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THE ADVOCATE

Volume 11, Number 1

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TRANSITION

BACK TO "NUTS AND BOLTS"

Focusing on the role of new military and civilian defense counsel in courts-martial and a Ten Year Index, the last two issues of The Advocate did not contain a significant number of substantive law items. With this issue, however, we go back to basics - "nuts and bolts" - "blocking and tackling." Thoughts on obtaining the greatest benefit for the defense at Article 32 investigations, utilizing the Jencks Act, and the consequences which the Supreme Court's most recent approach to double jeopardy might have on military justice are provided in the articles which follow.

* * * * *

SCHAFER AND HOLMES DEPART

After this issue, The Advocate unfortunately will no longer have the services of Larry C. Schafer and David L. Holmes. Captain Schafer, former articles editor, associate editor, and frequent contributor, is entering the private practice of law in Phoenix, Arizona. Also entering civilian practice is Captain Holmes, who has enlightened us with the "Side-Bar" over the past year. Larry and Dave, we thank you for a job well done and wish you continued success in your new endeavors.

* * * * *

UNSOLICITED ARTICLES

During the past few months, we have received several unsolicited writings for publication in The Advocate. We sincerely appreciate and encourage the submission of your works. However, if you do desire to write, we suggest that you first contact Articles Editor Peter Nolan (Autovon 289-1087). Submitted materials are, of course, subject to our normal editing processes. The decision to publish a proposed item is discretionary with the Editorial Board and the Chief, Army Defense Appellate Division.

ARTICLE 32 - THE USEFUL ANACHRONISM

Captain Richard M. O'Meara, JAGC*

Introduction

In November 1954, a paper submitted by Colonel Frederick B. Weiner, JAGC, USAR, to The Judge Advocates Association questioned whether the Article 32¹ pretrial investigation really served any useful purpose and whether the requirement for such investigation should not be eliminated completely except where the convening authority feels that the pretrial statements do not give a sufficiently clear picture of what actually happened.²

The Association's Committee on Military Justice, after receiving statements from the three Judge Advocate Generals, rendered a report which was adopted by the Association in 1955. The report concluded:

Your committee feels the pretrial investigation serves a useful purpose; indeed the Armed Forces can point to it with pride as exceeding any comparable protection in civilian life The Committee deprecates the tendency to formalize pretrial investigations to the point where errors therein could constitute the basis for trial reversals.

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1. Article 32, Uniform Code of Military Justice, 10 U.S.C. §832 [hereinafter cited as UCMJ].
2. Judge Advocate Journal (Bull. No. 21, December 1955) at 22.

Pretrial investigations should not be full dress trials in themselves and any further tendency in that direction will lead to a movement for their abolition, which your Committee opposes.³

Earlier that year, Judge Brosman, Court of Military Appeals, summed up the importance of the Article 32 procedure as follows:

[U]nder the Uniform Code, the filing, investigation, and referral of general court-martial charges are parts of no game; neither do they constitute steps in the paternalistic imposition of sanctions for the violation of club rules. Instead these and related procedures constitute the elements of that which is a juristic event of substantial gravity - one demanding the very highest sort of professional responsibility and conduct from all attorneys involved.⁴

The above-cited views constitute the parameters of varied attempts by scholars, legislators, and practitioners to define the nature of the Article 32 pretrial investigation. On the

3. Id. Indeed, provision for pretrial investigation of charges has been statutorily mandated since 1920. These provisions afforded the accused an opportunity to make a statement, call witnesses, offer evidence, or present matter in explanation or extenuation for consideration. Summarized testimony and documents constituting evidence were required enclosures to the report. The original purposes of the formal pretrial investigation were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial. See generally, Hearings on S.64 Before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st Sess. (1919); War Department, Military Justice During the War 63 (1919).

4. United States v. Green, 5 USCMA 610,617, 18 CMR 234,241 (1955).

one hand, it is argued that the proceeding is not judicial in nature, that while some discovery is permitted, the proceeding is primarily a commander's tool, used to ensure that baseless charges are not referred to trial. In this regard, the investigation is likened to a grand jury proceeding or a preliminary hearing, created for the use of the Government to protect the accused. Those in favor of this view point to the exigencies of military life, the extreme simplicity of legislative and regulatory guidance regarding the proceeding and the very clear legislative statement that "failure to follow them [requirements of the Article] does not constitute jurisdictional error."⁵

On the other hand, appellate court decisions have, since 1951, added numerous additional requirements to the pretrial investigation model. These rulings have, however, created a piecemeal progression in the development of the Article 32 investigation from a commander's investigation to a full-blown preliminary judicial proceeding and, as yet, the final word has not been written. For the defense attorney, treatment of the Article 32 investigation as an integral part of the eventual trial can create numerous benefits. It is the purpose of this article to highlight some of the issues available to the defense counsel involved in a preliminary investigation pursuant to Article 32 and to present various tactical considerations which may be helpful.

