

T H E A D V O C A T E

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Beginning with the December 1969 issue, THE ADVOCATE is being mailed separately to Staff Judge Advocates and various other legal offices. Those who did not receive that issue and who wish to be placed on our mailing list are invited to communicate directly with THE ADVOCATE at the above address.

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SOME THOUGHTS ON PLEA BARGAINING

Ever since pretrial agreements were encouraged by The Acting Judge Advocate General in 1953, negotiated pleas have become a basic defense tool for ameliorating the consequences of an accused's misconduct. Indeed,

some few have even relied upon the relative security of a "deal" at the expense of a vigorous and probably successful defense.

Assuming the advisability of a negotiated plea of guilty, it is incumbent upon counsel to remember his continuing responsibility to further his client's cause despite the apparent futility of such efforts. United States v. Allen, 8 USCMA 504, 25 CMR 8 (1957). In order adequately to discharge this obligation, counsel should acquaint himself fully with the merits and mitigation of his case at the earliest possible moment. Great opportunity for a successful defense exists during the investigative phase and one fruit of such diligence will be the ability to take the initiative in the event that a negotiated plea is deemed advisable.

Although an offer to plead guilty was intended to originate with the accused (DA Message 525595, 8 May 1957, JAGJ 1957/3748), generally certain "boiler plate" clauses are required by the command and are frequently embodied in preprinted forms. Such clauses generally provide that the accused is satisfied with counsel, that the accused will enter into a stipulation of fact, and that the agreement will be invalidated upon the failure of either party to agree to the stipulation. Obviously acceptance of such a stipulation may be necessary in order to obtain the benefits of a pretrial agreement since the convening authority's willingness to bargain will be predicated in part upon considerations of time and expense saved.

However, in order to avoid an unfair stipulation dictated by the prosecutor, the defense counsel should draft and include a proposed stipulation as part of the offer to plead guilty. Even if the draft is not ultimately accepted, it will likely provide the basis for compromise and the final stipulation agreed upon will ordinarily be more favorable to the accused than one initiated by the trial counsel. Moreover, the agreement should clearly provide that the accused does not waive his right to raise legal objections at trial to the admissibility of any fact contained in the stipulation, or to request appropriate limiting instructions.

Most agreements contain provisions that the accused is satisfied with the advice of his defense counsel. There is no compelling reason why a statement such as this should be contained in the agreement. It does not benefit the client, is immaterial, and might create the appearance of coercion.

Counsel should also insist that all proposals to plead guilty, even those to which the staff judge advocate does not agree, should be presented to the convening authority for final determination. An offer to plead guilty is military correspondence addressed to the convening authority and should be delivered to him even if the staff judge advocate expresses doubts over the convening authority's willingness to accept the offer.

In sum, defense counsel should take the initiative in plea bargaining and attempt to control the terms of the agreement as much as possible, consonant with his client's best interests.

ARGUMENT AT SENTENCE TO THE JUDGE ALONE

It is becoming increasingly common for counsel to waive argument on sentence to the military judge sitting alone. This trend is alarming, in our view, and bears some scrutiny.

Argument at sentence to the judge alone has been described as "a golden opportunity for a lawyer really to be an advocate, and to salvage at this juncture something which may be irretrievably lost if the opportunity for advocacy is not seized upon." Federal Defender's Program, Handbook on Criminal Procedure in the United States District Court § 17.5 (West 1967). Yet too often military counsel seem to regard argument on sentence to the judge alone as a useless gesture and as wasted time, especially where they have already perceived a pattern in the judge's sentencing.

We submit that argument on sentence is always beneficial, both to the judge and the accused. The judge receives the benefit of counsel's peculiar insights into the accused's rehabilitative potential

and special needs, and the accused feels that he has not been betrayed when he needs counsel most. Also, since arguments are now recorded, the staff judge advocate and the convening authority will have the benefit of counsel's persuasion.

Sentencing argument should be cogent, to be sure, but spoken with emphasis and feeling. It is an often forgotten truism that something good can be said about everybody.

Since leeway is permitted, tell the judge, if you have personally investigated the accused's background, that you feel qualified to render an intelligent opinion on his behalf. Use the pretrial psychiatric report to help the judge understand the emotional and psychological factors underlying the incident. If there is no such report, consider asking for a continuance until one can be obtained.

