

PROPERTY OF U S ARMY  
THE JUDGE ADVOCATE GENERAL'S SCHOOL  
LIBRARY

A Journal For Military Defense Counsel

# THE ADVOCATE

## United States Army Defense Appellate Division

Volume 13

Number 5

September — October 1981

### THE GUILTY PLEA: A SYMPOSIUM Part Two

318

THE PROFESSIONAL RESPONSIBILITIES OF  
DEFENSE COUNSEL IN UNCONTESTED COURTS-MARTIAL  
Captain Gary D. Gray

333

THE PROVIDENCY INQUIRY: AN EXAMINATION OF  
JUDICIAL RESPONSIBILITIES  
Captain John Lukjanowicz

354

ISSUES WAIVED BY PROVIDENT GUILTY PLEA

357

SEARCH AND SEIZURE: A PRIMER  
PART SIX — "PLAIN VIEW"

362

PROPOSED INSTRUCTION

379

CASE NOTES

363

SIDE BAR

388

ON THE RECORD

368

USCMA WATCH

CHIEF, DEFENSE APPELLATE DIVISION

COL Edward S. Adamkewicz, Jr.

EDITORIAL BOARD

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

STAFF AND CONTRIBUTORS

Associate Editors

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

Contributors

CPT Kenneth G. Gale  
 CPT Chuck R. Pardue  
 CPT Steven T. Cain

ADMINISTRATIVE ASSISTANTS

Ms Diana Cooper  
 Mr. James M. Brown

Solicitation

*We encourage readers of The Advocate to submit articles pertaining to legal issues which are of particular importance to trial defense counsel and warrant examination in the pages of this journal; your contributions, comments, and suggestions can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.*

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

# OPENING STATEMENTS

## The Guilty Plea: A Symposium

### *Part Two*

This edition comprises Part Two of The Advocate's symposium on the guilty plea. The lead article addresses the defense counsel's responsibilities during each stage of the uncontested court-martial, and emphasizes the ethical principles which govern his conduct throughout the proceeding. The second article explores the extent to which recent appellate decisions have modified the judicial duties imposed by United States v. Green, 1 M.J. 453 (CMA 1976), and United States v. King, 3 M.J. 458 (CMA 1977), and suggests ways in which all parties to the trial can help preserve the providency of the accused's plea. Finally, the staff of The Advocate has compiled a "checklist" of legal issues which are waived by a provident guilty plea; the list complements the theoretical discussion of appellate review published in Part One of the Symposium, and should assist defense counsel in advising their clients of the consequences of pleading guilty.

### Preview

The two articles scheduled for publication in the upcoming edition of The Advocate deal with the Jenks Act and the "mistake of fact" defense. In addition, the staff is preparing the penultimate installment of our primer on search and seizure law, which discusses domestic gate searches. The next edition will also contain the index to Volume 13.

THE PROFESSIONAL RESPONSIBILITIES OF DEFENSE COUNSEL IN  
UNCONTESTED COURTS-MARTIAL

By Captain Gary D. Gray\*

*Although court-martial proceedings in which the accused pleads guilty are generally more abbreviated than contested trials, the defense counsel's duties are not concomitantly reduced. Many of his responsibilities in guilty-plea cases arise before trial, and are not explicitly reflected in the record. In this article, Captain Gray reviews these duties and underscores the extent to which the military justice system relies on the tenacity of trial defense counsel to insure that uncontested courts-martial are tried fairly.*

Asked to comment upon the criminal defense attorney's responsibilities, a Cuban law professor once responded, "The first job of a revolutionary lawyer is not to argue his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him."<sup>1</sup> Although our system of justice does not subscribe to representation by this type of "revolutionary lawyer,"<sup>2</sup>

---

\*Captain Gray, an action attorney at the Defense Appellate Division, received his B.A. degree from Middlebury College and his J.D. degree from Pepperdine University School of Law.

1. Shaffer, Guilty Clients and Lunch with Tax Collectors, 37 Jurist 89, 90 (1977).

2. Cf. ABA Code of Professional Responsibility [hereinafter ABA Code], EC 2-29 (appointed counsel should not seek to be excused from representation of client merely because he believes the client is guilty); paragraph 48c, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969, or Manual] (counsel must undertake defense of accused regardless of his personal opinion of latter's guilt). But see EC 2-30 (counsel should decline to represent client if intensity of personal feeling, as distinguished from community attitude, may impair effective representation); accord ABA Model Rules of Professional Conduct [hereinafter Model Rules], Rule 6.2 (Proposed Final Draft, 30 May 1981).

trial defense counsel must nevertheless frequently recommend to their clients the advantages of pleading guilty to charges against them. Before making such a recommendation, however, the attorney must personally determine whether his client is guilty.<sup>3</sup> This article reviews the professional responsibilities of the defense counsel whose client decides not to contest criminal charges pending against him; it does not address presentencing and post-trial responsibilities, which are common to all military judicial proceedings resulting in conviction.<sup>4</sup>

## I. Pretrial Responsibilities

### a. Advising the Accused

The defense counsel must undertake any defense, regardless of his personal opinion of the guilt of the accused,<sup>5</sup> unless in doing so he would be unable to exercise his professional judgment, within the bounds of law, solely for the benefit of the accused and free of compromising influences and loyalties.<sup>6</sup> In part, this means that the client who "confesses" to his defense counsel and expresses his desire to plead guilty cannot be permitted to take that action without the benefit of his counsel's independent investigation and advice.<sup>7</sup>

3. See text, infra at notes 7, 16-22, and 57.

4. Counsel's responsibilities for the accused do not, of course, end at trial. Paragraph 48k, MCM, 1969; United States v. Palenius, 2 M.J. 86 (CMA 1977). For a thorough discussion of post-conviction remedies, see Reardon & Carroll, After the Dust Settles — Other Modes of Relief, 10 The Advocate 274 (1978).

5. Paragraph 48c, MCM, 1969.

6. ABA Code, supra note 2, EC 5-1 (1976); ABA Standards for Criminal Justice: The Defense Function [hereinafter Defense Function], Standards 4-1.1(b) and 4-3.5. (2d ed. 1980). Accord, Model Rules, supra note 2, Rules 1.7 and 1.8(g).

7. Defense Function, supra note 6, Standards 4-4.1 and 4-5.1. See Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (defense counsel's essential pretrial duties in uncontested case are to "make an independent examination of the facts, circumstances, pleadings and laws involved" and to "offer his informed opinion as to what plea should be entered").

An accused's belief that he is guilty may not coincide with the government's ability to establish legal guilt.<sup>8</sup> Thus, defense counsel must assiduously probe the recollection of any accused, even one seemingly bent on atonement. Counsel must seek to establish trust and confidence by explaining, in general terms, the military justice system, and particularly his role as a partisan advocate.<sup>9</sup> He must impress upon the accused the importance of full disclosure,<sup>10</sup> and should avoid suggesting responses to his own questions.<sup>11</sup>

8. Comments to Standards 4-4.1 and 4-5.1, Defense Function, supra note 6, at 226. See Bazelon, The Defective Assistance of Counsel, 42 Cinn. L. Rev. 1, 34 (1973). Likewise, the government may not be able to prove a "factually guilty" accused to be "legally guilty." See Vitaris, The Guilty Plea's Impact on Appellate Review, 13 The Advocate 236, 237-38 (1981).

9. Defense Function, supra note 6, Standard 4-3.1(a). See Clark, Plea Bargaining: A Primer for Defense Counsel, 9 Cumberland L. Rev. 1 (1978). Of course, counsel's explanation of the military judicial system must eventually include those matters set forth in paragraph 48g, MCM, 1969 (meaning and effect of plea, right to testify or remain silent, allocution rights, right to assert proper defense or objection).

10. Defense Function, supra note 6, Standard 4-3.1(a). For an excellent, practical discussion of this topic, see Peskin, Attorney-Client Interview, 12 The Advocate 24 (1980).

11. Defense Function, supra note 6, Standard 4-3.2(a). To instruct or intimate that the accused should not be candid is unprofessional. Defense Function, supra note 6, Standard 4-3.2(b). Before the advent of the Army Trial Defense Service, at least one commentator suggested that in order to inspire confidence in his client, a military defense counsel should not "play the inquisitor" by probing too deeply into his client's story. Murphy, The Army Defense Counsel: Unusual Ethics for an Unusual Advocate, 61 Col. L. Rev. 233, 241 (1961). Despite doubts that the establishment of the Trial Defense Service made much impact on the skepticism of lower ranking soldiers, see The Trial Defense Service: From Pilot Program to Formal Organization, 12 The Advocate 363, 370-71 (1980), the merits of this approach are questionable. It at least appears contrary to the Manual injunction that counsel "should endeavor to obtain full knowledge of all the facts of the case[.]" Paragraph 48g, MCM, 1969.

The defense counsel must investigate all potential defenses before permitting his client to plead guilty.<sup>12</sup> He must determine whether the specifications lodged against his client are sufficient.<sup>13</sup> A thorough investigation will necessarily require time, and although counsel may not overlook the codal concerns for a speedy disposition of charges against an accused, he must not sacrifice thoroughness for speed.<sup>14</sup> In the extreme case, a failure to request a continuance may constitute ineffective assistance of counsel.<sup>15</sup>

In their concern that military justice remain "beyond reproach,"<sup>16</sup> Congress and the President drafted into the Code and the Manual several provisions which significantly complicate the pretrial responsibilities

12. United States v. Lemieux, 10 USCMA 10, 12, 27 CMR 84, 86 (1958). See Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), where assistance rendered by defense counsel in a guilty-plea case was held ineffective because of his unfamiliarity with the facts and relevant law. The accused was charged with robbing keys from a prison guard during an escape. His defense counsel recommended a plea of guilty to the robbery charge in return for a plea bargain providing for 25 years of confinement. The counsel was not aware that because the accused had left the keys in the jailhouse door, he had, under applicable law, conclusively demonstrated his lack of intent to permanently deprive. The accused should have pleaded guilty to no more than assault and escape, offenses punishable by a maximum sentence of seven years.

13. See Clark, supra note 9, at 16.

14. See, e.g., Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973) (counsel met with defendants on assembly line basis, spending only a few minutes with each client and making no independent investigation of facts before allowing accused to plead guilty); Colson v. Smith, 315 F.Supp.179 (N.D. Ga. 1970), affirmed, 438 F.2d 1075 (5th Cir. 1971) (counsel, handling 5,000 criminal cases per year, met with accused once or twice for a few minutes, made no independent investigation of facts, and advised client to plead guilty).

15. United States v. McMahan, 6 USCMA 709, 719, 21 CMR 31, 41 (1956) (defense counsel had only one day to prepare for premeditated murder case referred as capital).

16. Vickery, The Providency of Guilty Pleas: Does the Military Really Care? 59 Mil. L. Rev. 209, 230-31 (fall 1972).

of counsel for the accused who pleads guilty. Thus, paragraph 70b of the Manual,<sup>17</sup> which amplifies Article 45, UCMJ,<sup>18</sup> prohibits the entry of findings pursuant to a plea of guilty unless the accused is convinced that he is in fact guilty. This protection is without parallel in the federal civilian criminal system, where an individual may plead guilty and thereby consent to the imposition of penal sanctions even if he is unwilling or unable to admit his participation in the criminal acts.<sup>19</sup> Because a plea of guilty in the military must accord with the actual facts<sup>20</sup> and the personal belief of the accused,<sup>21</sup> counsel must thoroughly investigate the facts, as well as the accused's psyche. Although the accused need not remember that he committed the offenses to which he pleads guilty,<sup>22</sup> counsel must aid him in reviewing and assessing the evidence of criminal acts and must probe the depth of his belief that he in fact committed them.

17. Paragraph 70b(3), MCM, 1969, provides: "A plea of guilty will not be accepted unless the military judge, . . . after the accused has been questioned, is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty."

18. Article 45(a), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §845(a) (1976), provides: "If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matters inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the Court shall proceed as if he had pleaded not guilty."

19. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

20. United States v. Johnson, 1 M.J. 36, 38 (CMA 1975).

21. United States v. Moglia, 3 M.J. 216, 218 (CMA 1977). See also United States v. Davenport, 9 M.J. 364, 366-67 (CMA 1980).

22. United States v. Luebs, 20 USCMA 315, 43 CMR 315 (1971). Needless to say, defense counsel must be cautious not to force a concession of guilt where the accused believes his lack of memory is attributable to his innocence. See, e.g., the accused's allegations in Hendrix v. United States, 555 F.2d 785, 788 (Ct. Cl. 1977), that his counsel collaborated with military psychiatrists in brainwashing him to abandon his belief in his own innocence and to accept the fact that he may have been repressing memories of the alleged murder.

After the defense counsel has fully ascertained the pertinent facts and applicable law, he must advise the accused of all aspects of the case.<sup>23</sup> While the ultimate question of how to plead must be resolved by the accused,<sup>24</sup> he is entitled to the assistance of counsel in making that decision.<sup>25</sup> The defense counsel may not rely on the military judge's inquiry into the accused's understanding of the consequences of a guilty plea as a substitute for his own advice, because the judge's warning, coming as it does just before the plea is accepted, offers little time for mature reflection.<sup>26</sup>

The advice of counsel should address the probability of conviction, the likely sentence, and the collateral consequences of conviction.<sup>27</sup> A discussion of the probability of conviction must, of course, include the problems of proof and any possible defenses. Counsel must apprise his client of his opinion of the strength of the government's case,<sup>28</sup> and accurately assess the risks of contesting guilt.<sup>29</sup> A necessary part of this discussion is an explanation of the applicable law. Although insuring the client's comprehension is not always simple, it is

---

23. Defense Function, supra note 6, Standard 4-5.1. See Von Moltke v. Gillies, supra note 7, at 721.

24. Defense Function, supra note 6, Standard 4-5.2(a).

25. Herring v. Estelle, supra note 12. The omission of such advice can render a guilty plea improvident. See Rinehart v. Williams, 561 F.2d 126 (8th Cir. 1977); Walker v. Caldwell, supra note 14.

26. ABA Standards for Criminal Justice: Pleas of Guilty [hereinafter Guilty Pleas], Standard 14-3.2(b), comments (2d ed. 1980).

27. Guilty Pleas, id., Standard 14-3.2(b), comments.

28. Clark, supra note 9, at 19. Cf. ABA Code, supra note 2, EC 7-8 (counsel may emphasize harsh consequences possibly resulting from asserting legally permissible positions).

29. It is unprofessional for a lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case, or to exert undue influence on the accused's decision regarding his plea. Defense Function, supra note 6, Standard 4-5.1(b).

nonetheless essential to a later acceptance of his guilty plea.<sup>30</sup> A client's youthfulness, lack of education, and lack of prior experience with military justice may, of course, impose on counsel a stricter duty to explain these legal principles.<sup>31</sup>

Regardless of whether a pretrial agreement is involved,<sup>32</sup> the defense counsel must discuss the sentence which might be expected upon a finding of guilty. A realistic appraisal of the value of a sentence limitation or of an unnegotiated guilty plea depends not only on the authorized maximum punishment for the charges, but also on the probable sentence a particular military judge might impose in the absence of a guilty plea.<sup>33</sup> The accused must be warned, of course, that counsel's reckoning constitutes opinion and not a promise.<sup>34</sup>

30. A provident plea of guilty requires, inter alia, that the accused understand the relationship between the law and the facts. United States v. Burton, 21 USCMA 112, 115, 44 CMR 166, 169 (1971); United States v. Care, 18 USCMA 535, 40 CMR 247 (1969) (applying standards established in McCarthy v. United States, 394 U.S. 459 (1969)). The Court of Military Appeals, with the exception of Judge Fletcher, appears to have relaxed the Care requirement that this understanding be unequivocally demonstrated on the record. See United States v. Crouch, 11 M.J. 128 (1981). See also United States v. Akin, 9 M.J. 886 (ACMR), pet. denied, 10 M.J. 191 (CMA 1980) (concluding, sub silentio, that accused's apparent misunderstanding of materiality element did not render his plea of guilty to perjury improvident).

31. The assistance of counsel was declared ineffective in Rinehart v. Williams, supra note 25, where the defendant was 15 years old, had no prior dealings with the law, and demonstrated considerable naivety by asking counsel whether he would be permitted to have a car in jail. Among other deficiencies, counsel was cited for failing to advise the accused that murder required a specific intent to kill, and neglecting to explain the elements of manslaughter and the imperfect right of self-defense.

32. See text at section 1b, infra.

33. Guilty Pleas, supra note 26, Standard 14-3.2(b), comments.

34. United States v. Cortez, 337 F.2d 699, 701 (9th Cir. 1964). See also Rinehart v. Williams, supra note 25 (counsel's advice that a 25 to 30-year sentence could be expected was interpreted by accused as "the law"; he was unaware that maximum sentence was life imprisonment).