5. Article 32(d), UCMJ. Cf. *Humphrey v. Smith*, 336 U.S. 695, 69 S.Ct. 830, 93 L.Ed. 987 (1949); *United States v. Eggers*, 3 USCMA 191,194, 11 CMR 191,194 (1953) ("Discovery is not a prime object of the pretrial investigation. At most it is a circumstantial by-product - and a right unguaranteed to defense counsel."); *United States v. Samuels*, 10 USCMA 206,216, 27 CMR 280,290 (1959) (Latimer, J., concurring and dissenting) ("We must not overlook the essential requirement that military law must be workable in time of war as well as in periods of peace." Dissenting from majority opinion requiring sworn statements at pretrial investigations); *United States v. Ledbetter*, 2 M.J. 37, 54 (CMA 1976) (Cook, J., dissenting) ("The report of the full Committee on Armed Services to the House indicates that the committee did 'not intend to endorse any provisions which will bring added delays and unnecessary technicalities' into the system of military justice.").

The Rules of the Game

No charge may be referred to a general court-martial unless there has been an investigation conducted in accordance with Article 32. The purposes of an investigation are threefold: first, to inquire into the truth of the matters asserted in the charges; second, to check the form of the charges and specifications; and third, to make recommendations concerning the disposition of the charges in the interest of justice and discipline. In furtherance of these purposes, the investigating officer is charged with conducting a thorough and impartial investigation. The accused is permitted legal counsel. Upon request, the accused may be represented by civilian counsel provided by him, by military counsel of his own selection if reasonably available, or by a detailed defense counsel. At the investigation full opportunity to cross-examine witnesses and to present defense witnesses and other evidence must be provided. The accused may, if he elects, answer questions directed to him by the investigating officer and make a statement, sworn or unsworn. If the charges are forwarded after the investigation, they must be accompanied by a summarized record of the testimony taken on both sides, a copy of which has been provided the accused. In essence, these are the statutory rights available to the accused.⁶ As has been earlier stated, numerous additional rights and obligations have been created which will be discussed in the order they present themselves during the usual proceeding.

General Considerations

As stated above, the general statutory provisions for the conduct of an Article 32 investigation provide for a seemingly clear-cut model to accomplish the twofold task of gathering evidence in an expeditious manner while at the same time providing the accused an opportunity to contribute to

6. Article 32, UCMJ. In addition to the Codal provisions enumerated in Article 32, the practitioner should also become thoroughly familiar with paragraph 34, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969], and Dept. of Army Pam. 27-17, Military Justice Handbook Procedural Guide for Article 32(b) Investigating Officer (10 June 1970) [hereinafter cited as DA Pam 27-17].

the ultimate factual determination. Six general considerations, however, if not properly recognized, may work to deny the accused his proper role.

1. The doctrine of waiver. It has been consistently held that, if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right without regard to whether such enforcement will benefit him at the trial.⁷ Once the case comes to trial on the merits, however, the pretrial proceedings are superseded by the procedures at the trial. The rights accorded to the accused in the pretrial state merge into his rights at trial. If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused's rights at the trial, the defects are considered waived.⁸ Unless counsel is prepared to strenuously recognize and note objections during the proceeding, to renew those objections in the form of notice to the convening authority prior to referral, and to bring his objections to the attention of the military judge in the form of appropriate motions during trial, it is probable that appellate courts will refuse to even test for prejudice.⁹

It is therefore important to create a record. Because in many instances the investigating officer (IO) will be a line officer and therefore unfamiliar with recent appellate court decisions, it is suggested that counsel explain at the outset his concern that a complete record of his objections

7. See, e.g., United States v. Chestnut, 2 M.J. 84 (CMA 1976).

8. United States v. Chuculate, 5 M.J. 143 (CMA 1978); United States v. Ledbetter, 2 M.J. 37 (CMA 1976); United States v. Chestnut, 2 M.J. 84 (CMA 1976); United States v. Donaldson, 23 USCMA 293, 49 CMR 542 (1975); United States v. Mickel, 9 USCMA 324, 26 CMR 104 (1958).

