22 USCMA 124, 46 CMR 124 (1973); United States v. Davenport, 14 USCMA 152, 33 CMR 364 (1963); United States v. Battista, 14 USCMA 70, 33 CMR 282

(1963). ^{1/} Likewise, the military's command-authorized search has been examined with approval by the federal judiciary. See Wallis v. O'Kier, 491 F.2d 1323 (10th Cir. 1974), cert. denied, 419 U.S. 901 (1974).

Regardless of the present basic legality of the command-authorized search, it should be recognized that the particular circumstances of a search or the personal disposition of the authorizing officer may be used to support an argument that a particular officer was not sufficiently neutral and detached. In United States v. Sam, supra at 127, 46 CMR at 127, the Court of Military Appeals stated:

Although a commanding officer in determining whether to order a search in the military stands in the same position as a Federal magistrate issuing a search warrant, common sense leads us to appreciate the difficulty he may tend to experience in viewing his decision with a magistrate's neutrality and detachment.

Furthermore, as indicated in a recent Army Court of Military Review decision, there appears to exist an increasingly overt cynicism as to the commander's ability to function in a judicial capacity.

The law permits a commanding officer to conduct and authorize searches within narrowly defined limits. In this capacity, he has been likened to a "detached magistrate," although he is certainly no magistrate and generally has little if any detachment in the matter. United States v. Withers, CMR ____ (ACMR 25 February 1976). See also United States v. Thurston, SPCM 11540 (ACMR 15 July 1976).

^{1/} It should be noted that the entire procedure of allowing commanders to authorize searches is currently under attack at the Court of Military Appeals. See United States v. Ezell, CM 432696, USCMA Docket No. 31,304 (petition granted 25 February 1976); United States v. Boswell, SPCM 11087, USCMA Docket No. 32,414 (petition granted 2 July 1976); United States v. Hunter, CM 433746, USCMA Docket No. 32,651 (petition granted 20 August 1976). Until these cases are resolved, defense counsel may be well advised to object to all command authorized searches as being per se unconstitutional without regard to attendant circumstances.

There has only been one case in which the Court of Military Appeals has reversed a conviction because the officer who authorized the search was not neutral and detached. In United States v. Staggs, 23 USCMA 111, 48 CMR 672 (1974), a Navy station judge advocate had authorized a search after having been properly delegated the power to do so by his commanding officer. When approached by a law enforcement agent for a search authorization for Staggs' quarters, the station judge advocate immediately remembered the name. Some months prior, the station judge advocate had received information from another accused implicating Staggs. The station judge advocate had passed this initial information to law enforcement personnel, but nothing came of the resultant investigation. When the subsequent search authorization was requested, the station judge advocate realized that there was not sufficient probable cause. However he assisted the agent in drafting an affidavit and issued a provisional warrant requiring the agent to seek further corroboration in the form of controlled drug purchases. These purchases were made, the warrant executed, and Staggs arrested. Afterwards, "... the station judge advocate was heard to say 'we'd been after him' for some time." Id. at 113, 48 CMR at 674. In reversing, the Court of Military Appeals noted that the station judge advocate was not sufficiently impartial due to his assistance in a plan to perfect probable cause, his assistance in drafting the affidavit, his comments regarding the accused, and the history of the investigation. Id. at 114, 48 CMR 675. The Court found the officer to have been an "... active participant in gathering evidence against the accused..." and held that this participation was inconsistent with the role of an "... impartial and detached magistrate." Id. at 114, 48 CMR at 675.

Apparently the key to the Staggs decision lies in the court's determination that the officer who authorized the search was an active participant in gathering evidence against the accused, and the defense counsel who wishes to attack the neutrality of a commander must be prepared to prove such partiality. 2/

Any investigation of a commanding officer's attitude toward a client is best begun with the client himself. The accused

2/ According to Staggs, one who actively seeks evidence approaches a case with a "police" rather than a "judicial" attitude, and is therefore disqualified from authorizing a search. See United States v. Drew, 15 USCMA 447, 454, 35 CMR 421, 426 (1965). Thus, even though the Court of Military Appeals did not cite them in Staggs, it is apparent that the Court considers itself bound by the line of Supreme Court cases holding that law enforcement agents cannot authorize searches. Shadwick v. City of Tampa; United States v. United States District Court, Eastern Michigan, Coolidge v. New Hampshire; Mancusi v. De Forte, all supra.