The adjudged and approved sentence constitutes only the most direct result of conviction; the accused must also be advised of possible collateral consequences of his plea. These might include waiver of certain appellate issues; the loss of veteran's benefits; the imposition of bars to reenlistment; the loss of certain civil rights, such as eligibility for some licenses; the use of the conviction in subsequent civil cases; and deportation or expatriation.<sup>35</sup> This responsibility is essential because the military judge is not required to give such advice during his providency inquiry.<sup>36</sup>

*b. Plea Negotiation*

Recognizing that the prosecutor's function is to serve the ends of justice rather than merely obtain convictions,<sup>37</sup> and that, at times, the stigma of conviction serves no purpose,<sup>38</sup> defense counsel should be ready to propose alternatives<sup>39</sup> such as referral to special counseling or administrative elimination. If these attempts are unsuccessful or appear futile, inquiry into the possibilities of a negotiated plea may be appropriate.<sup>40</sup>

35. Guilty Pleas, supra note 26, Standard 14-3.2(b), comments. See also Clark, supra note 9, at 19-20.

36. United States v. Frangoules, 1 M.J. 467 (CMA 1976); United States v. Pajak, 11 USCMA 686, 29 CMR 502 (1960). Cf. United States v. Hancock, 49 CMR 830 (ACMR 1975) (otherwise provident guilty plea will not be rendered improvident by trial defense counsel's failure to advise accused that plea would prevent appellate consideration of search and seizure issue). United States v. Sena, 6 M.J. 775 (ACMR 1978) (guilty plea provident even though accused would not have pled guilty if he had known his pay would stop on expiration of his term of service (ETS) while in confinement).

37. Berger v. United States, 295 U.S. 78, 88 (1935). See Clark, supra note 9, at 13.

38. Bazelon, supra note 8, at 44-45.

39. Id. See Defense Function, supra note 6, Standard 4-6.1.

40. In cases ultimately involving guilty pleas, the failure to inquire into the possibility of a plea bargain may amount to ineffective assistance. See Walker v. Caldwell, supra note 14 (failure to inquire concerning plea negotiation contributed to assessment of ineffectiveness and rendered plea involuntary).

Ordinarily, a client's consent to engage in plea discussions should be obtained in advance;<sup>41</sup> under no circumstances, however, should counsel conclude a plea agreement without the accused's consent.<sup>42</sup> Although the potential for such action by military defense counsel is extremely remote in light of the customary use of a written offer and acceptance, unauthorized representations made in the course of unrecorded preliminary negotiations, which the accused is later unwilling to endorse, are obviously harmful to defense credibility and the accused's interests. The defense counsel should not even recommend that his client offer a particular pretrial agreement to the convening authority unless he has fully investigated the controlling law and the admissible evidence<sup>43</sup> and has previously apprised his client of the government's case and established the limits of his negotiating authority.<sup>44</sup> He should also be familiar with the personal background of the accused so that the process of reaching a pretrial agreement remains the conscious determination of an individual's future and not a test of negotiating skills.<sup>45</sup> Throughout the bargaining process, it is important to keep the accused abreast of the progress of plea negotiations and promptly communicate all government proposals.<sup>46</sup>

41. Defense Function, supra note 6, Standard 4-6.1(b).

42. Guilty Pleas, supra note 26, Standard 14-3.2(a). See also ABA Code, supra note 2, EC 7-8 and 7-9 (decision to forego legally available objectives or methods for non-legal reasons is for the client to make; however, when action in best interests of client seems unjust, counsel may seek permission to forego it). But see ABA Code, DR 7-101(B)(2) (counsel may refuse to participate in conduct which he believes unlawful, even though some support exists for argument that conduct is legal). Accord Model Rules, supra note 2, Rule 1.2(c).

43. Defense Function, supra note 6, Standard 4-6.1(b).

44. Clark, supra note 9, at 19.

45. Bazelon, supra note 8, at 45.

46. Defense Function, supra note 6, Standard 4-6.2(a). See also ABA Committee on Professional Ethics, Formal Opinion No. 326 (1970) (all settlement offers must be communicated to client). The failure to communicate a government sentence limitation proposal may contribute to a determination of ineffective assistance. See, e.g., Fitzgerald v. Beto, 479 F.2d 420 (5th Cir. 1973). In the civilian setting, the communication of a prosecution offer to the accused may bind the government even though

## II. Responsibilities During Trial

### a. Pretrial Motions

Whether or not it is tendered pursuant to a pretrial agreement,<sup>47</sup> a contemplated plea of guilty does not relieve counsel of his obligation to raise all non-frivolous motions on behalf of the accused.<sup>48</sup> Doubts about whether a colorable issue exists should be resolved in favor of the client.<sup>49</sup> The defense counsel may urge any permissible construction of the law, regardless of his enthusiasm for its chances of success,<sup>50</sup> and the failure to accede to an accused's request to do so may render the assistance of counsel ineffective.<sup>51</sup>

#### 46. Continued.

the offer is unauthorized. Cooper v. United States, 549 F.2d 12 (4th Cir. 1979). The application of Cooper to the military, in the context of plea discussions between government counsel or other members of the staff judge advocate's office and defense counsel, is as yet unclear. See United States v. Cooke, 11 M.J. 257, 261-62 (CMA 1981). See also Cooke v. Ellis, 12 M.J. 17 (CMA 1981).

47. An accused's right to assert pretrial motions may not be limited by pretrial agreement. United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968).

48. ABA Code, supra note 2, EC 7-1, 7-3 and 7-4. Accord Model Rules, supra note 2, Rules 3.1 and 3.3. See Sevilla, Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer, 2 J. Crim. Def. 237, 271-75 (1976).

49. ABA Code, supra note 2, EC 7-3.

50. ABA Code, supra note 2, EC 7-4. Cf. United States v. Lemieux, supra note 12 (counsel must pursue all possible defenses before allowing client to plead guilty).

51. In United States v. Oakley, 25 CMR 624 (ABR 1958), the board of review found that the defense counsel's refusal to contest the voluntariness of a pretrial statement amounted to ineffective assistance. The board stated, "an attorney has the duty to present to the court all claims of his client, unless he knows them to be false." See also Walker v. Caldwell, supra note 14 (failure to investigate possible suppression motion contributed to finding of ineffective assistance).

In some rare circumstances, a client's interests may be better served by failing to raise a meritorious motion at trial. It has been suggested that lack of jurisdiction, an issue which is waived neither by the failure to assert it at trial nor by a plea of guilty,<sup>52</sup> may be better left to appellate litigation if earlier success on the issue would subject the accused to prosecution by foreign or domestic civilian authorities. However, because a guilty plea admits every element charged, including jurisdiction, permitting a client to plead guilty when the defense counsel is certain of the absence of jurisdiction would arguably amount to an affirmative misrepresentation.<sup>53</sup>

52. United States v. Garcia, 5 USCMA 88, 94-95, 17 CMR 88, 94-95 (1954); paragraph 68b(1), MCM, 1969.

53. The Judge Advocate General's Professional Responsibility Advisory Committee has found nothing wrong with intentionally omitting to apprise the court of a potential jurisdictional defect. Ethics Case 78-1, reprinted in The Army Lawyer, June 1978, at 11. The Committee reasoned that counsel may, with the client's consent, waive or fail to assert a right or position where otherwise permissible. See ABA Code, supra note 2, DR 7-101(B)(1). Since current court-martial procedure does not require disclosure of jurisdictional defects, defense counsel does not thereby violate DR 7-102(A)(3) (lawyer shall not fail to disclose what is required by law), DR 7-102(A)(4) (lawyer shall not knowingly use perjured testimony or false evidence), or DR 7-102(A)(4) and (5) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct which is otherwise prejudicial to administration of justice). The Committee reached a different conclusion when the failure to disclose a jurisdictional defect involved affirmative misrepresentation of pertinent facts to the court. Ethics Case 76-7, reprinted in The Army Lawyer, June 1977, at 15. In that case, the defense counsel violated DR 7-102(A)(5) when he falsely affirmed that the accused's age was correctly reflected on the charge sheet. In fact, the accused was three years younger and had enlisted prior to his 17th birthday. The Committee determined that an affirmative misstatement cannot be justified by the requirement to protect client confidences, DR 4-101(B)(1) and (2), and advised counsel to "simply decline to verify the accuracy of such information, by reciting the absence of any obligation."

At least one commentator maintains that the Committee's opinions in this area do not sanction silence by a defense counsel as to a lack of jurisdiction in guilty-plea cases. Schwabe, Guilty Pleas in the Absence of Jurisdiction: An Unanswered Question, The Army Lawyer, April 1979, at 12. Major Schwabe contends that when the defense counsel is certain of a jurisdictional defect, he cannot permit his client to plead guilty,

b. Plea Inquiry

During the inquiry into the providence of the accused's guilty plea, all parties have an obligation to establish the truth on the record.<sup>54</sup> The military judge, trial counsel, and defense counsel are independently responsible for resolving apparent conflicts between the

---

53. Continued

because to do so would perpetrate a falsehood. In *United States v. Alef*, 3 M.J. 414 (CMA 1977), the Court required the government to allege the bases for in personam and subject matter jurisdiction. Because a guilty plea admits every element charged, paragraph 70b, MCM 1969, facts upon which jurisdiction is based, argues Schwabe, are admitted to the court in a guilty plea. But cf. *United States v. King*, 6 M.J. 553, 554-55 (ACMR 1978)(failure to sufficiently allege jurisdictional predicate may be waived by failure to object at trial). Of course, counsel should not argue the absence of a defense to preserve the benefits of a plea agreement at trial and after conviction assert its existence in order to create an improvident plea. Cf. *United States v. Baro*, CM 439932 (ACMR 23 July 1981) (unpub.) (noting that such conduct suggests either the perpetration of a fraud on the court or ineffective assistance of counsel, citing ABA Code, supra note 2, DR 1-102(A) and 7-102). See also *United States v. Cameron*, CM 440652, \_\_\_ M.J. \_\_\_, n.3 (ACMR 29 October 1981); Model Rules, supra note 2, Rule 3.3.

54. *United States v. Johnson*, supra note 20, at 39. In Johnson, both counsel knew that the termination date of an alleged AWOL was actually earlier than that to which the accused had pleaded guilty. The Court of Military Appeals condemned their failure to disclose this fact to the military judge as a violation of Article 45, UCMJ, and Canon 7, ABA Code, supra note 2 (DR 7-102(A)(6) and (7) (lawyer can neither participate nor assist client in conduct he knows to be false or fraudulent); and DR 7-102(B)(1) (lawyer must reveal true facts when client has perpetrated fraud upon court)). Id. at 38 n.2. This obligation to identify inconsistencies between the "actual facts" and those admitted by the plea is not shared by counsel practicing before federal civilian courts. See text accompanying notes 16-22, supra. In the civilian criminal courts, "the only required duty of counsel under the most liberal construction when a plea of guilty is entered is that counsel . . . should ascertain if the plea is entered voluntarily and knowingly." *Lamb v. Beto*, 423 F.2d 85, 87 (5th Cir. 1970).

accused's responses during the providency inquiry and the plea of guilty.<sup>55</sup> The defense counsel's assurances that a particular defense is not viable are therefore accorded significant weight in affirming findings of guilty entered pursuant to pleas when providency is raised on appeal;<sup>56</sup> however, counsel's failure to disclose a valid defense will render a guilty plea improvident and constitute ineffective assistance.<sup>57</sup> Because the providence of a guilty plea entered pursuant to a pretrial agreement depends, additionally, on the accused's understanding of the terms of that agreement,<sup>58</sup> both trial and defense counsel must disclose during the providency inquiry any discrepancy between their understanding of the pretrial agreement and that expressed by the military judge.<sup>59</sup>

55. United States v. Cimoli, 10 M.J. 516, 518 n.2 (AFCMR 1980). This duty arose when the accused admitted possession of marijuana in the natural form but had entered pleas of guilty to possessing the substance in its hashish form.

56. See, e.g., United States v. Watkins, 11 USCMA 611, 29 CMR 427 (1960).

57. Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966). The defense counsel for petitioner Evans testified at the habeas corpus hearing that he had been aware at trial of Evans' hospitalization and attempted suicide, but could not recall if he had been apprised of the recommendation of Evans' doctors that a sanity hearing be held. He stated, however, that even had he known of such a recommendation, he might not have requested a sanity hearing or informed the trial court of the recommendation because he believed Evans would be better off in prison with a possibility of parole than in the state hospital for the criminally insane. That hospital, counsel testified, was so inadequate that it could not provide effective treatment and would inevitably result in permanent confinement. Granting Evans' petition, the district court held that regardless of the merits of counsel's evaluation of the system, his failure to disclose such critical information to the court rendered his assistance ineffective.

58. United States v. Green, 1 M.J. 453 (CMA 1976).

59. United States v. Passini, 10 M.J. 108 (CMA 1980).

c. Presentencing

After findings are entered, the defense counsel's professional responsibilities in the guilty-plea case are identical to those of counsel in the contested case. He may not rely upon the sentence limitation which he may have secured by pretrial agreement as a substitute for vigilant efforts at trial to obtain minimum punishment.<sup>60</sup> The pretrial agreement cannot transform the court-martial into an "empty ritual,"<sup>61</sup> and it may only be during the presentencing phase of trial that counsel in the uncontested case have an opportunity to exercise their advocacy skills in the client's behalf. Thorough preparation and presentation of the accused's case in extenuation and mitigation is no less essential when the accused pleads guilty than when he maintains his innocence, and shortcomings in this area may be cited as ineffective assistance.<sup>62</sup>

III. Conclusion

Although the time which the defense counsel spends in court with the uncontested case may be significantly abbreviated, his responsibilities to the accused and the military judicial system are not. Ill-acquainted with military judicial proceedings and fearful of the possi-

60. United States v. Allen, 8 USCMA 504, 25 CMR 8 (1957). Cf. United States v. Callahan, 22 CMR 443, 447-48 (ABR 1956) (pretrial agreement which precludes presentation of evidence in extenuation and mitigation violates military due process).

61. United States v. Allen, supra note 60, at 507, 25 CMR at 11 ("The sentence proceeding is an integral part of the court-martial trial. . . . Plainly, therefore, counsel's duty to represent the accused does not end with findings. Remaining for determination is the question of the accused's liberty, property, social standing -- in fact, his whole future. And his lawyer is charged with the substantial responsibility of appealing on his behalf to the conscience of the court"). See also United States v. Manos, 17 USCMA 10, 15, 37 CMR 274, 279 (1967) (in many guilty plea cases, "[t]he accused's only hope in the trial is to mitigate his punishment by reference to his former good record and service").

62. See, e.g., United States v. Huff, 11 USCMA 397, 29 CMR 213 (1960) (counsel's failure in sentencing argument to address inference of uncharged misconduct in data read from charge sheet and his reminder to the court members that the accused's noncommissioned officer status "demand's respect" contributed to ineffectiveness of his assistance); United States v. Allen, supra note 60 (representation ineffective where defense counsel presented no evidence in extenuation or mitigation).

bility of greater punishment, the accused who pleads guilty may not be willing to disclose to the military judge the "truth" which the providency inquiry is designed to discover. Servicemembers convicted pursuant to their pleas sometimes claim that their trial responses are inaccurate because they were told how to answer the military judge's questions by trial defense counsel concerned with preserving advantageous pretrial agreements.<sup>63</sup> Because the in-court prophylaxes required by military law may be thwarted in this and other manners, the chief responsibility for preventing the entry of improvident guilty pleas must rest with defense counsel. Likewise, because most guilty pleas are entered pursuant to a pretrial agreement, the primary responsibility for determining an appropriate negotiated sentence must also rest with him. In the last analysis, the defense counsel in the uncontested court-martial must, like the "revolutionary lawyer," determine if his client is guilty and seek the sanction which will best suit his needs.<sup>64</sup>

---

63. Such protestations will "fall on deaf ears" if the record contains a delineation of the elements of the offenses and the accused's responses are consistent with factual guilt. *United States v. Chancellor*, 16 USCMA 297, 300, 36 CMR 453, 456 (1966). Cf. *United States v. Joseph*, 11 M.J. 333 (CMA 1981) (accused's post-trial assertion that company commander promised nonjudicial punishment in exchange for cooperation during investigation did not preclude subsequent court-martial conviction pursuant to plea, because, *inter alia*, accused did not raise claim of immunity at trial when judge asked whether written pretrial agreement encompassed all understandings of parties).

64. See text accompanying note 1, *supra*.

THE PROVIDENCY INQUIRY: AN EXAMINATION OF  
JUDICIAL RESPONSIBILITIES

by Captain John Lukjanowicz\*

*In an uncontested court-martial, all parties share the responsibility of insuring that the providence of the accused's guilty plea will not be challenged on appeal. Captain Lukjanowicz explores the military judge's duties in this regard by tracing the Court of Military Appeals' reformulations of the mandates set forth in United States v. Green and United States v. King. He concludes that while several recent decisions have relaxed certain aspects of the providency inquiry, the military judge must still take affirmative steps to develop a record capable of withstanding post-conviction attacks on the validity of the guilty plea.*

The trial judge serves a critical role in the uncontested court-martial.<sup>1</sup> His prominence is underscored by the fact that the overwhelming majority of criminal convictions in the military justice system are achieved pursuant to a plea of guilty.<sup>2</sup> For that reason, the Court of Military Appeals has addressed the military judge's role in uncontested cases more closely than that of either the trial or defense counsel.<sup>3</sup>

---

*\*Captain Lukjanowicz received his B.A. from Seattle University and his J.D. from Georgetown University. He currently serves as managing editor of The Advocate, and is an action attorney at the Defense Appellate Division.*

1. See United States v. Hoaglin, 10 M.J. 769, 772 (NCFR 1981) (Edwards, J., concurring); paragraph 70b(2), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as Manual].

2. For example, during fiscal year (FY) 1980, the Army Court of Military Review (ACMR) rendered decisions pursuant to Article 66, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. §866 (1976), in the cases of 1764 accused, 77.4% of whom had pled guilty. In FY 1979, 67.2% of the 1584 cases decided by ACMR involved guilty pleas and 56.2% of the 1601 decisions in FY 1978 were uncontested.