Never read a final argument; you will either insult the judge or bore him. Never challenge the verdict at sentencing, or take a position inconsistent with a guilty plea. But always be mindful of what you can best do for your client, and how he can be returned as a useful member of society in the shortest possible time.

PRETRIAL CONFINEMENT IN VIOLATION OF ARTICLE 13 -- A PROPOSED INSTRUCTION

Many recent records of trial contain stipulations between the prosecution and the defense that the accused has been punished in violation of Article 13, most often by having been commingled with sentenced prisoners during pretrial confinement. In virtually all of these cases, the military judge has instructed the court, that it should consider the fact of pretrial punishment as an additional matter in mitigation. Rarely, however, has the instruction been as forceful as it might have been, and on many occasions has failed to impart to the court the seriousness of the violation involved.

In United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969), the Court of Military Appeals, after

finding a violation of Article 13, ordered the intermediate appellate court to afford the accused meaningful relief, lest it be said that the Court was "prepared to wink at such grossly illegal treatment of men in pretrial confinement," See also United States v. Jennings, No. 22,066, _____ USCMA _____, _____ CMR _____ (1969).

In order that the seriousness of the violation be fully and fairly explained to the court, counsel may want to consider proposing to the military judge an instruction such as the following:

You are further instructed that the accused has been illegally punished during pretrial confinement in direct violation of Article 13, Uniform Code of Military Justice by [here state nature of violation]. The treatment he received violated not only provisions of [here state local regulations violated] and the Manual for Courts-Martial, but also the specific command of Congress. The Court of Military Appeals, our highest military court, has repeatedly condemned conduct such as this on the part of commanders and confinement officers. It has said that such violation constitutes punishment without due process of law. In a recent case, the Court noted that meaningful relief could only be granted the accused by disapproving his punitive discharge. Violations of Article 13 cannot be regarded as unimportant or trifling matters. The sentence you adjudge, should you deem that any sentence at all is appropriate, must reflect a proper consideration and appreciation of the illegal punishment to which the accused has been subjected.

EXTENUATION AND MITIGATION IN NONJUDICIAL PUNISHMENT

Since new Paragraph 75d, Manual for Courts-Martial, United States, 1969 (Revised edition) and AR 27-10 now permit the introduction of evidence of previous nonjudicial punishment as a matter in aggravation during the presentence hearing, it is important that the accused be able to explain the circumstances of this previous punishment in order to mitigate its effect at trial. One way to accomplish this is to counsel soldiers who are about to accept nonjudicial punishment to exercise their option to explain whatever extenuating circumstances there are directly on the Article 15 form. In the past, an oral explanation of mitigating factors sufficed, but since the form itself may now be introduced into evidence against the soldier at a later court-martial, it is advisable that he make some extenuating or mitigating statements on the back of the form in the space provided.

EVIDENTIARY OBJECTIONS

Appropriate relief on appeal is often denied because proper objection to an evidentiary or other error was waived at trial. See United States v. Woods, 18 USCMA 291, 40 CMR 3 (1969). Many questionable actions of the trial judge do not warrant objection--indeed an untimely objection may often be more harmful than beneficial. Counsel should be aware, however, of those instances in which proper objection is essential in order to preserve error for appeal.

We have compiled a list of some of the most common trial evidentiary objections together with citations to military authority which discusses the evidentiary point involved. We suggest that this list be kept handy as a quick trial reference.

1. Leading question: United States v. Yerger, 1 USCMA 288, 3 CMR 22 (1952); United States v. Smith, 3 USCMA 15, 11 CMR 15 (1953).
2. Unresponsive answer; gratuitous comment: ACM 17412, Houghton, 31 CMR 579 (1961).
3. Hearsay: United States v. Murray, 15 USCMA 183, 35 CMR 155 (1964); United States v. Williams, 8 USCMA 328, 24 CMR 138 (1957); United States v. Yerger, supra.
4. Best evidence: See United States v. Jewson, 1 USCMA 652, 5 CMR 80 (1952); ACM 18074 Kauffman, 33 CMR 748 (1963).
5. Lack of corroboration; corpus delicti: United States v. Afflick, 18 USCMA 462, 40 CMR 174 (1969); United States v. Kisner, 15 USCMA 153, 35 CMR 125 (1964).
6. Irrelevant, incompetent, immaterial: United States v. Roberts, 18 USCMA 42, 39 CMR 42 (1968); United States v. Duncan, 9 USCMA 465, 26 CMR 245 (1958); CM 417555, Creek, 39 CMR 666 (1968).
7. Privileged communication: United States v. Nees, 18 USCMA 29, 39 CMR 29 (1968).
8. No proper foundation for question: See United States v. Lindsay, 12 USCMA 235, 30 CMR 235 (1961); United States v. Thompson, 11 USCMA 252, 29 CMR 68 (1960); ACM 17412 Houghton, supra.
9. Evidence prepared with view toward prosecution: United States v. Exposito, 13 USCMA 169, 32 CMR 169 (1962).