should be asked to supply information as to whether the Commander has previously imposed nonjudicial punishment on him for similar offenses. Likewise, the defense counsel should attempt to ascertain whether there has been any ongoing effort in the unit to secure evidence against the accused or, in drug cases, to combat drug abuse in general within the unit. Finally, the client may be able to supply a great deal of information as to the extent, if any, of the commander's personal participation in the search effort. The defense counsel should be aware that he can call his client to the witness stand to testify only for the limited purpose of proving a prosecutorial attitude on the part of the commander, and any cross-examination will be limited to the same issue. Paragraph 149b(1), Manual for Courts-Martial, United States, 1969 (Revised edition).

In seeking to determine whether a commander was neutral and detached in his authorization of a search, the commander himself is an obvious source of information. Commanding officers being interviewed by trial defense counsel regarding searches will generally assume that the only issue is probable cause. As a layman, the commander presumably will not realize that the search can be ruled unlawful solely on the basis of his own predilections and attitudes. Thus, when in the course of an interview, a defense counsel changes the direction of his questions and asks what sort of soldier his client has been, the commander may volunteer information which reveals his attitude toward the client. Likewise, cross-examination is an excellent tool for revelation of a previously discovered prosecutorial outlook on the part of a commander. If questioning is carefully done, the commander may be induced to lay before the military judge facts which show a pattern of long-standing suspicions and repeated efforts to secure evidence against the accused. In so doing, the commander may even believe that he is strengthening the government's case rather than destroying it.

In addition to the client and the commanding officer, numerous excellent sources of information may be found among the other enlisted personnel of the client's unit. Indeed, in many cases it may be advisable to interview these persons before seeing the commander. Typically, counsel will talk to the company first sergeant and the client's platoon sergeant in an effort to ascertain the existence of any possible evidence for use in the sentencing portion of trial. It is a relatively simple matter to ask these individuals what their commanding officer thinks of the accused, and they may be led to provide particulars as to the basis for any hostile or biased attitude on the part of the commander. Likewise, information may be obtained from orderly room personnel and other individuals who may have spent a great

deal of time in the presence of the commanding officer. These include clerk-typists, the commander's driver, and the charge of quarters who was on duty at the time of the search. Interviewing enlisted personnel may prove to be a "no lose" proposition for the defense counsel since testimony which is worthless on the search issue may prove useful in sentencing and vice versa. Thus, the defense counsel may be assured of finding witnesses who will be useful either in extenuation and mitigation or on the search motion.

From a practical standpoint, care should be taken to prevent the prosecution from early discovery of a defense strategy which involves an attack on a commander's neutrality in authorizing a search. Defense counsel should not unnecessarily reveal their strategy to opposing counsel. Thus, where a motions checklist is required of counsel before trial, the defense should inform the Court and government counsel only that it intends to challenge an illegal search and seizure. ^{3/} Further particulars should be set forth only when required in litigation of the issue or at the request of the trial judge. Notwithstanding the fact that the prosecution presumably will not coach its witnesses, the element of surprise will insure that the government witnesses will not come to court prepared to rebut a defense allegation that a Commander was not neutral and detached in authorizing a search. Indeed, where the facts suggest a probable cause issue, the defense counsel may wish to make his initial objection or motion to suppress in terms of probable cause and, if cross-examination of the commander reveals a lack of detachment and neutrality, extend the argument to that officer's lack of neutrality. Regarding any enlisted witnesses who can provide information as to the commander's attitude, the defense counsel can alleviate any suspicions generated by requesting them as witnesses by allowing the prosecution and the witnesses to assume that they are being called to testify on sentencing.

Naturally, the element of surprise will be lost if a defense counsel files a pretrial brief attacking a commander's neutrality. Thus, it may be better not to do so. No advantage need be lost since counsel can, at trial, simply provide the judge with a list of authorities containing brief summaries of the principles for which they stand. Having such a list of authorities prepared will yield an additional advantage in that, if necessary, it can be coupled with a brief statement of facts and filed with

^{3/} The motions and hearings checklist is required by Rule 34, Uniform Rules of Practice Before Army Courts-Martial. The question of whether these rules have been improperly promulgated is currently awaiting decision in United States v. Kelson, SPCM 11249, USCMA Docket No. 31,460 (petition granted 16 January 1976).

the convening authority post-trial under the provisions of Article 38(c), Uniform Code of Military Justice.