3. Compare United States v. King, 3 M.J. 458 (CMA 1977) (trial judiciary must actively participate in and prepare for appellate authorities a record which satisfactorily demonstrates, inter alia, no sub rosa agree-

Nevertheless, recent decisions by both the Court of Military Appeals and the service courts of review suggest that the military judge's duties in the guilty plea process are becoming more relaxed, especially with regard to his responsibility to explain the meaning and effect of pretrial agreements.<sup>4</sup>

Broadly speaking, challenges to guilty pleas can be based either upon the accused's alleged misunderstanding at the time he pled guilty, or upon events which occurred outside the guilty plea hearing and may have affected the plea's validity. In the former instance, recent case law may be dispositive of the post-conviction attack. The opinions regarding the judge's obligation to determine the meaning and propriety of pretrial agreements will be far less helpful, however, when the validity of the plea is attacked on the basis of events occurring outside the providency inquiry. In order to understand this distinction, it will be helpful to review the manner in which appellate courts have attempted to improve the procedures for accepting and preserving negotiated guilty pleas.

### 3. Continued

ments) and United States v. Green, 1 M.J. 453 (CMA 1976) (trial judge must shoulder primary responsibility for assuring on the record that accused understands, inter alia, meaning and effect of each condition, as well as sentence limitation, imposed by any pretrial agreement) with United States v. Myles, 7 M.J. 132 (CMA 1979) (breach of counsels' obligation to disclose terms of agreement exonerates military judge from inquiring into such terms). See also United States v. Rabago, 10 M.J. 610 (ACMR 1980). Cf. Comment, 18 S.C.L. Rev. 668, 673-74 (1966) (disapproving of judicial reliance on representations of defense counsel).

4. Consequently, a greater burden will be placed on the defense counsel to insure that his client is familiar with the terms and conditions of a pretrial agreement. Indeed, the Second Circuit has noted that Rule 11 of the Federal Rules of Criminal Procedure, which governs acceptance of guilty pleas, was not intended to relieve counsel of his responsibilities to insure that his client understands his plea and its consequences. Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974). For a situation in which the accused did not understand the collateral consequences of his plea, see Sena v. United States, 6 M.J. 775 (ACMR 1978). Cf. United States v. Walls, 12 M.J. 1 (CMA 1981) (defense counsel explained terms of "Offer to Stipulate" to military judge).

### Background

In 1976, the Court of Military Appeals expanded the scope of the plea-bargain inquiry in an attempt to enhance the finality of convictions based on negotiated guilty pleas. In United States v. Green,<sup>5</sup> the Court adopted the suggestions in Chief Judge Fletcher's concurring opinion in United States v. Elmore.<sup>6</sup> Under those guidelines, military judges conducting providency inquiries<sup>7</sup> after 12 September 1976 would be required to (1) assure on the record that an accused understands the meaning and effect of each condition in the pretrial agreement; (2) obtain the same assurance from an accused concerning sentence limitations; (3) strike, on their own motion and with the parties' consent, conditions from the agreement that are offensive to law, public policy, or notions of fundamental fairness; (4) secure from both trial and defense counsel their assurances that the written agreement incorporates all terms and conditions; and (5) secure both counsels' concurrence that their interpretation of the agreement comports with his own.<sup>8</sup>

Chief Judge Fletcher hoped that the newly-mandated five-step inquiry would enhance public confidence in the plea bargaining process; provide invaluable assistance to appellate tribunals by exposing any secret understandings and by clarifying on the record any ambiguities lurking within the agreement; satisfy the statutory mandate<sup>9</sup> that the military

---

5. 1 M.J. 453 (CMA 1977). The Green decision was the final leg of a trilogy initiated by United States v. Chancellor, 16 USCMA 297, 36 CMR 453 (1966), and supplemented by United States v. Care, 18 USCMA 535, 40 CMR 247 (1969), whereby the Court of Military Appeals attempted to "foreclose post-conviction litigation as to the providence of guilty pleas." United States v. Joseph, 11 M.J. 333, 334 (CMA 1981).

6. 1 M.J. 262, 264 (CMA 1976) (Fletcher, C.J., concurring in the result).

7. See United States v. Care, supra note 4.

8. United States v. Green, supra note 5, at 456. Steps 1, 2, and 5 properly can be characterized as the "unanimity" provisions of Green, while step 4 is that decision's "openness" requirement. See United States v. Crowley, 3 M.J. 988, 996 (ACMR 1977) (en banc) (Costello, J., dissenting and concurring in result).

9. Article 45, UCMJ, 10 U.S.C. §845 (1976).

judge determine that the guilty plea is voluntarily and providently entered; and insure compliance with statutory and case law as well as basic notions of fundamental fairness.<sup>10</sup> Significantly, Green did not require the appellant to demonstrate prejudice. The reason for this omission is obvious: three of the decision's objectives deal specifically with improving and aiding the military justice system as a whole. The Court in Green, therefore, was concerned with more than one individual accused -- it was concerned with the overriding need to enhance the military justice system's ability to deal with guilty pleas.

The Green decision was undermined by the intermediate appellate courts' initial insistence that the new requirements need not be strictly observed.<sup>11</sup> In United States v. Crowley,<sup>12</sup> the Army Court of Military Review permitted a guilty plea to stand even though the military judge failed to comply strictly with the Green mandates.<sup>13</sup> The Court in Crowley noted that "[i]f the military judge has conducted an inquiry

10. United States v. Green, supra note 5, at 456.

11. See, e.g., United States v. Mobley, 3 M.J. 1008 (ACMR 1977); United States v. Crowley, 3 M.J. 988 (ACMR 1977) (en banc). But see United States v. Reedy, 4 M.J. 505 (ACMR 1977) (findings and sentence set aside where military judge failed to ask whether written agreement was all-inclusive, failed to secure from accused his understanding of the meaning and effect of the sentence limitation, and failed to secure counsels' concurrence that his interpretation of agreement comported with their own); United States v. Goode, 3 M.J. 532 (ACMR 1977). Significantly, Reedy was authored by Judge Dribben and Goode by Senior Judge Cook, two members of the Army Court of Military Review who consistently urged that the Green mandates be scrupulously honored. See United States v. Hill, 7 M.J. 580, 581 (ACMR 1979) (Dribben, J., concurring and dissenting); United States v. Crowley, supra at 999-1002 (Cook, S.J., & Dribben, J., dissenting); United States v. Winkler, 5 M.J. 835, 837-38 (Cook, S.J., concurring and dissenting).

12. 3 M.J. 988 (ACMR 1977) (en banc), aff'd, 7 M.J. 336 (CMA 1979).

13. In that case,

Crowley attacked the trial judge's 'Green inquiry' on several bases. He particularly averred that the military judge's inquiry failed in the following respects: (1) he did not explain the significance of not entering into a stipulation of fact after discovering

which is in substantial compliance with the Green guidelines . . . the plea can be considered provident."<sup>14</sup>

In United States v. King,<sup>15</sup> however, the Court rejected the "substantial compliance" rationale articulated in Crowley, stating that substantial compliance with Green was unacceptable because it ignored the basic policies underlying that decision:

Since we believe the whole purpose of Green . . . is thwarted unless its terms are strictly adhered to, we decline either to 'fill-in' a record left silent because of the trial judge's omission or to develop a sliding scale analysis whereby 'substantial compliance' becomes our standard for review.<sup>16</sup>

13. Continued

that there was no stipulation of fact; (2) he did not insure on the record that Crowley understood the sentence limitations; (3) he did not assure himself that his interpretation of the agreement comported with that of counsel; and, (4) he did not secure assurances from counsel that the written agreement encompassed all of the understandings of the parties.

Lause, Crowley: The "Green" Inquiry Lost in Appellate Limbo, The Army Lawyer, May 1979, at 10, 11.

14. United States v. Crowley, supra note 12, at 995. The Court stated that "substantial compliance" would "require a sufficiently high level of compliance so that [the judges on the court of review] could assure [them]selves from the record by direct responses or justifiable inferences that all the inquiries have been satisfactorily covered and answered." Id. In that regard, the court secured affidavits from the trial and defense counsel that there were no secret agreements. Furthermore, the Court inferred that no misunderstandings as to the terms of the agreement existed since neither the accused, trial counsel, nor the defense counsel expressed dissatisfaction with the judge's explanation.

15. 3 M.J. 458 (CMA 1977).

16. Id. at 459 (footnote omitted).

Nevertheless, despite King's strict admonition that substantial compliance with the Green mandate was insufficient to protect the providence of guilty pleas on appeal, the intermediate appellate courts affirmed some guilty findings while setting aside others, even though the military judge technically may have erred while conducting his inquiry.<sup>17</sup> Furthermore, the Court of Military Appeals fostered this disarray by sending the lower courts conflicting signals.<sup>18</sup> In the absence of a strong reaffirmation of King by the Court of Military Appeals, the lower appellate tribunals began to affirm guilty pleas even though the military judge's

17. Compare United States v. Beckman, 4 M.J. 814 (ACMR 1978) (military judge need not ask whether his interpretation of agreement comported with that of counsel where entire document consisted of one short paragraph and record expressly indicated absence of unwritten agreements) and United States v. Easley, 4 M.J. 768 (ACMR 1977) (military judge's failure to ask counsel comportment question not fatal to providence of plea), pet. denied, 5 M.J. 132 (CMA 1978) and United States v. Williamson, 4 M.J. 708 (NCOMR 1977), pet. denied, 5 M.J. 219 (CMA 1978) and United States v. Kersten, 4 M.J. 657 (ACMR 1977) (no error where judge failed to explain "subsequent misconduct" clause, but conducted several general inquiries of "an intelligent and experienced noncommissioned officer" and an adequate number of specific inquiries concerning both the general and the quantum portions of the agreement), rev'd, 4 M.J. 295 (CMA 1978) and United States v. Wilson, 4 M.J. 618 (NCOMR 1977) (military judge's failure to ask trial counsel if sub rosa agreement existed not fatal to providence of plea where accused and defense counsel denied existence of such agreement), pet. denied, 4 M.J. 288 (CMA 1978) with United States v. Gregg, 4 M.J. 897 (NCOMR 1978) (findings and sentence set aside where military judge did not ascertain from counsel that written agreement encompassed all understandings between parties) and United States v. Wilson, 4 M.J. 687 (NCOMR 1977) (findings and sentence set aside where accused was not questioned about sentence limitation portion of agreement) and United States v. Sheppard, 4 M.J. 659 (ACMR 1977) (error in military judge's inquiry called providence of accused's plea into question).

18. The confusion existing at that time is perhaps best illustrated by the history of United States v. Crowley, supra note 12. Crowley petitioned the Court of Military Appeals for further review of his case. 3 M.J. 475 (CMA 1977). His motion for summary disposition on the basis of United States v. King was denied, 4 M.J. 110 (CMA 1977), as was his petition for grant of review, 4 M.J. 165 (CMA 1977). Six days later, however, the Court of Military Appeals reconsidered and granted Crowley's petition, 4 M.J. 171 (CMA 1977), and summarily reversed the lower court's decision on the basis of United States v. King, 4 M.J. 170 (CMA 1977).

omissions were more significant than mere failures to ask the "comportment" question.<sup>19</sup>

When the Court of Military Appeals finally issued an opinion on the "strict" versus "substantial" compliance issue, it was far from

18. Continued

The government's petition for reconsideration then was granted, 4 M.J. 272 (CMA 1978), and the case was subsequently affirmed. See note 22, infra and accompanying text. See also Lause, supra note 13, at 10. As the lead government counsel in the Crowley case pointed out:

During the four month hiatus between the King decision and the granting of reconsideration of Crowley, approximately twenty-five petitions for grant of review, which presented several variations of the "Green issue", were denied by the High Court. In spite of the King edict, the Court of Military Appeals continued to deny petitions raising the "Green error", even when the lower Court had been supplied affidavits "filling in" the record, where trial judges failed to ask about sub rosa agreements or seek assurances about comportment; where the trial judges did not explain all the cancellation clauses or did not discuss moot conditions. The Government even attempted to concede error in several cases, yet the Court of [Military] Appeals refused to grant the petitions, much less reverse . . . .

Id. at 12 (emphasis supplied).

This apparently inconsistent treatment of substantially similar cases affected other appellate judges. See United States v. Milum, 5 M.J. 672 (ACMR 1978) (noting Court of Military Appeals' treatment of Crowley and other cases). Indeed, Senior Judge Cook, who had strictly adhered to the Green mandates, see note 11 supra, voted to affirm a case even though the military judge failed to ask the "comportment" question. He explained his turnabout:

helpful. In United States v. Hendon,<sup>20</sup> the Court said that the plea bargain inquiry was "adequate", but did not discuss how this related to the proper standard of review. The Court of Military Appeals' sub-

---

18. Continued

My volte-face is occasioned primarily by a uniform pattern of denials of petitions by the United States Court of Military Appeals in cases which involve this precise omission. While Chief Judge Fletcher has admonished us not to engage in such speculation, I nevertheless feel that, under the totality of the post-King decision situation, ignoring such repetitive and undeviating conduct by our Supreme Court would be tantamount to closing my eyes to an onrushing front-end-loader.

United States v. Arrington, 5 M.J. 756, 758-59 (ACMR 1978) (Cook, J., concurring) (footnote omitted), pet. denied, 6 M.J. 46 (CMA 1978).

19. See, e.g., United States v. Dimpter, 6 M.J. 824 (NCOMR 1979) (plea deemed provident by panel reviewing proceeding in revision notwithstanding prior panel ruling in same case that plea improvident because military judge failed to ask trial counsel about existence of sub rosa agreement), pet. denied, 7 M.J. 115 (CMA 1979); United States v. Allen, 6 M.J. 633 (CGCMR 1978) (presumption that judicial proceedings conducted regularly and in accordance with the law not rebutted by accused's contention that summarized record reflecting only that he understood terms of pretrial agreement failed to satisfy Green/King requirements); United States v. Kelley, 6 M.J. 532 (ACMR 1978) (military judge's failure to strike, sua sponte, pretrial agreement provision that was contrary to law did not invalidate plea where judge explained provision and it neither fettered his conduct of trial nor hampered defense counsel), pet. denied, 6 M.J. 294 (CMA 1979); United States v. Smith, 5 M.J. 857 (ACMR 1978) (inquiry adequate where military judge "touched on" each of several automatic cancellation provisions), pet. denied, 6 M.J. 132 (CMA 1978); United States v. Winkler, 5 M.J. 835 (ACMR 1978) (military judge failed to explain two automatic cancellation provisions of agreement, yet court affirmed because he repeatedly inquired about accused's understanding of meaning and effect of plea; properly explained accused's rights to with-

sequent decision in United States v. Crowley<sup>21</sup> also was less than enlightening. In that case, the Court established a "window" between the dates of the Green and King decisions in which cases tried within that period could be affirmed on the basis of substantial compliance with

19. Continued

draw pleas; and assured that accused understood each condition in plea, even though he did not explain each one individually), pet. denied, 6 M.J. 89 (CMA 1978).

Where the military judge's only delict was to fail to ask the comportment question, the lower courts had no hesitancy in finding guilty pleas provident, especially where neither counsel nor the accused objected to the judge's interpretation of the agreement. See, e.g., United States v. Thomas, 6 M.J. 573 (ACMR 1978), aff'd on other grounds, 8 M.J. 216 (CMA 1980); United States v. Harvey, 6 M.J. 545 (NOMR 1978), pet. denied, 6 M.J. 193 (CMA 1979); United States v. Arrington, 5 M.J. 756 (ACMR 1978), pet. denied, 6 M.J. 46 (CMA 1978); United States v. Milum, 5 M.J. 672 (ACMR 1978). Nevertheless, the lower courts did find several pleas improvident based on a military judge's deficient Green/King inquiry. See, e.g., United States v. Tobey, 6 M.J. 917 (NOMR 1979) (plea improvident where military judge failed to discuss pretrial agreement provision concerning processing of administrative discharge); United States v. Cain, 5 M.J. 698 (NOMR 1978) (even though military judge ascertained from accused that there were no promises other than those contained in written agreement, rehearing authorized where it could not be determined from inquiry whether accused assumed any obligation not set forth in document); United States v. Grover-Madrill, 5 M.J. 768 (ACMR 1978) (plea improvident where military judge failed to explain five automatic cancellation provisions, including clause which would void agreement after trial in the event of a rehearing if accused changed plea).

20. 6 M.J. 171 (CMA 1979). "Among other omissions, the trial judge in Hendon failed to explain all of the automatic cancellation clauses and did not receive counsels' accession that their understanding of the agreement comported with his." Lause, supra note 13, at 12. The government thus attempted, unsuccessfully, to concede the case. In fact, between the oral argument and the decision in Hendon, the Court of Military Appeals denied 50 petitions raising the exact or similar issue. Id. This state

Green.<sup>22</sup> Nevertheless, Crowley also reaffirmed the Court of Military Appeals' mandate for strict compliance with the Green guidelines.<sup>23</sup>

---

20. Continued

This state of affairs affected the lower courts. See United States v. Hill, 7 M.J. 580 (ACMR 1979) (adopting harmless error test even though military judge did not strictly comply with Green); United States v. Testman, 7 M.J. 525 (ACMR 1979) (noting that military judge's inquiry "more thorough" than the one approved in Hendon). But see United States v. Miller, 7 M.J. 535 (NCOMR 1979) (where pretrial agreement contained provision requiring suspension or disapproval of punitive discharge, but also provided for possibility of administrative discharge, military judge erred by failing to discuss the potential administrative discharge with the accused).

21. 7 M.J. 336 (CMA 1979).