10. Impeaching own witness: United States v. Narens, 7 USCMA 176, 21 CMR 302 (1956); ACM 18054, Carmon, 32 CMR 885 (1962).
11. Improper argument of counsel: United States v. Long, 17 USCMA 323, 38 CMR 121 (1967); United States v. Gerlach, 16 USCMA 383, 37 CMR 3 (1966); ACM S-21235, Baker, 34 CMR 833 (1964).
12. Calling for a conclusion: See United States v. Jefferies, 12 USCMA 259, 30 CMR 259 (1961); United States v. Grant, 10 USCMA 585, 28 CMR 151 (1959); United States v. Sutton, 15 USCMA 531, 36 CMR 29 (1965).
13. Improper as highly prejudicial: United States v. Johnpier, 12 USCMA 90, 30 CMR 90 (1961).
14. Partisanship and bias: United States v. Marshall, 12 USCMA 117, 30 CMR 117 (1961); CM 411253, McKinney, 35 CMR 487 (1964); See United States v. Lindsay, supra, CM 400296, Wade, 27 CMR 637 (1958).
15. Cross-exam beyond scope of direct: United States v. Sellars, 17 USCMA 116, 37 CMR 380 (1967); United States v. Marymount, 11 USCMA 745, 29 CMR 561 (1960).
16. Authentication: United States v. Bryson, 3 USCMA 329, 12 CMR 85 (1953).
17. Accusatory questions: CM 417318, Price, (10 September 1968).

RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

CONFESSION--CORROBORATION BY INDEPENDENT EVIDENCE--

Accused, in a pretrial statement, confessed to smoking marihuana. The required corroboration consisted of the testimony of a Sergeant who had observed the accused smoking a cigarette in the barracks and described the odor of the smoke as harsher than ordinary cigarette smoke. It was established that the Sergeant was in the room with the accused for only 15 seconds, that he was a nonsmoker, that he never smelled marihuana burning, and that except for the odor he observed nothing unusual in the room. The Air Force Court of Military Review stated that the Sergeant's testimony consisted of mere suspicion and conjecture and failed to indicate the type of offense that had been committed. There was therefore no admissible independent evidence to justify a "jury inference" of the truth of the accused's confession in accordance with Paragraph 140a(5), Manual for Courts-Martial, United States, 1969 (Revised edition). ACM 20447, Greenberg, 41 CMR ___ (1969).

FAIR TRIAL--PROSECUTION ARGUMENT-- Accused, who was convicted of a \$150.00 larceny, expressed a strong desire to remain in the Air Force. The trial counsel argued on sentence that the Air Force could not have meant much to a man who had not advanced beyond the grade of buck sergeant in 16 years and nine months of service. There was no evidence in the record that the accused's failure to advance was due to prior misconduct or to circumstances within his control. The Air Force Court of Military Review found the trial counsel's remarks prejudicial to the accused as they exceeded the evidence of record, exceeded the bounds of fair comment, and by implication, stated an incorrect principle of law. The Court noted that the remarks "strongly suggested that the quantum of punishment could be based, at least in part, on the accused's lack of promotion over the years." ACM S-22832, Larochelle, ___ CMR ___ (1969).

GUILTY PLEA--PROVIDENCY: A sailor pleaded guilty to a charge of consensual sodomy with a Phillipine girl. The Navy Court of Military Review held his guilty plea to be improvident as it was coerced by an incriminating pretrial statement made by the accused which in turn had been coerced by a threat to turn the accused over to the Phillipine government for what the accused was informed would be an automatic death penalty. NCM 691238, Lewis, (28 October 1969), 6 Crim. L. Rep. 2199.