Having shown, to the extent possible, that a Commander was not neutral and detached and having supported his argument by citation to the major Supreme Court cases and, in particular, the Court of Military Appeals decision in United States v. Staggs, supra, the defense counsel will have presented his argument in the strongest possible manner. If, in the sense of Staggs, the commander was in fact "... an active participant in gathering evidence against the accused..." the trial judge will be hard put to overrule the defense objection or deny the motion to suppress. Furthermore, even if the trial judge's ruling is unfavorable, the defense will have built a solid record of trial which will allow an informed resolution of the issue on appeal.

* * *

UTILIZING THE POST-TRIAL INTERVIEW TO THE ACCUSED'S ADVANTAGE

Although considered to be an indispensable aspect of the initial review of a court-martial, the post-trial interview is not required by either the Uniform Code of Military Justice or the Manual. Rather, it is a creature of custom and tradition in the military justice system. The clemency interview, as it has also been called, is conducted to assist the convening authority in making "a fair and untainted appraisal of the advisability of clemency action. . .after personal consultation with the accused." United States v. Clisson, 5 USCMA 227, 282, 17 CMR 277, 282 (1954). It provides the recently convicted soldier with his last opportunity to make a favorable impression by a personal appearance before, and personal pleas to, a representative of the convening authority. Therefore, it is incumbent upon the trial defense counsel to assist his client in preparing for and in undergoing the post-trial interview, rather than abandoning him to succeed as best he can on his own.

The trial defense counsel's first priority is to evaluate realistically the tactical advantage to be gained by his client's participation in a post-trial interview. Undoubtedly, the accused can be compelled to appear at the interview, but the extent of his participation and the amount of information he will relate to the interviewer should be thoroughly discussed with counsel before the interview takes place. Trial defense counsel may decide that it

is in his client's best interests for the accused to make a limited appearance at the post-trial interview. The demeanor and idiosyncrasies of the accused may make it advisable to limit his oral presentation at the interview to general statements about his personal history and to respond to other areas of inquiry by means of a written statement prepared with the assistance of counsel.

The format of the post-trial interview may vary slightly from place to place. Essentially, the clemency interview consists of a series of questions posed to the accused, usually immediately after trial, by an "impartial" officer--sometimes the staff judge advocate himself, but more usually another trial counsel in the office or the chief of justice for the command. The questions asked may include those about the accused's background, both civilian and military, his impressions of the trial, his attitude toward the military, and his desire for further duty. Although many commands now require that the accused be read Article 31 warnings before the interview begins, the accused is seldom, if ever, informed that he may have his trial defense counsel present during the interview if he so desires.

The military appellate courts have provided little guidance for the conduct of post-trial interviews. Most of the opinions on the topic have pertained to the question of who qualifies as an impartial officer to conduct the interview. Interestingly enough, not only is a trial counsel who participated in the case disqualified from being the interviewer, but also the defense counsel is similarly disqualified. United States v. Peck, 41 CMR 732 (ACMR 1970). Although the Court of Military Appeals has not addressed the issue, both Army and Navy Boards of Review have held that there is no requirement for mandatory representation by counsel at a post-trial interview. United States v. Boheman, 39 CMR 201 (ABR 1968); United States v. Canady, 34 CMR 709 (NBR 1964). In Boheman, supra, it was even stated, albeit as dictum, that the presence of counsel at the post-trial interview "might well inhibit a full, free, and frank discussion between the accused and the interviewer which could result in a favorable recommendation for clemency." 39 CMR at 301.

During an oral argument before the Court of Military Appeals last term involving an unrelated issue, the discussion shifted to the ancillary topic of post-trial interviews. The judges expressed their concern that trial defense counsel were allowing their clients to appear at post-trial interviews without preparation or representation. At least one member of the Court expressed his disbelief that any tactical advantage could be served by sending

the accused to such a crucial hearing without being accompanied by his counsel. Such expressions, though admittedly not the formal opinion of the Court on the matter, provide some indication of the Court's possible unwillingness to follow the theory espoused in Boheman, supra, that the presence of counsel would have a chilling effect on the exchange between the accused and the interviewer and thus impair the accused's chances for clemency.