22. Id. at 337 (Cook, J., concurring in the result). See also United States v. Lott, 9 M.J. 70, 71 (CMA 1980).

23. See United States v. Crowley, supra note 21, at 336.

## The Current Standard

### General Principles

Whatever else it may have accomplished, Crowley established the fact that the colloquy between the military judge and the accused remains the critical aspect of the military judge's Green/King inquiry.<sup>24</sup> This colloquy must conclusively demonstrate the voluntary and intelligent nature of the accused's plea.<sup>25</sup> In order to establish these elements, the military judge must make two different types of assessments.<sup>26</sup> First, he must attempt to discover the state of the accused's understanding in the courtroom at the time the guilty plea is entered.<sup>27</sup> Second, he must make factual findings about events that occurred outside the courtroom

24. Id. The Navy Court of Military Review has described this colloquy as follows:

The key to an adequate record is not whether there is a mechanistic application and ritualistic incantation of espoused guidelines, but whether the record establishes a complete understanding of all parties to the trial as to the meaning and effect of the terms and conditions of the pretrial agreement so that it can be determined that there was a voluntary and provident plea of guilty. As to certain matters, the inquiry can be simple, as to others it requires more detail. The responsibility of conducting a simple or detailed inquiry to assure the record reflects the complete understanding of the parties is on the trial judge.

United States v. Kraffa, 9 M.J. 643, 646 (NOMR 1980), rev'd on other grounds, 11 M.J. 453 (CMA 1981) (convening authority's supplemental action in remitting confinement mooted trial judge's error in failing to explain how deferment differed from suspension and remission). In short, the accused should not be expected or encouraged to be a monosyllabic participant during this inquiry.

25. United States v. Green, supra note 5, at 456.

26. See note 8 supra and accompanying text.

27. United States v. Green, supra note 5, at 456.

in the past: by questioning the accused, he must try to discover whether the plea is made voluntarily and whether any promises were offered in order to induce it.<sup>28</sup> The utility of the judge's Green/King inquiry thus depends in large part upon which of these assessments he develops on the record. When the post-conviction appeal raises questions only about the accused's understanding at the time of pleading guilty, his responses during the providency inquiry can be dispositive of any alleged error.

28. Prior to 1971, the most complete statement of the standard used to test the voluntariness of a guilty plea was found in Brady v. United States, 397 U.S. 742, 755 (1970):

[A] plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats (or promises to discontinue improper harrassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their very nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

This standard proscribed two different sets of coercion -- government conduct which so overwhelms a defendant's will as to make him incapable of independent choice (i.e., beatings) and inducement by unfair or illegal government tactics (i.e., a threat to impose an illegal sentence), regardless of whether the defendant's ability to choose remains unimpaired.

In 1971, however, Santobello v. New York, 404 U.S. 257 (1971), established a new basis for attacking guilty pleas. Santobello explicitly recognized the propriety of plea bargaining, but held that government promises which were part of the inducement or consideration for a guilty plea had to be performed fully if the plea were to stand. Id. at 262. After Santobello, it was no longer sufficient to scrutinize the voluntary and intelligent nature of a plea: if a defendant's constitutional rights were to be enforced, any promises made to him had to be identified and recorded.

### "Unanimity" Provisions

Despite the clear language of King and Crowley regarding strict compliance with Green, the Court of Military Appeals apparently has sub silentio overruled those decisions in United States v. Passini,<sup>29</sup> and United States v. Cruz.<sup>30</sup> These two cases seem to impose a substantial compliance/harmless error rule when the military judge fails to make the required five-step inquiry. Subsequent decisions have borne this out — the Court of Military Appeals has relaxed its standard of review and has adopted an objective test with regard to the military judge's obligation to insure that there are no discrepancies between his explanation of the pretrial agreement and the parties' understanding of that document.<sup>31</sup>

29. 10 M.J. 108 (CMA 1980).

30. 10 M.J. 32 (CMA 1980). During this time, the courts of military review also were eroding the strict compliance doctrine enunciated in King and affirmed in Crowley. See, e.g., United States v. Hoaglin, 10 M.J. 769 (NCFM 1981) (plea provident where accused made no assertion that he misunderstood terms judge failed to explain); United States v. Lay, 10 M.J. 678 (ACMR 1981) (plea not improvident where "adequate" compliance with Green mandate and accused not prejudiced), pet. denied, 11 M.J. 347 (CMA 1981); United States v. Duval, 10 M.J. 578 (ACMR 1980) (military judge need not explain "conditions" of agreement that merely recognized contractual nature of bargain); United States v. Schaller, 9 M.J. 939 (NCFM 1980) (although military judge did not receive accused's personal assurance that he understood maximum sentence limitation, court found he understood agreement where he acknowledged that he and his counsel had initiated agreement, discussed each term, and that he had fully understood them).

31. See, e.g., United States v. Crawford, 11 M.J. 336 (CMA 1981); United States v. Griego, 10 M.J. 385 (CMA 1981); United States v. Hinton, 10 M.J. 136 (CMA 1981). These decisions are unfortunate and represent a departure from the rationale enunciated in Green and affirmed in King and Crowley. Arguably, reversing convictions for technical non-compliance with Green and King presents a danger to society that outweighs considerations of judicial administrative convenience. This argument, however, is unpersuasive. The Green/King mandate involves more than administrative convenience; the accused's rights and the integrity of the conviction are at stake. Moreover, reversal for non-compliance with those decisions

Thus, the Court of Military Appeals deemed a guilty plea provident despite the military judge's failure to ask counsel the "comportment" question where the pretrial agreement was "straightforward" and "susceptible to only one interpretation."<sup>32</sup> Similarly, where the military judge failed to ask the comportment question or ascertain whether the accused understood the agreement's cancellation provisions, but the record nevertheless reflected the military judge's assurance that the accused understood the subject terms of the pretrial agreement, the guilty plea was deemed provident.<sup>33</sup> These recent pronouncements seem to relax the military judge's "unanimity" inquiry.<sup>34</sup>

---

31. Continued

does not mean that the accused is set free. Instead, the case is remanded for a proceeding which fully satisfies the Green/King requirements. See United States v. Steck, 10 M.J. 412 (CMA 1981) (proceeding in revision under Article 62(b), UCMJ, 10 U.S.C. §862(b) (1976), can remedy defective Green/King inquiry). Indeed, strict compliance with Green and King in the original action would actually increase society's protection against reversal of valid convictions. Full compliance with these decisions not only safeguards the accused's constitutional rights to have a voluntary and intelligent plea, see Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969), but also assures a clear record for the reviewing court. If the trial court fails to comply fully with Green and King, however, the reviewing court must rely on diverse portions of the record to demonstrate that an accused's rights were adequately protected. Such a tortured approach was precisely the situation that Green and King sought to remedy.

32. United States v. Griego, supra note 31, at 385.

33. See United States v. Hinton, supra note 31, at 137. Accord United States v. Crawford, supra note 31, at 337 (record revealed that accused and counsel understood agreement's terms and thus military judge's failure to explain each term to accused was harmless).

34. See note 8 supra. In order to insure that all parties at trial understand the terms and conditions of the agreement, defense counsel should heed and seek to implement the Court of Military Appeals' guidelines that pretrial agreements should be limited to bargaining for charges, sentence, and pleas. United States v. Dawson, 10 M.J. 142, 149 (CMA 1981). As the Navy Court of Military Review has noted, "counsel in the field are ill-advised to experiment with the military justice

Because that inquiry requires the judge only to ascertain that an accused understands the terms and conditions of a pretrial agreement,<sup>35</sup> the intelligence vel non of the accused's decision to plead guilty under a negotiated agreement is revealed on the record--a record which will contain an objective standard against which later purported misunderstandings about the terms of the agreement can be tested. Significantly, however, these decisions have not expressly abolished the requirement that the military judge conduct such an inquiry: they have merely tested for prejudice and found none.<sup>36</sup> Nor has the Court of Military Appeals

34. Continued

system through pretrial agreements with esoteric provisions. As pretrial agreements become more complex, they become more insidious." United States v. Arnold, 8 M.J. 806, 808-09 (NCMR 1980). In negotiating agreements, therefore, defense counsel should seek to strike any condition which does not relate to "charges, sentence, and pleas" or should move to have such conditions stricken, provided the government agrees to remain bound by the agreement. If the government refuses to remain bound, the defendant should be so informed and allowed to decide whether to withdraw from the agreement on the record. Cf. United States v. Walls, 9 M.J. 88, 92 (CMA 1980) (military judge's misadvice as to maximum impossible punishment did not affect defendant's willingness to plead guilty).

35. See note 8 supra and accompanying text.

36. Thus, the careful military judge will conduct an inquiry in accordance with either the guidelines propounded in United States v. Williamson, supra note 17, at 710, or those found at Department of Army, Pamphlet No. 27-15, Military Justice Handbook, Trial Guide, pp. 15-22 (15 Jan. 1980). See also United States v. Hoaglin, supra note 1, at 770-71 (Williamson guidelines made mandatory for Navy-Marine Corps military judges). Shortcuts by a military judge in this area ultimately prove fruitless and may well result in a prejudicial misunderstanding by an accused, thus jeopardizing an otherwise valid guilty plea. The slight additional time the military judge would have to take in carefully questioning an accused would eliminate most attacks on guilty pleas, thus saving time in the long run. See Davis, The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy, 6 Val. U.L. Rev. 111, 134 (1972).

abolished the judge's requirement to conduct an "openness" inquiry,<sup>37</sup> although it has raised a formidable barrier to subsequent relief predicated upon allegations that sub rosa plea bargain agreements existed.<sup>38</sup>

### "Openness" Inquiry

The record made by the judge during his Green/King inquiry will be relatively useless when a post-conviction challenge raises questions about events that occurred outside the courtroom. Typically, the accused will allege that he was induced to plead guilty by government coercion, or by a plea bargain, subsequently broken by the government, that was not revealed during the providency inquiry.<sup>39</sup> Because these inducements may also affect the trustworthiness of the accused's responses to the military judge's "openness" inquiry, the Green/King record should not be relied upon to dispose of such a post-conviction attack. In two recent cases, however, the Court of Military Appeals relied on either the ac-

37. See note 8 supra; United States v. Griego, supra note 31, at 386 (both counsel agreed with accused's assertion that no promises had been made which were not included in agreement); United States v. Crawford, supra note 31, at 337 (judge conducted sub rosa inquiry); United States v. Hinton, supra note 31 (decision limited to comportment issue and judge's explanation of cancellation terms); United States v. Passini, supra note 29 (decision limited to comportment issue); United States v. Cruz, supra note 30, at 32 (judge received assurances from both counsel that written document reflected all understandings). Because the "sub rosa agreement inquiry [is] an issue at the very heart of the purpose" underlying the Green mandate, United States v. Lay, supra note 30, at 684, and because the policy interest in "exposing any secret understandings between the parties" is clearly distinguishable from the objective of "clarifying on the record any ambiguities which lurk within the agreements," United States v. Green, supra note 5, at 456 (emphasis added), the recent pronouncements by the Court of Military Appeals in the unanimity area would seem to be inapposite to cases in which the military judge fails to assure that the agreement encompasses all of the parties' understandings.

38. See notes 40-46 infra and accompanying text.

39. See United States v. Joseph, supra note 5, at 336; United States v. Cooke, 11 M.J. 257, 259 (CMA 1981); United States v. Melancon, 11 M.J. 753 (NMCMR 1981).

cused's or counsel's responses during the Green/King inquiry in order to affirm guilty pleas allegedly predicated on secret government promises. In United States v. Joseph,<sup>40</sup> the accused complained that his commander breached a promise to punish him nonjudicially rather than by court-martial if he cooperated during an investigation. Because this post-trial assertion directly contradicted the accused's assertion at trial that the written agreement encompassed all the understandings of the parties,<sup>41</sup> the Court of Military Appeals upheld the conviction, noting that it "decline[d] to consider . . . allegations of fact alleged to exist before trial that [were] contrary to the factual representations . . . made at trial."<sup>42</sup>

Similarly, in United States v. Cooke,<sup>43</sup> the Court denied relief to an accused who asserted after trial that his unwritten pretrial agreement to spend only 30 days in confinement was breached by the convening authority because he spent 46 days in confinement.<sup>44</sup> The Court agreed with the lower tribunal's finding that no such pretrial agreement existed, especially in light of the defense counsel's denial of the existence of any such understanding.<sup>45</sup> Thus, the Court of Military Appeals appears to sanction a per se exclusion of post-conviction statements which are inconsistent with representations made at trial.

The approach taken in these two cases, however, is inconsistent with the notion that an accused's guilty plea be both intelligent and voluntary,<sup>46</sup> and it conflicts with the fifth amendment privilege against self-incrimination. When allegations of either coercion or concealed government promises are made, the accused usually is confronted with his

---

40. 11 M.J. 333 (CMA 1981).

41. Id. at 335

42. Id. See also United States v. Davenport, 9 M.J. 364, 367 (CMA 1980) (evidence aliunde the record will not be considered by appellate authorities to determine anew the providence of the plea).

43. 11 M.J. 257 (CMA 1981).

44. Id. at 261.

45. Id. at 260-61.

46. See United States v. Green, supra note 5, at 456; note 9 supra and accompanying text.

contrary statements during the providency inquiry. Yet, those statements represent testimony introduced at a judicial hearing to establish the existence of facts. Because the facts to be established are the prerequisites of a valid guilty plea, the accused is put in the position of testifying in favor of his own conviction. A defendant's statements, used to establish facts leading to his own conviction, must meet fifth amendment standards of voluntariness.<sup>47</sup>

Those standards are quite strict. Under the rationale first espoused in Bram v. United States,<sup>48</sup> the fifth amendment privilege against self-incrimination forbids the use against an accused of any statement "extracted by any sort of threats or violence [or] obtained by any direct or implied promises, however slight."<sup>49</sup> In light of this test, an accused can impeach even the most careful judge's inquiry regarding the existence of a sub rosa agreement by a post-conviction assertion of secret government coercion or promises. Although the accused must contend with the fact that either he or his counsel denied being coerced at the time the plea was taken, any governmental coercion powerful enough to induce an accused to plead guilty and thus to consent to immediate conviction would also appear to be powerful enough to persuade him to untruthfully answer questions about the plea.<sup>50</sup>

---

47. A valid guilty plea "is itself a conviction." Boykin v. Alabama, 395 U.S. 238, 242 (1969). Proof of the validity of the plea entered during the providence inquiry obviates the need to prove the defendant's actual guilt at trial. Thus, the considerations of fairness and accuracy that underlie the application of the fifth amendment at a contested trial apply with equal force to the providency inquiry. If the colloquy is intended to establish conclusively the validity of a plea, and hence conviction, the protections deemed essential at a contested trial must be provided.

48. 168 U.S. 532 (1897).

49. Id. at 542-43.

50. See United States v. McCarthy, 433 F.2d 591, 593 (1st Cir. 1970) ("[I]n cases in which a guilty plea has been improperly induced, most defendants would be expected to deny any impropriety[.]"). See also Blackledge v. Allison, 431 U.S. 63, 74 (1977) (although recorded providency inquiry constitutes formidable barrier to collateral attack on guilty plea, federal courts should not automatically exclude defendant's post-conviction assertions).

The Supreme Court confronted this problem in Fontaine v. United States.<sup>51</sup> In that case, the defendant alleged that prolonged police interrogation and physical abuse had induced his guilty plea.<sup>52</sup> The district court denied the accused a hearing because he stated at trial that his plea was entered voluntarily and without coercion.<sup>53</sup> The Supreme Court reversed, stating that although the federal plea inquiry procedure was intended to "flush out and resolve" such issues, "its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations."<sup>54</sup> Parallel reasoning would apply when an accused alleges that his plea was influenced by secret government promises which were subsequently broken. Although the accused often will be faced with his own disavowal of such promises,<sup>55</sup> he may explain his disingenuousness during the Green/King inquiry by asserting that secrecy was a required part of the bargain.<sup>56</sup> Under the Bram standard of voluntariness, however, an accused's induced misrepresentation or silence will not foreclose a later claim that an off-the-record promise was broken.<sup>57</sup>

As a practical matter, the providency inquiry is therefore an unsuitable forum for discovering whether government coercion or secret plea bargaining exists. Indeed, where an illegitimate bargain has been reached, it is unrealistic to expect the parties to reveal it. This deliberate concealment of a promise during the Green/King inquiry possibly could be considered a waiver of the right to have the promise enforced. Waiver, however, is an inappropriate ground for failing to reach the merits of a claim. As the Supreme Court has observed, if a plea is "so coerced as to deprive it of validity to support [a] conviction, the

---

51. 411 U.S. 213 (1973).

52. Id. at 214.

53. Id. at 213-14.

54. Id. at 215.

55. See United States v. Joseph, supra note 5, at 335.

56. See United States v. Cooke, supra note 43, at 259.

57. See Santobello v. United States, supra note 28, at 262 (conviction based on broken plea bargain cannot stand).

coercion likewise deprives it of validity as a waiver of [the defendant's] right to assail the conviction."<sup>58</sup>

### Conclusion

Where does the foregoing analysis leave the careful military judge who seeks to discharge his responsibilities under Green? The military judge should realize that he must undertake two discrete inquiries at trial: the unanimity inquiry and the openness inquiry. The former requirement can be fulfilled merely by following the procedure outlined in United States v. Williamson.<sup>59</sup> No matter how searching his "openness" inquiry may be, however, no judge can protect himself against a later complaint by a convicted servicemember that his rights were violated.<sup>60</sup>

---

58. Waley v. Johnston, 316 U.S. 101, 104 (1942). Thus, the holding implicit in United States v. Joseph, supra note 5, at 335, that the accused waived his right to have his post-conviction claim considered, appears to be inconsistent with the rationale espoused in Waley.