IMPEACHMENT OF WITNESS--PROMISE OF IMMUNITY: A federal trial judge's refusal to permit cross-examination of a codefendant who testified for the government as to whether he had been promised immunity in return for his testimony was held to be prejudicial error by the Eighth Circuit. The witness' possible belief that such a promise had been made, regardless of the basis for such a belief, might well have affected the jury's view of his credibility. United States v. Dickens, F.2d (8th Cir. 10 November 1969), 6 Crim. L. Rep. 2246. —

IN-COURT IDENTIFICATION--EFFECT OF PRETRIAL CONFRONTATIONS: Two airmen had been attacked by a group of individuals which included the three accused. The victims shortly thereafter pointed the accused out from a group of persons at a bus stop as the individuals who had attacked them. A large group, including the accused, was taken to security police headquarters and photographed. The victims were present during this process. The accused and the victims were then taken into a room so that, according to one of the victims, they could make positive identification and not forget what the accused looked like. On two subsequent occasions, the victims were shown photographs of the victims by the security police. A judge advocate officer, who was not a member of either the prosecution or the defense, interviewed the victims and "practiced" identifying photographs of the accused. The Air Force Court of Military Review stated that the credibility of the victims' in-court identification of the accused was

"completely impeached" by the chaos surrounding the initial identification of the accused at the bus stop and by the "highly questionable" pretrial exhibition of the accused, in person and by photographs, to the victims. ACM 20442, Grundy, 41 CMR ___ (1969).

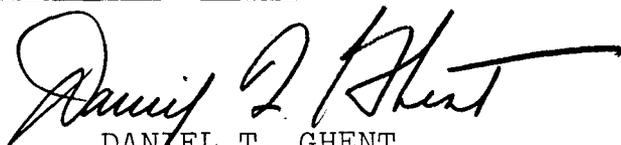
MARIHUANA--EVIDENCE AS TO NATURE OF SUBSTANCE: The Navy Court of Military Review stated that circumstantial evidence that a particular substance was in fact marihuana must be "solid." The Court held that the test of minimal factual sufficiency on review was not met by a single witness' testimony that he smelled a peculiar odor and saw the defendants share a possibly hand-rolled cigarette while acting in an unusually lively manner. NCM 692030, Hadick, (14 November 1969), 6 Crim. L. Rep. 2246.

RIOT--SUFFICIENCY OF SPECIFICATION: The Air Force Court of Military Review stated that the gravamen and most essential element of riot under Article 118, Uniform Code of Military Justice, was the terror which is caused to the general public. United States v. Metcalf, 16 USCMA 153, 36 CMR 309 (1966). Therefore, terror to the public must be specifically alleged in a specification charging participation in a riot. ACM 20442, Grundy, 41 CMR ___ (1969).

SEARCH AND SEIZURE--AUTHORIZATION BY COMMANDING OFFICER: The Army Court of Military Review held that a seizure of bloodstained trousers was unlawful and should not have been admitted into evidence when the search producing the trousers had been ordered by the battalion executive officer, and there was no evidence establishing that the authority to order a search had been delegated to him by the battalion commander. The Court noted that the executive officer had originally been dispatched by the battalion commander to act as the "project officer" at the scene of the crime which was about 30 kilometers from the battalion headquarters, and, at the time of the search, was actively pursuing the role of investigating officer. CM 420573, Crawford, (17 December 1969).

SEARCH AND SEIZURE--CONSENT: An accused was asked by police officers if he would consent to a search of his car, but was not informed that his consent was necessary for such a search and that they would not make a search if he declined to give his consent. The accused testified that he gave his consent because he did not think that there was much that he could do about the search. The Fifth Circuit held that a suspect cannot consent to a warrantless, non-custodial search of his car unless he knows that he can freely and effectively withhold his permission to such a search. While consent may constitute a waiver of Fourth Amendment rights, a valid waiver requires an intentional relinquishment of a known right or privilege. Henderson v. Perkins, ___ F.2d ___ (5th Cir. 12 November 1969), 6 Crim. L. Rep. 2201.

SEARCH AND SEIZURE--PROBABLE CAUSE: A commander authorized a search of accused's belongings based upon information from a security policeman who had observed the accused smoking marihuana on two occasions approximately two months prior to the date of the authorization. The Air Force Court of Military Review, citing United States v. Britt, 17 USCMA 617, 38 CMR 415 (1968), held that the lapse of two months before the issuance of the authority to search was too long a period of time to permit the incidents to support a finding of probable cause at the later date. ACM 20447, Greenberg, supra.



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