Although the panels in Boheman and Canady found that there is no requirement for the presence of defense counsel at the post-trial interview, neither of these decisions even suggested that defense counsel is prohibited from attending. Therefore, counsel should not only take positive steps to assist their clients in preparing for the post-trial interview, but also should carefully consider attending and, where desirable, participating in the interview. The presence of counsel will not only reassure the client that someone in the room is "in his corner", but also provide him with the opportunity to turn to his attorney in the event he is at a loss for words or feels that he has forgotten something of importance that he wanted to relate to the interviewer. If the interviewer refuses to conduct the interview in the presence of counsel, the trial defense counsel should argue that his client should not be compelled to barter away his right to the effective assistance of counsel for the possibility of clemency. If the presence of counsel is still prohibited, counsel should note this fact in his rebuttal to the staff judge advocate's review or in an Article 38(c) brief to the convening authority.

In preparing his client for the post-trial interview, defense counsel should explain the reason for the meeting and review with his client the nature of the questions to be asked. If a local form or questionnaire is to be used, counsel should offer his client the opportunity to read the form over in advance. This tactic will familiarize the defendant with the type of questions to be asked and avoid surprise or long pauses before answering. Counsel should also insure that his client appears before the interviewer punctually and presents a neat military appearance. It must be emphasized to the client that this will be his last opportunity to appear in person before a representative of the convening authority who holds discretionary power over sentence reduction. For, as former Chief Judge Quinn wrote:

The accused's best chance for sentence reduction, within the court-martial processes, comes in the initial review. It is only at that level of the appellate procedure, that he can project his traits of character and his attitudes in a personal interview. United States v. Coulter, 3 USCMA 657, 660, 14 CMR 75, 78 (1953).

Although the practice is routine in many commands, defense counsel should avoid scheduling or permitting the Government to schedule the clemency interview immediately after the conclusion of the trial. A client who has just been convicted and sentenced to serve a lengthy sentence to confinement, especially where the client himself remains convinced of his own innocence, is not going to display the remorseful and repentant attitude nor the optimistic outlook that an interviewer may feel is essential to any recommendation for clemency. Therefore, trial defense counsel are urged to seek a 24 to 72-hour "cooling-off" period for their clients before they are subjected to the interviewer's battery of questions. Such a delay will minimize the chances of a disgruntled client lashing out at the manner in which he has been tried. Furthermore, it will provide defense counsel with additional time to prepare his client for the interview.

Trial defense counsel can utilize the post-trial interview to the tactical advantage of the client in many ways. The clemency interview provides the accused with the opportunity to present mitigating and extenuating evidence that may not have been particularly desirable for presentation to a court with members. For example, trial defense counsel may conclude that evidence of his client's participation in a drug rehabilitation program may not favorably impress the court members empaneled to hear his case because it reveals more misconduct than that for which the accused was tried and convicted, such as use rather than mere possession. Although evidence of rehabilitation efforts may not appear convincing to the members, this same evidence may convince the convening authority of the defendant's sincere desire to "clean himself up" and start anew. Another matter that defense counsel may feel is more properly presented in the relaxed forum of the post-trial interview is evidence of psychiatric counselling. When the accused may feel ill at ease in revealing to members that he has sought psychiatric help or when defense counsel is of the opinion that a jury would not be receptive to such evidence, reports of counselling sessions may still have a beneficial impact on the interviewer, and then the convening authority, by demonstrating the need for further treatment rather than incarceration.

There is one caveat that must be noted. If the accused has contested his guilt at trial and desires to make a full admission of his culpability at the post-trial interview as part of a plea for clemency, such a decision should be fully and carefully considered with counsel before the admission is made to the interviewer. A post-trial confession will surely be included in the interviewer's report and undoubtedly will find its way into the post-trial review. It then becomes the duty of the defense counsel to insure that the admission is accurately related to the convening authority without elaboration or supplementation and that it is properly labeled as part of the client's

plea for clemency. In his rebuttal to the staff judge advocate's review, the defense counsel should correct any erroneous opinion that may be conveyed to the convening authority, such as the possible impression that the post-trial confession can be utilized by the convening authority to sustain the government's burden of proof and uphold the conviction.