59. 4 M.J. 708 (NCMR 1977), pet. denied, 5 M.J. 219 (CMA 1978). See also note 36 supra.

60. Interestingly, nothing in either the UCMJ or the Manual appears to preclude a military judge from placing an accused under oath before asking the sub rosa question. Indeed, the Third Circuit has advised its district judges to swear in the defendant at the guilty plea hearing and to warn defendants pleading guilty that they may not at a later time contend that any promise, representation, agreement or understanding was made other than those set forth in open court. See United States v. Hawthorne, 502 F.2d 1183, 1187-88 (3d Cir. 1974). The court views this warning as a means of deterring defendants from misrepresenting facts in the guilty plea hearing by threatening prosecution for perjury. If such a procedure were adopted by a military judge, the swearing and warning requirements certainly would present a substantial evidentiary barrier to post-conviction attacks. See Perry v. United States, 514 F. Supp. 156, 163-64 (D.N.J. 1981) (fabrications petitioner presented to court should subject him to perjury prosecution).

Nonetheless, a comprehensive hearing held at the time the plea is taken can eliminate appellate issues based on a purported misunderstanding in the courtroom. Thus, the Court of Military Appeals' recent reformation of the Green/King inquiry frees a military judge from engaging in legal "mumbo-jumbo" as long as the record reflects sufficient facts under which a reviewing court can objectively assure itself that no misunderstanding existed at the time he accepted the plea. Even a modified Green/King inquiry, however, cannot ferret out instances where a plea was induced by coercion or unkept government promises not exposed in the courtroom.<sup>61</sup> Consequently, the military judge must insure that his "openness" inquiry is even more thorough than his "unanimity" inquiry in order to protect the providency of guilty pleas on appeal.<sup>62</sup>

61. The utility of the Green/King inquiry in separating meritorious claims from frivolous ones appears dubious if secrecy is a required part of the sub rosa agreement. Thus, every accused who presents a colorable claim for relief should be granted a DuBay-type hearing to determine the merits of his claim, for there simply is no way to determine whether such a claim is baseless until it is heard. See United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967). A colorable claim will be easier for an accused to present when the judge fails to conduct a thorough openness inquiry. In view of the military justice system's heavy dependence on guilty pleas, see note 2 supra, any liberal policy of granting hearings when guilty pleas are attacked as involuntary seems quixotic. Yet, because a guilty plea must be both voluntary and intelligent, those elements must be conclusively established, even though it may take a post-conviction hearing to do so. See United States v. Zuis, 49 CMR 150, 157 (ACMR 1974).

62. See note 60 supra.

## ISSUES WAIVED BY PROVIDENT GUILTY PLEA

This checklist is designed to assist defense counsel in advising their clients of the desirability of pleading guilty. The list enumerates those legal issues which are waived by a provident guilty plea. However, the defense counsel should never decline to make objections just because his client decides not to contest criminal charges. Many legal issues which will survive a guilty plea are nevertheless waived by a failure to object. Further, under the Military Rules of Evidence,<sup>1</sup> motions to suppress should be made before the entry of pleas. Defense counsel should also attempt to make other evidentiary objections through motions in limine prior to arraignment, since success on those objections may affect the decision to plead guilty.<sup>2</sup>

---

1. See, e.g. Mil.R.Evid. 304(d)(2) and 311(d)(2).

2. Any pretrial agreement requiring the defense to forego making motions violates public policy and is void. *United States v. Holland*, 1 M.J. 58 (CMA 1975).

A provident guilty plea waives appellate review of:

Minor defects in specifications <sup>3</sup>	U.S. v. Blahat, 23 CMR 558 (ABR 1957)
Nonjurisdictional defect in composition of court with respect to findings	U.S. v. McBride, 6 USCMA 430, 20 CMR 146 (1955)
Defective pretrial advice	U.S. v. Henry, 50 CMR 685 (AFCMR 1975)
Defective Article 32 investigation	U.S. v. Parker, 8 M.J. 785 (NCMR 1980)
Lack of defense counsel at Article 32 investigation	U.S. v. Rehorn, 9 USCMA 487, 26 CMR 267 (1958)
Ineffective assistance of counsel at Article 32 investigation	U.S. v. Courtier, 20 USCMA 278, 43 CMR 118 (1971)
Sixth amendment violations	U.S. v. Dixon, 8 M.J. 858 (NCMR 1980)
Fourth amendment violations	U.S. v. Blackney, 2 M.J. 1135 (CGCMR 1976)
Privilege against self-incrimination	U.S. v. Martin, 4 M.J. 852 (ACMR 1978); US v. Cordova, 4 M.J. 604 (ACMR 1977)
Right to confrontation	U.S. v. Martin, 4 M.J. 852 (ACMR 1978); US v. Cordova, 4 M.J. 604 (ACMR 1977)
Right to trial on the merits	US v. James, 10 M.J. 646 (NCMR 1980)

---

3. Note, however, that a fatal defect in a specification, such as the failure to state an offense, is not waived by a guilty plea. United States v. Hunt, 7 M.J. 985 (ACMR 1979).

A provident guilty plea does not waive appellate  
review of otherwise preserved issues pertaining to:

Jurisdiction	U.S. v. Rehorn, 9 USCMA 487, 26 CMR 267 (1958). MCM, para 69d; para 215a
Due process objections	U.S. v. Clay, 1 USCMA 74, 1 CMR 74 (1959)
Major defect in specification	U.S. v. Hunt, 7 M.J. 985 (ACMR 1979); U.S. v. Eslow, 1 M.J. 620 (ACMR 1975)
Status as conscientious objector	U.S. v. Stewart, 20 USCMA 272, 43 CMR 112 (1971)
Denial of requested counsel	U.S. v. Marsters, 49 CMR 495 (CGCMR 1974)
Lack of verbatim record	U.S. v. Blakney, 2 M.J. 1135 (CGCMR 1976)
Defective court composition during sentencing	U.S. v. McBride, 6 USCMA 430, 20 CMR 146 (1955)
Statute of limitations	U.S. v. Kammeyer, 30 CMR 586 (NBR 1969)
Admissibility of evidence on sentencing	U.S. v. Morales, 23 USCMA 508, 50 CMR 647 (1975)
Speedy trial	U.S. v. Schalck, 14 USCMA 371, 34 CMR 151 (1964)
Challenge of military judge	U.S. v. Wismann, 19 USCMA 554, 42 CMR 156 (1970)
Multiplicity	U.S. v. Buchholtz, 47 CMR 178 (ACMR 1973)
Trial on unsworn charges	U.S. v. Taylor, 15 USCMA 102, 41 CMR 102 (1969)

Part Six - "Plain View"

Under certain circumstances, evidence or contraband in the "plain view" of police officers may be seized without a warrant and admitted against an accused in a subsequent criminal proceeding.<sup>1</sup> The Supreme Court has justified the "plain view" exception to the fourth amendment's warrant requirement by noting that "plain view does not occur until a search is in progress . . . [a]nd, given the initial intrusion, the seizure of an object in plain view . . . does not convert the search into a general or exploratory one;" this "minor peril to Fourth Amendment protections" is counterbalanced by the "major gain in effective law enforcement" that the plain view doctrine allows.<sup>2</sup> The legal meaning of the phrase "plain view" is not coextensive with its everyday usage: the doctrine does not stand for the proposition that any or all evidence in plain view may be seized without obtaining a warrant.

Prior Valid Intrusion

In order for evidence in plain view to be seized without a warrant, there must be a prior valid intrusion into the area where the evidence is found. If law enforcement officials possess a valid warrant to search a residence or other structure, contraband or evidence of another crime discovered during the search may be seized without a new warrant and admitted into evidence. In United States v. Canestri,<sup>3</sup> for example, the

1. The "plain view" exception to the warrant requirement was first enunciated in Coolidge v. New Hampshire, 403 U.S. 446 (1971). Prior to that decision, the "plain view" exception had been implicitly recognized by the federal courts. See United States v. Lee, 274 U.S. 559 (1927); United States v. Lefkowitz, 285 U.S. 452 (1932); Ker v. California, 374 U.S. 23 (1963). The exception was recognized by the military judicial system in United States v. Burnside, 15 USCMA 326, 35 CMR 298 (1965). The doctrine was recently addressed in United States v. Gladdis, 11 M.J. 845, 847 (ACMR 1981), where the court observed that "when a police official is at a place he has a right to be and it is 'immediately apparent' to him that something he sees is evidence of a crime, his seizure of that evidence without a warrant is justified by the 'plain view' doctrine." See generally Rintamaki, Plain View Searching, 60 Mil.L.Rev. 25 (1973).

2. Coolidge v. New Hampshire, supra note 1, at 452.

3. 518 F.2d 269 (2d Cir. 1975).

police obtained a warrant to search the defendant's house for evidence of a robbery allegedly committed by his brother. During the search, the police found a sawed-off shotgun and two automatic weapons belonging to the defendant. The Court held that the weapons were admissible and convicted the defendant of violating federal firearm statutes.<sup>4</sup>

The warrant must be specific as to the place to be searched and the objects sought, and it must be based on probable cause. Evidence found during the search may be seized, but its discovery does not authorize an expansion of the search.<sup>5</sup> Further, when the objects named in the warrant have been found, or have not been located after a diligent search, the government agents must terminate the intrusion.<sup>6</sup> Additionally, there must be a reasonable relationship between the place searched and the objects named in the warrant.<sup>7</sup> When their initial intrusion is unsupported by a search warrant, law enforcement authorities may still seize evidence in plain view if one of the recognized exceptions to the warrant requirement applies.<sup>8</sup>

4. See also *United States v. Pacelli*, 470 F.2d 67 (2d Cir. 1972), cert. denied, 415 U.S. 983 (1973); *United States v. Maude*, 481 F.2d 1062 (D.C. Cir. 1973); *United States v. Campasule*, 516 F.2d 288 (2d Cir. 1975); *United States v. Rollins*, 522 F.2d 160 (2d Cir. 1975).

5. See *United States v. Britting*, 7 M.J. 978 (AFCMR 1979) (observation of marijuana seeds in plain view did not justify search of film canister where LSD, metamphetamine and cocaine were found).

6. See *United States v. Odland*, 502 F.2d 148 (7th Cir.), cert. denied, 419 U.S. 1088 (1974); *United States v. Dzialak*, 441 F.2d 212 (2d Cir. 1971).

7. *Coolidge v. New Hampshire*, supra note 1.

8. See, e.g., *United States v. Escobedo*, 11 M.J. 51 (CMA 1981) (entry into barracks room and seizure of evidence in plain view was valid as to Escobedo since there was probable cause for his arrest, while entry and subsequent seizures were invalid as to his roommate because of absence of probable cause); *United States v. Mathis*, 16 USCA 522, 37 CMR 142 (1967) (seizure of stolen radio and television set upheld where woman with whom defendant was living allowed agents to enter room where items were in plain view). See also *United States v. Morrison*, 5 M.J. 680 (ACMR 1978); *United States v. Garcia*, 3 M.J. 1090 (NCFMR 1977); *United States v. Cruz*, 3 M.J. 707 (AFCMR 1977).

The plain view exception may be invoked when a law enforcement officer is not actively searching for evidence but inadvertently uncovers an incriminating object. Thus, in Harris v. United States,<sup>9</sup> a police officer who approached a parked vehicle in order to roll up its windows discovered evidence of a crime which was subsequently admitted at trial. The same principles apply in cases where the authorities discover evidence of a crime in plain view while performing some duty or while investigating another crime.<sup>10</sup> In United States v. Smeal,<sup>11</sup> law enforcement agents went to the defendant's residence after they were notified that his wife had apparently shot herself. During the investigation of the shooting, one agent observed a typewriter in the bedroom that matched the description of one stolen from an office on base. The machine's serial number was recorded, and the next morning it was seized. The Court upheld the seizure because the typewriter was in plain view when observed and the law enforcement authorities were properly on the premises when they responded to an emergency.<sup>12</sup> Cases where evidence of crime or contraband is discovered during a routine inspection or inventory also fall into this category.<sup>13</sup>

9. 390 U.S. 234 (1968).

10. See South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. Gargatto, 476 F.2d 1009 (6th Cir. 1973); United States v. Hillstrom, 533 F.2d 209 (5th Cir. 1976); United States v. Kazmierczak, 16 USCMA 594, 37 CMR 214 (1967); United States v. Welch, 19 USCMA 134, 41 CMR 134 (1969).

11. 23 USCMA 347, 49 CMR 751 (1975).

12. See also United States v. Rodriguez, 8 M.J. 648 (AFCMR 1979).

13. Military cases in this category typically deal with drugs or contraband found during a routine "health and welfare" inspection. See United States v. Grace, 19 USCMA 409, 42 CMR 11 (1970); United States v. Sayles, 48 CMR 743 (AFCMR 1974); United States v. Jones, 4 M.J. 589 (CGCMR 1977); United States v. Hayes, 3 M.J. 672 (ACMR 1977); United States v. Fontonette, 3 M.J. 566 (ACMR 1977).

## Inadvertence

Another condition precedent for the warrantless seizure of evidence in plain view is that its discovery be inadvertent. The lower federal courts have interpreted "inadvertence" to mean the absence of probable cause to believe that the evidence would be found. A plain view seizure, in other words, cannot be challenged on the basis of the government's "advance knowledge" if its agents harbored only a mere expectation or suspicion that the subject evidence or contraband would be discovered.<sup>14</sup> Thus, in United States v. Lange,<sup>15</sup> a squadron administrative officer was advised of the theft of a watch and money; the officer was also aware of other thefts reported over the prior two months. The administrative officer conducted a thorough check for cleanliness and accountability of government property in the area where he believed he would find the stolen property. During his inspection, he found three wallets among the defendant's possessions. The Court found that the inspection was a sham and that the discovery of the wallets was not inadvertent but planned and anticipated; consequently, the search and seizure of those items was unlawful.<sup>16</sup>

## Identifying Objects in Plain View

The "plain view" doctrine only requires that enough of the seized object be visible to justify a determination that it is contraband or evidence of a crime. Thus, in United States v. Chalk,<sup>17</sup> law enforcement agents observed the butt end of a shotgun partially covered by papers on the floor behind the front seat of an automobile; the weapon was deemed to be in plain view.<sup>18</sup>

---

14. See United States v. Liberti, 26 Crim.L.Rptr. (BNA) 2441 (2d Cir. Feb. 20, 1980) ("inadvertent" does not mean "unexpected"); United States v. Hare, 589 F.2d 1291 (1979); United States v. Websch, 446 F.2d 220 (10th Cir. 1971); United States v. Hillstrom, supra note 10; Mapp v. Warden, 531 F.2d 1167 (2d Cir. 1976); United States v. Glassell, 488 F.2d 143 (9th Cir. 1973).

15. 15 USCMA 486, 35 CMR 458 (1965).

16. See United States v. Figgins, 47 CMR 155 (ACMR 1973); United States v. Banks, 44 CMR 878 (AFCMR 1972); United States v. Hay, 3 M.J. 654 (ACMR 1977); United States v. King, 2 M.J. 4 (1976).

17. 441 F.2d 1277 (4th Cir. 1971).

18. Compare United States v. Gladdis, supra note 1 (officer's view of 2 inches of spoon handle protruding from accused's pocket sufficient to

## Conclusion

In order for the plain view doctrine to justify the warrantless seizure of evidence, there must be a prior valid intrusion pursuant to a search warrant, or an intrusion based upon one of the exceptions to the warrant requirement. Further, the evidence or contraband must be in plain view such that its nature can be determined without further investigation, and its discovery must be inadvertent. Finally, there must be facts and circumstances from which the probability that the object is contraband or evidence can be determined using the "reasonable man" standard.

---

### 18. Continued

establish probable cause when officer had been informed by doctor that accused was suffering from "heroin-type overdose"), with *United States v. Thomas*, 16 USCMA 306, 36 CMR 462 (1966) (bottle found to contain heroin improperly seized as it was taken from accused only because he had it in his hand while asleep). In *United States v. Sanchez*, 10 M.J. 273 (CMA 1981), appellant's platoon sergeant observed appellant through an open barracks window igniting a "distinctively unusual" metallic pipe; aware both that appellant did not normally smoke a pipe, and that the pipe was of a type used to smoke marijuana, the sergeant seized the pipe. The court approved the seizure, finding the sergeant was lawfully in the area when the pipe was viewed, and that he had probable cause to believe the pipe contained contraband. *Id.* at 274. See *United States v. Van Hoose*, 11 M.J. 878 (AFCMR 1981) (seizure of sexually oriented magazines and devices and information on a piece of paper illegal when no probable cause at the time to know that the items seized were evidence of any crime).

Intrusions and identifications assisted by artificial means present special fourth amendment problems. *Cf.* *Walter v. United States*, 447 U.S. \_\_\_\_ (1980) (projection of film in FBI's possession required warrant); *United States v. Taborda*, 28 Crim.L.Rptr. (BNA) 2289 (2d Cir. Nov. 24, 1980) (use of telescope to see into house required warrant). Whether a reasonable expectation of privacy existed appears to be controlling. See *Katz v. United States*, 389 U.S. 347 (1967).

## PROPOSED INSTRUCTION

### Accessory After the Fact

In the military justice system, an accused is guilty of being an accessory after the fact\* if (1) an offense was committed; (2) he "received, comforted or assisted" the offender for the purpose of "hindering or preventing his apprehension, trial or punishment;" and (3) he knew the offender committed the offense. The second element necessarily includes the requisite criminal intent. See United States v. Tamas, 6 USCMA 502, 508, 20 CMR 218, 226 (1955). However, the standard military instruction does not mention or define this necessary mens rea. See Department of Army, Pamphlet No. 27-9, Military Judges' Guide §4-1 (1969). In order to bring this element to the court members' attention, the defense counsel should request that the military judge present the following instruction:

An accessory after the fact is one who with knowledge that an offense against laws of the United States has been committed willfully receives, relieves, comforts, or assists the offender, in order to hinder or prevent the latter's apprehension, trial or punishment.

An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Extracted from Devitt and Blackmar, Federal Jury Practice Instructions, §21.03 (3rd ed. 1977), this instruction was cited with approval in United States v. Mills, 597 F.2d 693, 697 (9th Cir. 1979). The "intent" element should be stressed in the military as well as in the federal system. See United States v. Tamas, *supra*; United States v. Verdi, 5 M.J. 33 (CMA 1978). Without the proposed instruction, the members could erroneously conclude that an act which coincidentally aids an offender renders the accused guilty, regardless of the fact that the act was committed in order to benefit the latter.

\* Article 78, Uniform Code of Military Justice, 10 U.S.C. §878 (1976).

## SIDE BAR

### *A Compilation of Suggested Defense Strategies*

#### Pretrial Agreements

If the quantum portion of a pretrial agreement provides that the convening authority will approve no sentence "in excess of" a specified limitation and the adjudged sentence includes punishment not reflected in the document, the convening authority may nonetheless approve the sentence if it is less onerous than the ceiling contained in the agreement. Similarly, the convening authority can reduce the adjudged sentence in accordance with the Table of Equivalent Punishments, paragraph 127c, Manual, if the revised sanction does not violate the express language of the document. In a recent case, the pretrial agreement provided for approval of no sentence "in excess of" confinement at hard labor for ten years, total forfeitures, and a punitive discharge. While the court adjudged ten years of confinement and a punitive discharge, the sentence did not include forfeitures. The convening authority converted three years of the adjudged confinement into total forfeiture of pay and allowances for three years.

Although the Army Court of Military Review noted that the Table of Equivalent Punishments equates one day of confinement to one day of forfeiture of pay, it concluded that the convening authority had increased the severity of the sentence by providing for forfeitures of allowances, but affirmed the remainder of the sentence. See United States v. Crockett, CM 440412 (ACMR 13 April 1981) (unpub.). In another case, the adjudged sentence included a fine but no forfeitures, while the pretrial agreement provided for no sentence "in excess of" confinement, forfeitures, and a punitive discharge. Although the pretrial agreement permitted the imposition of forfeitures, the convening authority could approve the fine because of the language of the agreement. In United States v. Schoemacher, 11 M.J. 849, 852 (ACMR 1981), the court concluded that unless the pretrial agreement specifically states otherwise, "it does not preclude the convening authority from approving types of punishments not specifically mentioned. The convening authority's action is valid so long as the approved sentence, considered as a whole, is not more severe than that agreed upon."

In United States v. Bond, CM 439172 (ACMR 9 Dec. 1980) (unpub.), reconsidered (ACMR 9 Jan. 1981) (unpub.), the pretrial agreement provided for no sentence in excess of a "dishonorable discharge, confinement at hard labor for two years, total forfeitures, and reduction to Private E-1, if adjudged by the court" (emphasis added). The court sentenced

the accused to a discharge, reduction to the grade of Private E-1, and confinement at hard labor for five years. The convening authority approved the discharge and reduction along with confinement at hard labor for two years and partial forfeitures for two years. The government, relying on United States v. Brice, 17 USCMA 336, 38 CMR 134 (1967), argued that the test to be applied is whether the approved sentence, considered as a whole, is less severe than that adjudged and no more severe than the ceiling reflected in the pretrial agreement. The Court held that Brice was inapposite because the qualifying phrase "if adjudged by the court" effectively limited the maximum sentence which could be approved to the component parts adjudged by the trial court. See also United States v. Cifuentes, 11 M.J. 385 (CMA 1981) (parties' understanding at trial overrides subsequent interpretation by staff judge advocate or appellate courts). To avoid the unexpected result of Crockett and Schoemacher, the defense counsel should express sentence limitations in terms of ceilings on specific types of punishments and add the qualifying language "if adjudged" after the listing, e.g., the convening authority "agrees to approve no sentence in excess of a bad-conduct discharge and confinement at hard labor for three months, if adjudged." But see United States v. Neal, 12 M.J. 522 (NMCMR 1981).

#### Referral Documents

Many jurisdictions use some type of forwarding document to refer court-martial charges. These forms typically contain recommendations from the chain of command, as well as the signature of the convening authority referring the case to trial. In some jurisdictions, the forms also reflect prior nonjudicial punishments, judicial actions, and bars to reenlistment. When the military judge asks the trial counsel if he has evidence that the convening authority personally selected the members and convened the court, the trial counsel may offer the command recommendations as an appellate exhibit. Although the members do not see appellate exhibits, in a bench trial the military judge may be exposed to the accused's prior disciplinary record before findings; this problem is aggravated if the information contained in the referral document is inaccurate, incomplete, or inadmissible. The trial defense counsel should argue that under Mil. R. Evid. 402, only the portion reflecting the convening authority's personal referral is relevant, and the remainder of the document is irrelevant to any issue on the merits. To obviate the need for such documentation, the defense counsel should acknowledge personal action by the convening authority if the issue is uncontested.

#### Confidential Informants

Most CID informants are paid for their services. Indeed, USACIDC Supp. 1 (15 Apr. 77) to Army Reg. 195-4, Use of CID Funds for Criminal Investigation Activities (11 Mar. 77), provides for payment of fees,

bonuses, and even salaries for informants. While the amount of the fee or bonus paid has varied from \$5.00 to \$21,000.00, the average informant's fee generally ranges between \$500 and \$1000 and is conditioned not on conviction but on the type and quality of information involved, the degree of danger to the informant, and the effort he expended in gathering the information. The payments have to be fully documented and will be annotated in the confidential informant's file. Since such evidence may bear on the informant's credibility, the defense counsel should inquire into the existence of monetary fees when interviewing or cross-examining the informant or the CID agent who supervised him. See Mil. R. Evid. 608.

#### Mathews Inquiry

In the aftermath of United States v. Mathews, 6 M.J. 357 (CMA 1979), many military judges began questioning accused to establish the admissibility of records of nonjudicial punishment and summary court-martial convictions. This procedure is of doubtful validity in light of Estelle v. Smith, \_\_\_ U.S. \_\_\_, 101 S.Ct 1866 (1981). While Estelle was a capital case, the Court apparently did not restrict its holding to those proceedings. It noted:

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of the basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Culombe v. Connecticut, 367 U.S. 568, 581-582 (1961) (opinion announcing the judgment) (emphasis added). See also Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).

101 S.Ct. 1872. If the defense counsel fails to object to such an inquiry, any legal error will be waived. See United States v. Taylor, SPCM 15697 (ACMR 3 Sep. 1981) (unpub.), reissued as an opinion of the court, \_\_\_ M.J. \_\_\_ (ACMR 1981). Defense counsel should argue that the

military judge should apply pre-Mathews law, which precluded such an inquiry. See United States v. Gordon, 5 M.J. 563 (ACMR 1978). In this regard, the Judge Advocate General of the Navy on 5 October 1981 certified the following issue to the Court of Military Appeals in the case of United States v. Sauer, CMR 80-1114:

Was the United States Navy-Marine Corps Court of Military Review correct as a matter of law in its determination that Estelle v. Smith, \_\_\_ U.S. \_\_\_, 101 S.Ct.1886, 68 L.Ed.2d 359 (1981) effectively overrules United States v. Spivey, 10 M.J. 7 (CMA 1980) and United States v. Mathews, 6 M.J. 357 (CMA 1978)?

#### Admissibility of Prior Summary Court-Martial Convictions

In United States v. Booker, 5 M.J. 238 (CMA 1977), vacated in part, 5 M.J. 246 (1977), the Court of Military Appeals held that servicemembers must be informed of their right to confer with counsel before accepting nonjudicial punishment under Article 15, UCMJ, or trial by summary court-martial, and that evidence of sanctions imposed under either procedure is inadmissible in the absence of an affirmative demonstration of compliance with that requirement. Confusion appears to exist when the prior punishment is not offered as a prior conviction under paragraph 75b of the Manual, but as a personnel record reflecting disciplinary proceedings under paragraph 75d. The Booker prerequisites to admissibility apply even if the record is introduced as a personnel record reflecting the accused's past conduct and performance under paragraph 75d. United States v. Syro, 7 M.J. 431 (CMA 1979). Further, in United States v. Cofield, 11 M.J. 422 (CMA 1981), the Court held that summary court-martial convictions are inadmissible for impeachment purposes unless the Booker requirements are satisfied, but inexplicably held that the inadmissible prior conviction was admissible as a personnel record during presentencing for aggravation of the sentence. United States v. Cofield, supra at 426 n.4.

In a recently decided case, the Army Court of Military Review held that the Court of Military Appeals did not intend to retreat from Booker in Cofield, and that the military judge had erroneously considered an inadmissible prior conviction as evidence of past conduct and performance. However, the court did hold that the defense counsel's failure to object at trial waived any error arising from the improper admission of prior summary court-martial convictions. United States v. Taylor, supra. The court reached the same conclusion in United States v. Ponce, SPCM 16009 (ACMR 21 Oct. 1981) (unpub.), holding that the improper admission of that evidence does not amount to a plain error which "materially prejudices

substantial rights" of the accused. See Mil. R. Evid. 103(d). Defense counsel must therefore make timely objections to the admission of prior summary court-martial convictions when the government fails to comply with the requirements enumerated in Booker, whether the conviction is offered under paragraph 75b or 75d of the Manual.

#### Excess Confinement

In United States v. Groshong, ACM S25039 (AFCMR 13 May 81) (unpub.), pet. granted, 12 M.J. \_\_\_ (CMA 12 Oct. 81), the Court of Military Appeals specified the following issue for review:

When the combination of pretrial confinement and confinement adjudged is greater than the maximum confinement which a special court-martial may adjudge, must action be taken by the convening authority or the Court of Military Review to assure that the time spent in confinement is not greater than the maximum confinement authorized in view of the duty to approve only an appropriate sentence?

This problem may arise whenever there is pretrial confinement (or restriction tantamount to pretrial confinement) and the adjudged sentence reaches the maximum jurisdictional limits of a special court-martial, or in a general court-martial where the maximum punishment adjudged combined with the pretrial confinement is greater than that authorized in the Table of Maximum Punishments, para. 127c, Manual. See United States v. Davidson, pet. granted, 12 M.J. 57 (CMA 1981). Defense counsel should raise this issue in his response to the post-trial review, or by means of a brief filed under the provisions of Article 38(c), UCMJ.

## USCMA WATCH

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

In at least seven cases [United States v. Grostefon, pet. granted, 11 M.J. 358 (CMA 1981), argued 22 October 1981; United States v. Andreas, pet. granted, 12 M.J. 10 (CMA 1981); United States v. Rainey, pet. granted, 12 M.J. 63 (CMA 1981); United States v. Brown, pet. granted, 12 M.J. 58 (CMA 1981); United States v. Shavers, pet. granted, 12 M.J. 52 (CMA 1981); United States v. Mennitto, pet. granted, 12 M.J. 50 (CMA 1981); United States v. Sykes, pet. granted, 12 M.J. \_\_\_\_ (CMA 24 Sep 1981)] the Court of Military Appeals has specified the question of whether appellate defense counsel erred by failing to assign as issues on review the "grounds for relief" enumerated by the accused in his Request for Appellate Defense Counsel. The Court has not, however, specified the precise issues which appellate defense counsel declined to raise. The Court may use these cases as vehicles to define the role of appellate defense counsel. The Court performed a similar function in United States v. Palenius, 2 M.J. 86 (CMA 1977), where it directed that trial defense counsel familiarize themselves with any issues that should be argued before the appellate courts; discuss those issues with the client; and see that they are communicated to appellate defense counsel. The Court may endeavor to develop a procedure for the disposition of these allegations by appellate counsel. The specified issues may also reflect an effort to elaborate, for military practice, the requirements announced in Anders v. California, 386 U.S. 738 (1967), and described in ABA Standards for Criminal Justice 24-2.3 (2d ed. 1980). These authorities essentially require the attorney to assign as grounds for appellate relief any matter which the accused insists should be raised, provided the attorney does not deceive or mislead the court.

The allegation of possible ineffective assistance may create an ethical conflict for the appellate defense attorney. If he is faced with the prospect of arguing that he ineffectively represented the accused, the appellate defense attorney's only viable alternative is to withdraw from the case. By creating this conflict without the accused's knowledge or consent, the Court may effectively deny him the benefit of the attorney

who is in the best position to represent his interests. The problem is particularly serious in a case such as United States v. Andreas, supra, where the Court granted review of two issues raised by the appellate attorney and specified as an issue the attorney's failure to raise several other grounds for relief enumerated by the accused.

During oral argument in United States v. Grostefon, supra, Judge Cook observed that counsel are obliged to raise only those errors which have a reasonable prospect of success. See People v. Johnson, 30 Crim.L.Rptr. (BNA) 2013 (Cal.Ct.App. 27 August 1981). He perceived no problem with this standard, especially because the lower military appellate tribunals exercise de novo review. Chief Judge Everett recognized the counsel's obligation to refrain from raising frivolous errors, but questioned whether the accused's fifth and sixth amendment rights outweigh that responsibility. He asked if the enumerated grounds for relief should be raised in order to dispel any fear the accused may have as to "command influence" on his appeal, and suggested that a financially well-off accused would be able to retain civilian counsel to raise the enumerated issues. Judge Fletcher viewed the Request for Appellate Defense Counsel form as a vehicle through which trial defense counsel communicate with appellate defense attorneys; accordingly, he expressed concern about developing a procedural mechanism which would ensure the Court that both trial and appellate counsel had mutually agreed not to raise the enumerated "grounds for relief."

#### GRANTED ISSUES

##### OFFENSES: Law of Principals

In United States v. Knudson, ACMR 439332, pet. granted, 12 M.J. 15 (CMA 1981), the court will consider the sufficiency of the evidence to sustain findings of guilty of wrongful introduction and transfer of LSD. Although the issue requires the Court to consider the admissibility of written and oral statements made by a co-actor after the offense and the extent to which the accused's own pretrial statements were corroborated, the more far-reaching aspect of the granted issue concerns the scope of the law of principals. The accused loaned \$100.00 to an acquaintance who used the loan, as well as his own funds, to purchase LSD, with the understanding that the loan, and \$100.00 interest, would be repaid. His acquaintance introduced and began selling the LSD on a military installation. Even if the accused knew of the seller's intended purpose for the loan, a fact which was disputed at trial, and thereby aided in the possession of LSD, does his criminal liability extend to the actual perpetrator's subsequent introduction of LSD and his sale or transfer of that contraband, absent evidence of assistance accorded the perpetrator in committing those subsequent offenses?

#### CONVENING AUTHORITY: Disqualification

In United States v. Andreas, AFCMR, pet. granted, 12 M.J. 10 (CMA 1981), the key prosecution witness was a civilian stewardess who acted as the appellant's alleged accomplice in several drug-related offenses. The chief legal advisor of the special court-martial convening authority promised the witness complete transactional immunity in exchange for her testimony. Although this promise was made without legal authority, the witness testified at a general court-martial pursuant to the promised immunity. The Court will consider, inter alia, whether the lower appellate court erred in ruling that the general court-martial convening authority was not disqualified to act on the case by virtue of the promise of immunity made by the staff judge advocate serving his subordinate special court-martial convening authority. See United States v. Chavez-Rey, 1 M.J. 34 (CMA 1975); United States v. Sierra-Albino, 23 USCMA 63, 48 CMR 534 (1974).

#### EVIDENCE: Production of Transcript

Do the military justice system's liberal discovery procedures require the government to furnish an accused with a transcript of prior civilian criminal proceedings? The appellant in United States v. Toledo, AFCMR 22835, pet. granted, 12 M.J. 15 (CMA 1981), had been tried in a federal court for committing civilian offenses. Prior to his court-martial, he had requested that the government produce a transcript of the testimony of an alleged accomplice who had testified against him in the civilian proceedings and was expected to appear as a prosecution witness at his court-martial. The defense counsel argued that the transcript was necessary to prepare for cross-examination of the accomplice, whose expected testimony would be uncorroborated. The prosecutor determined that there was no transcript available, but that one could be provided if the appellant was willing to pay for its preparation. The Court will consider whether the military judge erred by denying the defense request for production of the transcript at government expense.

#### PRETRIAL AGREEMENT: Enforcement

Prior to the accused's court-martial, his defense counsel and the staff judge advocate had agreed, with the apparent approval of both the convening authority and the accused, that if the latter provided law enforcement officials with valid information regarding drug use and participated in controlled drug purchases, the convening authority would either approve an administrative discharge in lieu of court-martial or

would grant clemency if the accused were convicted. When the accused subsequently contemplated withdrawing from the agreement, the staff judge advocate modified it by agreeing to arrange for the convening authority to approve the administrative discharge rather than proceed to trial by court-martial. Unfortunately, the staff judge advocate was hospitalized before he could advise the convening authority of the modification, and the case proceeded to trial.