Trial defense counsel should recognize the value of the post-trial interview and insure that each client is aware of the importance of the interview to his chances for clemency from the convening authority. Every trial defense counsel is well aware that ethical duties to the client do not end with the announcement of the sentence in court. Therefore, every defense counsel should strive to prepare his clients for a lucid and convincing presentation during a post-trial interview. Furthermore, by being present at the interview, counsel can best utilize the hearing to the tactical advantage of his client.

* * *

RECENT OPINIONS OF INTEREST

COMA OPINIONS

JURISDICTION-CONCEALING STOLEN PROPERTY

United States v. Tucker, ___ USCMA ___, ___ CMR ___ (September 3, 1976).

In limiting a former decision, the Court stated that United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974), does not stand for the broad proposition that concealed stolen property belonging to a military victim automatically vests the military with jurisdiction over that offense. Situs is far more important than the status of the victim or the accused. Since the concealment is the gravamen of the offense here, the place of concealment holds the "utmost significance". Charges dismissed.

JURISDICTION

United States v. Hedlund, ___ USCMA ___, ___ CMR ___ (September 17, 1976).

A conspiracy to rob, formed on post, was consummated off-post by the robbery and kidnapping of an AWOL Marine and civilian.

Once again the Court interpreted O'Callahan v. Parker, 395 U.S. 258 (1969) and Relford v. Commandant, 401 U.S. 355 (1971) and found military jurisdiction over the conspiracy but not the robbery and kidnapping. The Court stressed that Relford does not allow jurisdiction to be founded solely upon the military status of the victim. An ad hoc approach must be used in applying Relford's twelve factors.

JURISDICTION-OFF-POST DRUG TRANSFER

United States v. McCarthy, ___ USCMA ___, ___ CMR ___ (September 24, 1976).

The defendant arranged a transfer of three pounds of marijuana. The negotiations were conducted in his unit on post, but the transfer was made off-post to a fellow serviceman who was also known to the accused as a dealer to other soldiers. Once again, an ad hoc Relford analysis was utilized and the balance test favored military jurisdiction.

Three points were stressed by the Court. First, O'Callahan questions should not be treated in a cursory manner at trial. Second, jurisdiction must be established affirmatively at trial by the Government. Finally, a hands-off policy to a particular offense by the civilian community is an insufficient basis to exercise military jurisdiction.

MILITARY JUDGE-ABANDONMENT OF IMPARTIALITY

United States v. Shackelford, ___ USCMA ___, ___ CMR ___ (September 17, 1976).

Due to inconsistencies in his providency inquiry, the military judge rejected the accused's guilty plea to an AWOL charge. At the subsequent trial on the merits before court members and the same military judge, the accused's testimony changed considerably on two points from what it had been during the providency inquiry. Obviously concerned with the accused's credibility, the trial judge asked over fifty questions, some in a prosecutorial manner. Much of his questioning was based on information he had received from the providency inquiry. The Court held that such action was error which required a rehearing. The Court made it clear that a trial judge must exercise extreme caution in questioning because of the affinity the jury has for his views. The sheer number of questions here was enough to highlight for the jury the judge's concern with the accused's credibility.

PRETRIAL AGREEMENT INQUIRY

United States v. Green, ___ USCMA ___, ___ CMR ___ (August 13, 1976).

Effective 30 days or more from the date of this opinion the Care inquiry conducted by the military judge in a guilty plea case must include a determination of whether or not a plea bargain exists and an inquiry into its terms in accord with the guidelines in United States v. Elmore. An inquiry into the sentence agreement should be delayed until after sentence has been announced in a judge alone trial.

ARTICLE 69-REVIEW BY COMA

McPhail v. United States, ___ USCMA ___, ___ CMR ___ (August 27, 1976).

The Court of Military Appeals asserted jurisdiction in a case which was reviewed under Article 69, UCMJ. Clear violations had occurred in that there was no jurisdiction under United States v. Uhlman, 24 USCMA 256, 51 CMR 635 (1976), and there was a violation of the mandate in United States v. Ware, 24 USCMA 102, 51 CMR 275 (1976), where the convening authority overruled the military judge's determination that there was no jurisdiction. COMA held that it must be permitted to remedy this constitutional defect under its supervisory authority. Otherwise, the Supreme Court mandates stressing exhaustion of military remedies before resorting to federal courts would be rendered meaningless.