At trial, the military judge denied the defense motion to dismiss the charges because the government had not fulfilled its agreement with the accused, and, contrary to his pleas, the accused was convicted. The convening authority approved the findings but reduced that portion of the sentence providing for confinement at hard labor. The Air Force Court of Military Review held that dismissal of the charges was not required in this case; however, the court did reassess the sentence because the "clemency relief" granted by the convening authority was deemed insufficient. The court "unequivocally condemn[ed]" the use of such an agreement, particularly when it has not been reduced to writing, and considered the possibility of simply declining to enforce it altogether. In United States v. Brown, 10 M.J. 800 (AFCMR 1981), pet. granted, 12 M.J. 22 (CMA 1981), the Court will consider whether the government failed to honor the pretrial agreement to administratively discharge the appellant rather than court-martial him.

#### DEFENSE COUNSEL: Inadequacy

In United States v. Jefferson, ACRM 438956, pet. granted, 10 M.J. 94 (CMA 1980), argued 19 September 1981, issue specified, 12 M.J. \_\_\_\_ (CMA 22 Sep 1981), the civilian defense counsel requested a military witness on the merits of a contested case the Friday afternoon before the start of the trial on Monday. The witness had been reassigned. The defense counsel objected to proceeding without the "crucial" defense witness, and argued that to continue without him would amount to a "travesty." Although he knew of the substance of the witness' expected testimony several months prior to trial, the defense counsel told the military judge that he had never talked to the witness and had not attempted to locate him until the preceding week. The sole basis for his averment of the expected testimony's materiality was a CID Agent's Investigation Report which revealed that the witness was present in the immediate area of the alleged rape and sodomy and did not hear any unusual noises. The military judge criticized what he perceived to be an untimely request for the witness and the defense counsel's failure to acquire a personal basis for his averment of the materiality of the expected testimony. The lower court did not find error in the judge's denial of the request,

holding in part that it was untimely and that the defense counsel had failed to establish materiality since he had not interviewed the witness. After hearing oral argument on the issue of whether the military judge erred by denying the defense request, the Court of Military Appeals requested briefs on whether the accused was denied effective assistance of counsel.

#### REPORTED ARGUMENTS

##### RECORD OF TRIAL: Corrections

In United States v. Anderson, NCMR 791931, pet. granted, 10 M.J. 94 (CMA 1980), argued 15 September 1981, the Court may modify procedures for correcting typographical errors in records of trial. The current procedure merely requires the military judge to execute a certificate of correction. The Court, however, has endorsed ABA Standards which require an opportunity for both parties to appear at a hearing preceding the execution of any correction certificate. See United States v. Wilkerson, 1 M.J. 56 n.1 (CMA 1975). It may adopt a procedure short of a full hearing, in which the military judge, and perhaps the court reporter, could be required to submit an affidavit that the tape or stenographic notes were in fact reviewed. Procedural modifications in this area will presumably foster judicial economy at the appellate level.

##### INSTRUCTIONS: Lesser-Included Offenses

In United States v. Jackson, ACMR 438721, pet. granted, 10 M.J. 29 (CMA 1980), argued 16 September 1981, the Court will address the quantum of evidence that requires an instruction as to a lesser-included offense. During the accused's court-martial for rape, the military judge refused to present instructions on attempted rape, indecent assault, and assault consummated by a battery. The prosecutrix's limited powers of perception at the time of the brief confrontation reasonably raised the possibility of a lesser-included offense. See, e.g., United States v. Jackson, 6 M.J. 261 (CMA 1979). The Court may reemphasize that an instruction as to a lesser-included offense is required whenever the fact-finder could rationally infer the possibility of a lesser-included offense from the evidence. See United States v. Huff, 442 F.2d 885 (D.C. Cir. 1971). The Court has consistently held that matters of credibility must be resolved in favor of the accused when determining whether the instruction is necessary. United States v. Barrios, 18 USCMA 15, 39 CMR 15 (1968).

## PROFESSIONAL RESPONSIBILITY: Accused's Falsification of Testimony

In what Judge Cook described as the most difficult case he has encountered during his seven years on the bench, the Court will address various ethical problems which frequently arise at the trial level. In United States v. Radford, 9 M.J. 769 (AFCMR 1980), pet. granted, 10 M.J. 29 (CMA 1980), argued 16 September 1981, the defense counsel, not subscribing to the accused's alibi defense, placed him on the stand and allowed him to testify in a narrative format. In the court members' presence, the military judge interrupted the accused and asked if the defense had previously notified the government of an alibi defense as required by the trial court's rules. The defense counsel stated that he did not feel an alibi defense had been raised and asked for an out-of-court hearing, where he intimated that the accused's testimony was false and requested to withdraw from the case.

The Air Force Court of Military Review stated that the defense counsel acted properly in disassociating himself from his client's testimony. Although there should have been an inquiry to determine whether the defendant wanted to continue with his present counsel, failure to do so was not critical, and the lower court affirmed the findings and sentence. The Court of Military Appeals was concerned that the conflict between the defense counsel and his client was communicated to the members, and noted that the matter should have been resolved out of their presence, preferably before trial. The Court will decide whether the American Bar Association Standards should apply to this situation. See American Bar Association Code of Professional Responsibility, Disciplinary Rule 7-102(A)(4) and American Bar Association Standards Relating to the Administration of Criminal Justice, "Prosecution Function and Defense Function," §4-7.7 (2d ed. 1980). The ABA Standards generally require counsel to discourage the accused from testifying falsely, but if the accused insists on testifying, counsel may seek to withdraw from the case. If counsel is unable to withdraw from the case, he must not assist the accused in the presentation of the testimony or argue the perjured testimony to the court.

## INSTRUCTIONS: Failure to Object

The Court entertained oral argument on another aspect of the continuing problem of erroneous instructions and the failure of trial defense counsel to object in United States v. Cauley, 9 M.J. 791 (ACMR 1980), pet. granted, 10 M.J. 17 (CMA 1980), argued 16 September 1981. Unless a trial defense counsel objects to an instruction, any error is generally waived. See United States v. Salley, 9 M.J. 189 (CMA 1980). However, if

the instruction is one-sided or if the military judge fails to instruct on a defense raised by the evidence, waiver does not apply. See United States v. Grandy, 11 M.J. 270 (CMA 1981); United States v. Thomas, 11 M.J. 315 (CMA 1981); United States v. Graves, 1 M.J. 50 (CMA 1979). In Cauley, the defense counsel properly objected to inadmissible evidence that the defendant had received notice of dishonored checks, thus invoking the statutory presumption of intent pursuant to Article 123a, UCMJ, and paragraph 202a of the Manual. However, he did not renew his objection to an instruction based on that evidence. Appellate defense counsel argued that the objection on the inadmissible evidence preserved an objection to the instruction, and that any further objection would have been redundant and futile. In addition, since the instruction pertained to the critical issue of the case, waiver should not apply because the instruction was erroneous, misleading, and unsupported by competent evidence. Government appellate counsel, while not conceding the instruction's prejudicial impact, emphasized that, as a whole, the instructions clearly and fairly presented the issues to the fact-finders. Because the lower court described other evidence of fraudulent intent as "overwhelming," the government argued that the issue was waived. This case underscores the importance of preserving evidentiary objections by raising similar objections to any instructions predicated on the evidence.

#### SEARCH AND SEIZURE: Foreign Officials

In United States v. Morrison, 9 M.J. 683 (AFCMR 1980), pet. granted, 10 M.J. 88 (CMA 1980), argued 15 September 1981, the Court was asked to extend the rule announced in United States v. Jordon, 1 M.J. 334 (CMA 1976), to include all exchanges of information, whether accidental, incidental, or required by treaty, which prompt foreign officials to search servicemembers' off-post housing. The appellant's conviction for possession of marijuana arose out of information received from a telephone call made under the auspices of the Commander of the OSI Detachment at Hahn Air Base to the German police. The Commander's German translator and administrative assistant called the local police to verify information regarding a Sergeant Ravine, the appellant's roommate, and his reported travelling companion, both of whom had been apprehended for possession of hashish oil and were apparently representing themselves to be husband and wife. The OSI commander knew that Sergeant Ravine's wife was not in Germany and suspected him of possible fraud with respect to his pay and allowances. As a result of this phone call, the German police searched the joint residence of Ravine and the appellant. The Court examined how and when information was required to be exchanged between American Forces and a host nation and what the host nation's

usual response would be upon receiving information of suspected illegal activities involving American servicemembers living off-post. The Court questioned both counsel as to whether this information was exchanged pursuant to a perceived treaty obligation. If the Court determines that this exchange was lawful, legitimate, or pursuant to treaty obligations, the fact that it accidentally resulted in a search probably would not render it unlawful under Jordan, supra.

#### SEARCH & SEIZURE: Reasonableness

Despite the Supreme Court's recent decisions in Robbins v. California, \_\_\_ U.S. \_\_\_, 101 S.Ct. 2841 (1981), and Belton v. New York, \_\_\_ U.S. \_\_\_, 101 S.Ct. 2860 (1981), the extent to which the fourth amendment protects privacy expectations in opaque containers remains uncertain. See also Rawlings v. Kentucky, 448 U.S. 98 (1980), Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977). The Court of Military Appeals will explore this complex area of the law in United States v. Sanford, pet. granted, 10 M.J. 94 (CMA 1980), argued 17 September 1981, where it must decide what expectation of privacy the accused had in a small leather change purse which he gave to another servicemember to hold for him. A noncommissioned officer observed the accused transfer the purse, and, having previously watched him take what he suspected to be drugs out of the purse, retrieved it from the bailee. A subsequent search of the purse revealed hashish.

The appellant argued that he had a legitimate expectation of privacy in the purse because it was an opaque container which did not by its outward appearance disclose the nature of its contents. See Robbins v. California, supra. His sudden bailment did not destroy this expectation. But see Rawlings v. Kentucky, supra. Further, because his commander was intimately involved in his apprehension, he could not authorize the search himself and should have sought such authorization from his superiors or a magistrate. United States v. Ezell, 6 M.J. 307 (CMA 1979). Aside from the issue of the reasonableness of Sanford's expectation of privacy, the Court appeared most concerned with his assertion that the search did not fall within the "incident to apprehension" exception to the fourth amendment's warrant requirement. Chief Judge Everett asked why a suspected drug trafficker should be able to defeat an unauthorized search of his purse by giving it to a third party shortly before his apprehension, when such a search would be constitutionally unobjectionable if he retained it. See, e.g., United States v. Garcia, 605 F.2d 349 (7th Cir. 1979). The answer may lie in the Supreme Court's reluctance to extend the limited exceptions to the warrant requirement beyond their traditional scope. See Robbins v. California, supra. Because the fourth amendment's warrant requirement has been jealously guarded, fortuity may and frequently does remove cases from the narrow scope of the recognized exceptions.

See, e.g., United States v. Moncalvo-Cruz, 29 Crim.L.Rptr. (BNA) 2425 (9th Cir. 10 July 1981) (woman's purse seized upon arrest could not be searched without warrant at police station one hour later).

#### OFFENSES: Disrespect

In United States v. Lewis, 9 M.J. 936 (NCMR 1980), certificate of review filed, 9 M.J. 404 (CMA 1980), argued 22 October 1981, the appellant disobeyed his platoon leader's order to stand at attention. The appellant's disrespectful reply to the platoon leader's request for an explanation formed the basis for a charge of disrespect toward a superior commissioned officer, in violation of Article 89, UCMJ. The Court must determine whether the lower appellate tribunal erred by setting aside the findings of guilty and dismissing the charge on the basis that the allegedly disrespectful language was inadmissible because it was uttered in response to an official inquiry which was not preceded by warnings under Article 31, UCMJ. At oral argument, the government appellate counsel contended, inter alia, that Article 31, UCMJ, bars admission of a statement only if it is elicited in a coercive atmosphere. See United States v. Duga, 10 M.J. 206 (CMA 1981). The appellant asserted that there is a congressional presumption that any questioning by a superior is tantamount to an order to respond. The Chief Judge likened the issue to a finding of contempt arising from a witness' assertion of fifth amendment rights in a contemptuous manner.

#### MILITARY JUDGE: Instruction

The Court has an opportunity to define the manner in which trial defense counsel may preserve instructional errors in United States v. Martin, 9 M.J. 731 (NCMR 1979), certificate of review filed, 9 M.J. 194 (CMA 1980), pet. granted, 11 M.J. 78 (CMA 1971), argued 20 October 1981. The military judge in that case erroneously defined reasonable doubt, see United States v. Salley, 9 M.J. 189 (CMA 1980), and although the defense counsel did not object, he did submit a proposed instruction which correctly explained that evidentiary standard. The Court has suggested that the submission of a proposed instruction, is, alone, sufficient to render the waiver doctrine inapplicable. See United States v. Thomas, 11 M.J. 388 (CMA 1981).

#### OFFENSES: Aiding and Abetting

In United States v. Burroughs, SPCM 14409, pet. granted, 10 M.J. 112 (CMA 1980), argued 21 October 1981, the Court must decide whether the appellant harbored the intent necessary to be convicted of aiding and abetting in the sale of marijuana and whether the Post-Trial Review sufficiently explained that doctrine. Two undercover agents approached

the appellant in his barracks and solicited marijuana. He stated that he had none, and the agents approached a third party, Private White, who was also in the room. At trial, there was a contested question of fact as to whether the appellant referred the agent to Private White. The latter subsequently negotiated a deal with the agents, but he did not have the appropriate change. One agent unsuccessfully solicited the appellant's help. The appellant eventually agreed to change a twenty dollar bill for Private White after he was reminded of a preexisting debt between them. Appellate defense counsel argued that there was insufficient evidence that the appellant and White intended to consummate the sale. Government counsel countered that the appellant assisted in the transaction by making change, and that he knew what was transpiring. Moreover, he benefited from the transaction because it enabled him to collect an existing debt from White.

With regard to the second issue, appellate defense counsel argued that it was impossible for the convening authority properly to evaluate the appellant's conviction as an aider and abettor without discussing the law of principals in the post-trial review. Opposing counsel contended that the error was waived, and that at any rate it was proper for the convening authority to rely on the Staff Judge Advocate's opinion as to evidential sufficiency. The review contained sufficient facts from which the convening authority could have concluded that the appellant was an aider and abettor. Judge Fletcher, however, was unsatisfied with this response, and repeatedly asked government counsel what standard the convening authority could use to decide whether the appellant was an aider and abettor if there was no discussion of the law in the post-trial review.

#### OFFENSES: Attempted Murder

May a servicemember be convicted of attempting to commit murder by engaging in an inherently dangerous act in violation of Article 118(3), UCMJ? In United States v. Roa, CM 439374, pet. granted, 10 M.J. 184 (CMA 1980), argued 21 October 1981, the Court must address that question with regard to an appellant who rolled a fragmentation grenade into an occupied military police station. The appellant was prosecuted for the attempted murder of four persons who were in the station when the grenade exploded. One occupant sustained a leg wound as a result of the explosion. The prosecution sought to support attempted murder prosecution on two theories, contending, first, that the appellant intended by his act to kill individuals inside the station and, second, that he had engaged in an inherently dangerous act as that term is used in Article 118(3), UCMJ. The military judge permitted the government to proceed on both theories, and while he expressed his belief that the Article 118(3), UCMJ, approach was the better theory, he thereafter entered findings without specifying the provision upon which he relied.

Appellate defense counsel argued that neither a specific nor a general intent to kill is an element of murder under Article 118(3), UCMJ. Therefore, since an attempt to murder under Article 80 requires proof of a specific intent to kill, the offense of attempted murder may not be proved by showing that the accused intentionally performed the act: an intent that someone die as a result of that act is a necessary element of the offense. Similarly, neither negligent homicide nor involuntary manslaughter by culpable negligence includes an intent element, and therefore cannot support an attempted murder charge. Although there generally is a presumption that the military judge knows and will correctly apply the law, appellate counsel argued that that presumption was rebutted by the judge's willingness to allow the government to proceed with a theory that could not sustain a conviction for attempted murder. Finally, even though there might be sufficient evidence on the record to sustain a finding that the appellant had formed an intent to kill, it would be improper for the Court to affirm on that basis, since the military judge could have entered a general verdict of guilty based on his belief that no specific intent was necessary under Article 118(3), UCMJ. Government appellate counsel argued that Article 80, UCMJ, requires only the intent to do the act which forms the basis of the charge. Moreover, unlike the offenses involving negligence, the offense of murder under Article 118(3), UCMJ, does contain an element of malice or intent in that the inherently dangerous act must evince a wanton disregard for human life. The government also argued that the evidence was sufficient to establish attempted murder under the Article 118(2), UCMJ, theory of that offense, even if an attempted murder could not be prosecuted on the basis that the accused committed an inherently dangerous act.

## CASE NOTES

### *Synopses of Selected Military, Federal, and State Court Decisions*

#### COURT OF MILITARY REVIEW DECISIONS

##### DEFENSES: Innocent Possession

United States v. Martinez, SPCM 15852 (ACMR 28 August 1981) (unpub.).  
(ADC: CPT Bloom)

The accused pled guilty to wrongfully possessing marijuana. Prior to sentencing, he testified that he had received a package which he was to deliver to a third party. He later discovered that the package contained marijuana, and he was apprehended while attempting to return it. The appellate court held that the defense of innocent possession had been raised, see United States v. Rowe, 11 M.J. 11 (CMA 1981), and ordered a rehearing.