CMR DECISIONS

DRUG CHARGING-ARTICLE 134 UCMJ VS. ARTICLE 92 UCMJ

United States v. Jackson, 432738, EN BANC, 24 September 1976.

The Court of Military Review in an en banc decision held that United States v. Courtney, ___ USCMA ___, ___ CMR ___ (July 2, 1976), is limited to its facts and that Jackson was not denied equal protection of the law by being charged for possession and sale of heroin under Article 134 rather than under Article 92.

In Courtney, litigation during trial revealed that Courtney was being singled out because all other offenses of that type were being charged under Article 92. In Jackson, CMR found that all of the same class of cases were charged under Article 134.

Six of the fourteen judges registered strong dissents. The dissenters stated that Courtney does not require that the

accused demonstrate discrimination, but rather that the Government must show that it applied rational standards in charging under Article 134. Case currently pending petition at the United States Court of Military Appeals.

ARTICLE 33-UCMJ

Phillips, 434343, 27 July 1976.

The charges and investigation were not forwarded to the convening authority within 8 days of the accused's confinement. No explanation was given for the delay. Held: Harmless error where reasons for the delay appear in the record of trial. Here, the delay was caused by the extensive Article 32 investigation. The Court did, however, recognize grounds for reversal in a case where prejudice existed.

DUNLAP-GOODE

Forsyth, 11727, 27 July 1976.

Trial defense counsel was served with a copy of the SJA Review 81 days after sentence was imposed. Involved in another trial, he did not respond within 5 days, nor did he request additional time. The Government did not take action until the 97th day; the day the trial counsel reminded the defense counsel to respond to the review. Held: The Government had a responsibility from the 86th day on to take action, absent a specific defense request for delay. Dismissal ordered.

DOUBLE JEOPARDY-PASSIVE WAIVER

Johnson, ___ CMR ___ (ACMR 28 July 1976).

At his first trial the appellant was found not guilty of one charge and guilty, in accordance with his plea, of the other. During extenuation and mitigation, the accused made some statements which were inconsistent with his guilty plea. After the military judge queried trial counsel about the possibility of the plea being improvident, the trial counsel indicated that the prosecution and defense had an informal agreement, in return for the plea of guilty, not to present evidence on the charge for which a finding of not guilty had been entered. The military judge, without defense objection, declared the prior findings "conditional", set them aside and declared a mistrial. Appellant was tried a second time on both charges and was convicted of both.

After condemning such informal agreements, CMR held that a second trial on the charge on which a not guilty finding

was rendered earlier was barred by former jeopardy, stating unequivocally that passive waiver does not apply to double jeopardy.

FEDERAL CASES

INFORMANTS-FIFTH AMENDMENT CLAIMS

United States v. Moreno, 19 Cr. L. 2429 (C.A. 5, 8/9/76).

An informant was subpoenaed to corroborate the defendant's entrapment claim. The judge conducted an in camera hearing, solely with the informant, delving into the informant's asserted Fifth Amendment privilege.

The Court held that the judge's permission for the informant to invoke the privilege was too broad and violated the defendant's Sixth Amendment rights to compulsory process. Courts cannot accept Fifth Amendment claims at face value and should not make a decision without counsel present. The test is whether a witness is subjecting himself to substantial, and not trifling, hazards.

IMPOUNDED CAR INVENTORIES

Altman v. State, 19 Cr. L. 2446 (Fla. Ct. App. 2nd Dist. 7/30/76).

The U.S. Supreme Court's decision in South Dakota v. Opperman, 19 Cr. L. 3314, does not give carte-blance authority to police to search cars which they impound. Inventories may not be used as subterfuges for warrantless searches of vehicles.

Here, the defendant was arrested by police after a high speed auto chase with resulting minor damage to his auto. Marijuana was discovered in the glove compartment after an inventory search. There was no search warrant, consent, or probable cause to believe any contraband was in the vehicle. In fact, the Court said that since a friend was available to take the accused's auto, the police should never have had it impounded.

COUNSEL-EFFECTIVE ASSISTANCE AT SENTENCING

United States v. Pinkney, 19 Cr. L. 2481 (C.A.D.C., 8/10/76).

In remanding for resentencing, the Court reaffirmed the principle that effective assistance of counsel is just as necessary at sentencing as at trial.