##### EVIDENCE: Admission of Summary Court-Martial Conviction

United States v. Taylor, SPCM 15697, \_\_\_ M.J. \_\_\_ (ACMR 3 September 1981).  
(ADC: CPT Currie)

The military judge erred in admitting a summary court-martial conviction without first assuring that the accused had been informed of his right to consult with counsel and afforded an opportunity to do so before consenting to the court-martial's jurisdiction. See United States v. Kuehl, 11 M.J. 126 (CMA 1977); United States v. Booker, 5 M.J. 238 (CMA 1977), vacated in part, 5 M.J. 246 (CMA 1978). The error was waived by the lack of objection. United States v. Beaudion, 11 M.J. 838 (ACMR 1981); Mil.R.Evid. 103(d). Importantly, the court queried, in dicta, whether the military judge could have cured the deficiency by directly questioning the accused as authorized by United States v. Mathews, 6 M.J. 357 (CMA 1979). See Estelle v. Smith, \_\_\_ U.S. \_\_\_, 101 S.Ct. 1866 (1981).

##### GUILTY PLEA: Voluntariness

United States v. Peters, 11 M.J. 875 (NMCMR 1981).  
(ADC: CPT Poirier, USMC)

After unsuccessfully moving to suppress the admission of drugs he was charged with possessing, the accused renounced a pretrial agreement and pled guilty to the charge only because the military judge, relying on United States v. Williams, 41 CMR 426 (ACMR 1969), assured him that

the motion would be reviewed on appeal. The appellate court held that the accused's plea waived any error stemming from the denial of the suppression motion, but that the plea was induced by misrepresentations of law and was therefore involuntary. The court set aside the findings as to the charge.

JURISDICTION: Involuntary Recall

United States v. Munnis, SPCM 15390 (ACMR 24 August 1981) (unpub.).  
(ADC: CPT McAtamney)

Although the accused was not notified of his right to appeal his involuntary recall to active duty from the National Guard, his court-martial possessed in personam jurisdiction. Distinguishing United States v. Kilbreth, 22 USCMA 390, 47 CMR 327 (1973), the appellate court said that there is "no possibility of prejudice to [the accused] from failure to notify him of his right to appeal" because there is nothing to indicate he would have been successful. He failed to object to the recall, received pay and allowances, and, prior to sentencing, asked to remain in the Army. The court did not comment on the assertions made at trial that the accused absented himself without authority two weeks after reporting for active duty and did not object to the recall because of ignorance.

MILITARY JUDGE: Usurpation of Fact-Finder's Function

United States v. Coleman, NMCM 80 2535 (NMCMR 29 June 1981) (unpub.).  
(ADC: LT Murphy, USNR)

After the military judge denied the accused's motion for a sanity board, he barred the introduction, on the merits, of the evidence proffered in support of the motion, finding it too weak to raise a defense requiring an instruction. The appellate court held that the judge had "usurped the function of [the] fact-finders and deprived the accused of his right to a fair trial," set aside the findings and sentence, and authorized a rehearing.

OFFENSES: Adultery

United States v. Barnett, NMCM 80 2277 (NMCMR 6 July 1981) (unpub.).  
(ADC: CPT Axelrod, USMC)

The military judge properly refused to instruct the members that adultery is a lesser included offense of rape. The appellate court observed that "adultery is an offense against the morals of society rather than the person of one of the participants," and "does not

involve an element of assault, such as is implicit in the crime of rape and the other offenses commonly recognized as lesser included in a charge of rape." See United States v. Ambalada, 1 M.J. 1132 (NCOMR 1977), pet. denied, 3 M.J. 164 (CMA 1977); United States v. Watkins, 1 M.J. 1034 (NCOMR 1976).

OFFENSES: Attempted Voluntary Manslaughter

United States v. James, CM 440909 (ACMR 11 September 1981) (unpub.).  
(ADC: MAJ Nagle)

The military judge found the accused guilty of attempted voluntary manslaughter because, at a minimum, he had the "intent to inflict grievous bodily harm." The appellate court held that although this intent is an element of voluntary manslaughter, see United States v. Carman, 46 CMR 1292 (ACMR 1973), an accused must have the specific intent to kill in order to be convicted of attempted voluntary manslaughter. Because the accused actually inflicted grievous bodily harm, the court affirmed findings of guilty to aggravated assault.

OFFENSES: Larceny

United States v. Abeyta, SPCM 15438, \_\_\_ M.J. \_\_\_ (ACMR 2 September 1981).  
(ADC: CPT Castle)

Overruling United States v. Brazil, 5 M.J. 509 (ACMR 1979), the appellate court held that taxicab services cannot be the subject of a larceny under Article 121, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §921 (1976). See United States v. Jones, 23 CMR 818 (AFBR 1956); United States v. McCracken, 19 CMR 876 (AFBR 1955); Article 121(a), UCMJ; paragraph 200, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter Manual]. Cf. United States v. Herndon, 15 USCMA 510, 36 CMR 8 (1965) (wrongful and unlawful use of telephone services by fraud properly charged under Article 134, UCMJ).

OFFENSES: Multiplicious

United States v. Kranz, SPCM 16203 (ACMR 4 September 1981) (unpub.).  
(ADC: CPT Roberts)

The accused sold marijuana to an undercover agent; immediately thereafter, a search incident to his apprehension revealed additional quantities of the substance. Citing United States v. Irving, 3 M.J. 6 (CMA 1977), the appellate court held that the sale and subsequently discovered possession were multiplicious for sentencing purposes and reassessed the sentence.

OFFENSES: Unlawful Entry

United States v. Bradchulis, NMCM 81 0720 (NMCMR 13 August 1981) (unpub.).  
(ADC: LCDR Warden, USN)

The accused was charged with unlawfully entering a locker in violation of Article 134, UCMJ. The appellate court held that the offense of unlawful entry "is limited to real property and personal property which amounts to a structure used for habitation or storage," United States v. Breen, 15 USCMA 658, 36 CMR 156 (1966), and set aside the findings as to the charge. See also United States v. Faison, SPCM 15979 (ACMR 22 October 1981) (unpub.).

OFFENSES: Wrongful Appropriation

United States v. Bryant, SPCM 15653 (ACMR 12 August 1981) (unpub.).  
(ADC: CPT McCarty)

During the providency inquiry the accused said that he took his roommate's money in order to illustrate the possible consequences of failing to secure personal belongings. Citing United States v. Roark, 12 USCMA 478, 31 CMR 64 (1961), the appellate court held that the accused's plea of guilty of wrongful appropriation was improvident because he did not have the necessary criminal intent even though "the taking might be wrongful." See also United States v. Hayes, 8 USCMA 627, 25 CMR 131 (1958). The court dismissed the charge and its specification. The Judge Advocate General of the Army filed a certificate for review with the Court of Military Appeals on 31 August 1981.

POST-TRIAL REVIEW: Adequacy

United States v. Canlas, NMCM 80 2705 (NMCMR 24 June 1981) (unpub.).  
(ADC: LT Taylor, USNR)

The staff judge advocate's post-trial review of the accused's hotly contested and factually complex trial was inadequate because it failed to delineate the elements of the offenses, rationalize the evidence, support the opinion that the conviction was correct in law and fact, or discuss the accused's theory of the case, even though that theory was asserted in the trial defense counsel's response to the post-trial review. The court concluded that there was a fair risk that the reviewing authority may have been misled before he took action. See United States v. Bennie, 10 USCMA 159, 27 CMR 233 (1959); United States v. Hagen, 9 M.J. 659 (NCMR 1980); paragraph 85b, Manual.

SENTENCING: Evidence in Aggravation

United States v. Dorsey, SPCM 15846 (ACMR 17 August 1981) (unpub.).  
(ADC: CPT Huntsman)

Pursuant to his plea, the accused was convicted at a special court-martial of communicating a threat. Although no evidence in aggravation was submitted and the accused introduced evidence that he was an above-average soldier, the military judge sentenced him to the maximum punishment. The same trial judge had previously presided over an aggravated assault case wherein the victim of the accused's threat was severely beaten by the co-accused immediately following the threat. These facts were also elicited, in great detail, from the accused during the providency inquiry. The appellate court stated that neither an accused's responses during this colloquy, see United States v. Brooks, 43 CMR 817 (ACMR 1971), nor facts established at another trial may be considered during sentencing. Although the court did not hold that the military judge acted improperly, it determined that the sentence was inappropriately severe and reduced it accordingly.

SENTENCING: Instructions

United States v. Hooper, SPCM 15357 (ACMR 11 September 1981) (unpub.).  
(ADC: MAJ Johnson)

Because the military judge failed to instruct the members that they should commence their vote on sentencing with the lightest proposal and continue until two-thirds of the members concur, the court ordered a rehearing on the sentence, despite the absence of an objection at trial. See United States v. Lumm, 1 M.J. 35 (CMA 1975); United States v. Johnson, 18 USCMA 436, 40 CMR 148 (1969).

SENTENCING: Rebuttal Evidence

United States v. Stevenson, SPCM 15713 (ACMR 26 August 1981) (unpub.).  
(ADC: CPT McCarty)

The accused did not place his character or prior conduct into issue when he testified, prior to sentencing, that he wanted to remain in the Army. The trial counsel's elicitation, during cross-examination, of the accused's admission that he had received two nonjudicial punishments was therefore improper, and the appellate court reassessed the sentence.

STAFF JUDGE ADVOCATE: Disqualification

United States v. Decker, SPCM 15935 (ACMR 12 August 1981) (unpub.).  
(ADC: MAJ Johnson)

A staff judge advocate who had recommended to the convening authority that clemency be granted to a prosecution witness in return for his testimony may not prepare the post-trial review. See United States v. SierraAlbino, 23 USCMA 63, 48 CMR 534 (1974). The appellate court concluded that the staff judge advocate could not render an impartial opinion as to the weight and credibility of the witness' testimony, see United States v. Kennedy, 8 M.J. 577, 580 (ACMR 1977); paragraph 85b, Manual, and ordered a new review and action.

WITNESSES: Impeachment

United States v. Wilson, CM 440762, \_\_\_ M.J. \_\_\_ (ACMR 30 October 1981).  
(ADC: CPT McCarty)

Although Military Rule of Evidence 608(b) authorizes counsel to impeach a witness by asking him whether he made a false official statement, or by questioning him about the facts surrounding the misconduct, it does not allow the admission of a record of nonjudicial punishment for the offense. The appellate court noted that a document reflecting punishment imposed under Article 15, UCMJ, merely "represents an accusation of misconduct and a determination by the commanding officer that the misconduct occurred even when it may not in fact have taken place . . ." and that they, like summary court-martial convictions, lack "sufficient reliability for their use for impeachment." See United States v. Cofield, 11 M.J. 422 (CMA 1981).

FEDERAL DECISIONS

CHARACTER EVIDENCE: Admissibility

Johns v. United States, 29 Crim.L.Rptr. (BNA) 2538  
(D.C. Cir. 17 August 1981).

In a murder trial in which the accused claimed she acted in self-defense, the judge ruled that if the defense introduced evidence of the victim's violent character, the government would be allowed to introduce evidence of the accused's reputation for violence and to cross-examine her about her earlier arrest for assault. The accused did not testify. The appellate court recognized that both parties' reputation for violence was relevant to the issue of who was the more likely aggressor. However, the deceased's character, if known by the

accused, is also relevant to the "potentially more central aspect of the claim of self-defense: the subjective question whether the defendant was in reasonable fear of imminent great bodily harm." In contrast, the accused's propensity for violence is irrelevant to the issue of her fear of the deceased. Concerned that a jury could not apply these distinctions, the appellate court held that the trial court erred by not adhering to the general rule prohibiting the prosecution from presenting evidence of the defendant's bad character until she had placed her good character in issue.

SEARCH AND SEIZURE: "Plain View"

United States v. Rivera, 29 Crim.L. Rptr. (BNA) 2530  
(5th Cir. 2 September 1981).

Before DEA agents executed a warrant to search for marijuana on a farm, they saw several cars there loaded with large bundles wrapped in black plastic. When the cars began to depart, the agents properly seized the bags but failed to note which bags came from which vehicle. The warrantless search of the bags two days later was illegal. Robbins v. California, 453 U.S. \_\_\_, 101 S.Ct. 2841 (1981). The government unsuccessfully contended that because marijuana was protruding through some of the bags and there was probable cause to believe that their contents had a common source, under a "common-pool plain-view" theory the contents of all the bags had been verified. The appellate court, while not adopting this extension of the plain-view doctrine, formulated three requirements which must be met before it would be applied: (1) the contents of a container found in a previously searched vehicle must have been in plain-view; (2) these observations must be communicated to the authorities who subsequently search the other vehicle(s); and (3) it must be apparent that all containers originated from a common pool. The government failed to meet its burden as to the first two criteria.

SEARCH AND SEIZURE: Reasonableness

United States v. Mefford, 29 Crim.L. Rptr. (BNA) 2554  
(8th Cir. 8 September 1981).

The warrantless search of the accused's closed but unsealed paper bag was proper because he had no legitimate expectation of privacy in its contents; it was not "sealed with tape, staples or strings, was not in a car trunk, and its contents could easily have been lost or destroyed." But see United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted, \_\_\_ U.S. \_\_\_, 30 Crim.L. Rptr. (BNA) 4035 (warrantless search of closed but untaped bag found in trunk of accused's car illegal).

SEARCH AND SEIZURE: Reasonableness

United States v. Monclavo-Cruz, 29 Crim.L. Rptr. (BNA) 2425 (9th Cir. 10 July 1981).

A law enforcement agent arrested the accused and seized her purse. One hour later, it was searched without a warrant at the agent's office. The court held that the search was improper because it was not incident to her arrest. The accused had a reasonable expectation of privacy as to the contents of the purse, Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977), and the inventory rationale of South Dakota v. Opperman, 428 U.S. 364 (1976), is inapposite to the contents of personal luggage. Finally, United States v. Edwards, 415 U.S. 800 (1974), in which the Court said that searches that could legally be conducted on the spot at the time of the arrest may be performed later at the place of detention, has been limited, by Sanders and Chadwick, to searches of the person and articles of clothing, including wallets.

SEARCH AND SEIZURE: Reasonableness

United States v. Tolbert, 517 F.Supp. 1081 (E.D. Mich. 1981).

When questioned by DEA agents in an airport terminal, the accused denied ownership of her suitcase. The agents' warrantless search of the luggage revealed cocaine. The district court sustained the accused's motion to suppress, holding that she had a reasonable expectation of privacy before she was confronted by the authorities, and that she did not forfeit this expectation, or abandon her property, by falsely denying ownership. To hold otherwise would allow police to approach a "suspicious" person and "try to pressure him into 'abandoning' his property" in an effort to circumvent the fourth amendment. But see United States v. Tolbert, 474 F.2d 174 (5th Cir. 1973).

WARRANTLESS DETENTION: Legality

Sharpe v. United States, 50 U.S.L.W. 2196 (4th Cir. 4 September 1981).

Although the police may stop a moving vehicle without a warrant or probable cause, the stop must be brief. Terry v. Ohio, 392 U.S. 1 (1968). The court characterized the accused's thirty- to forty-minute warrantless detention without probable cause as an illegal "de facto arrest." See Dunaway v. New York, 442 U.S. 200 (1979).

State Court Decision

WARRANT REQUIREMENT: "Good Faith" Exception

Richmond v. Commonwealth, 50 U.S.L.W. 2162 (Ky. Ct.App. 31 July 1981).

Evidence obtained pursuant to a technically defective warrant in which a state magistrate improperly, but in good faith, authorized a search outside his own district was not suppressed because the exclusionary rule is "designed to deter willful and unlawful conduct;" the court concluded that its application here would serve no purpose.

Announcement of New Service

*Readers who desire to obtain copies of decisions synopsized in Case Notes may now contact the editor of that feature by telephoning autovon 289-1195, or 289-2277 during off-duty hours, or by writing to Case Notes Editor, The Advocate, Defense Appellate Division, United States Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041.*

# ON THE RECORD

or

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

(Explanation of allocution rights by military judge in indecent exposure case):

MJ: Now take time to talk with your counsel and then tell the court whether you wish to testify or to remain silent.

ACC: Your Honor, I do not deserve to testify.

\* \* \* \* \*

Q: You're not working for [the accused] are you?

A: No, sir.

Q: I mean he hasn't paid you off to come in here and lie for him, has he?

A: No, sir. He doesn't make that kind of money.

\* \* \* \* \*

(Civilian defense counsel arguing on findings):

IDC: Remember what you were like when you were 20 or a little younger or a little older, and we would submit that in your life around that age you did something that you've regretted. Hopefully, it was nothing criminal like this. . . .

\* \* \* \* \*

(Cross-examination by defense counsel):

Q: [Y]ou answered "no" to some of [the prosecutor's] questions before they were even asked . . . . Do you recall the events of that day with clarity?

A: With who?

TC: When did you begin regretting your involvement. [in blackmarketing]?

ACC: Back in August, sir.

TC: About the time you were apprehended?

ACC: Yes, sir.

\* \* \* \* \*

(Defense counsel announcing accused's choice of allocution rights during sentencing):

DC: The accused is going to ask leave of the court to make the statement in a form that is, frankly, unusual. But it's a method that is highly important for her self-expression today. [The accused] asks leave of the court to sing in a respectful and quiet manner with an acoustic guitar which is standing by, one song. And she proposes to do this in the legal format of . . . an unsworn statement[.] There will be narrative afterwards.

\* \* \* \* \*

(During providency inquiry):

MJ: He asked you if you wanted to buy some hash?

ACC: Yes, sir.

MJ: Did you understand what that meant?

ACC: Yes, sir.

MJ: You didn't think it was some sort of a meat mixture?

\* \* \* \* \*

MJ: Do you recall committing any of these offenses?

ACC: No sir, that alcohol just disengages my brain.