9. United States v. Cruz, 5 M.J. 286 (CMA 1978); United States v. Combs, 28 CMR 866,870, n.1 (AFBR 1959). ("[The investigating officer's] method of obtaining testimony under oath administered via telephone is of uncertain propriety. However, we need not pass upon the validity of this question for other reasons. Certified defense counsel did not object to this procedure at any time.")

be noted. In addition, it may be useful to explain to the IO that the various objections made should not be construed as an attempt to "sharpshoot" his conduct or to make him appear incompetent. Objections are made in order to preserve for the military judge and the appellate courts those issues which may at a later time become important, as part of the total record of trial, to a determination of compliance with military due process. In this regard, it is important that counsel request permission to review the IO's report prior to its submission to the convening authority to insure that objections are properly noted, requests properly explained, and the IO's rulings accurately recorded. If tapes are made of the proceedings, counsel should request that they be maintained until appellate action, if any, is taken.¹⁰ Where possible, a verbatim transcript of the proceedings should be requested as well.¹¹

After the report is complete, counsel should endeavor to insure that his objections are made known to the convening authority. This can be accomplished by a written notice addressed directly to the convening authority outlining each objection and, where possible, providing explanation of the prejudicial consequences involved. Whenever possible, these objections should be made prior to completion of the staff judge advocate's pretrial advice. In this way, the staff judge advocate must consider them when he makes his required

10. See O'Brien, *The Jencks Act - A Recognized Tool for the Military Defense Counsel*, 11 *The Advocate* 20 (1979) [hereinafter cited as O'Brien].

11. See Combs, *supra* at 873. ("There would seem to be no question that if verbatim stenographic notes are extant before trial and the Government has notice of the fact that their production may be required at the time of trial, there is a duty on the part of those in authority to preserve such notes."); DA Pam 27-17, para. 3-3a provides for verbatim transcripts when requested by the appointing authority; *United States v. Scott*, 6 M.J. 547 (AFCMR 1978) (Destruction of defense requested Article 32 verbatim recording resulted in conviction reversal).

determination regarding the conduct of the Article 32 investigation.¹²

Finally, counsel should insure that all objections noted at the investigation are made the subject of appropriate motions at trial. Suffice it to say that any objection made before the IO should be important enough to raise before the military judge. In addition, failure to raise these objections at trial will most likely waive their use during later appellate proceedings.

2. Choice of investigating officer. While it would be extremely rare for a defense counsel to be actively involved in the determination of who shall investigate his case, this determination can be susceptible to judicial review if counsel creates the proper record.

The Manual for Courts-Martial provides in part that prior to forwarding charges with a recommendation for trial by general court-martial, the summary court-martial convening authority will appoint a commissioned officer to investigate the charges. The IO should be a mature officer, preferably an officer of the grade of major or lieutenant commander or higher, or one with legal training and experience.¹³ The IO is required to conduct a fair and impartial investigation. This impartiality requires that neither the accuser nor any officer who has a direct interest in the case be designated to perform this duty. The IO is subject to challenge on the

12. Paragraph 35c, MCM, 1969, reads in part:

The advice of the Staff Judge Advocate . . . shall include a written and signed statement as to his findings with respect to whether there has been substantial compliance with the provisions of Article 32, . . . and whether the allegation of each offense is warranted by evidence indicated in the report of investigation.

13. Paragraph 34, MCM, 1969.

basis of a lack of impartiality or status.¹⁴ In United States v. Payne, 3 M.J. 354 (CMA 1977), the Court of Military Appeals addressed the issue of the impartiality of an IO and held a line officer, acting as an IO, to the standards of conduct outlined in the ABA standards relating to the administration of criminal justice and presumed prejudice where the IO sought out and received guidance from a judge advocate whom he knew would be involved in the prosecution of the case.¹⁵

In light of Payne, it is important that counsel conduct a voir dire of the IO. Important areas of concern include the actual method of appointment; the relationship of the IO to the accused, to the Criminal Justice Section of the SJA Office,¹⁶ and to the convening authority; and the IO's background and legal knowledge regarding the specific charges. In addition, the record should indicate what guidance the IO

14. Paragraph 33, MCM, 1969; United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955) ("We therefore start with the premise that a record discloses error when it shows that a perfunctory and superficial pretrial hearing was accorded an accused.").

15. Although the Court found clear and convincing evidence in the record to rebut the presumption, the Court stated that in future cases, when testing for prejudice, doubts will be resolved against the judicial officer.

16. In the recent case of United States v. Grimm, CM 437235, M.J. (ACMR 25 Jan. 1979), the Army Court of Military Review determined that a chief of criminal law did not "serve in a prosecutorial function," which would prohibit him from furnishing ex parte advice to an IO. The Court emphasized the following points in reaching its conclusion: The chief of justice was not a trial counsel; he did not direct the strategy or trial tactics of trial counsel; he did not furnish advice to the military police or CID; his duties were primarily administrative, as opposed to prosecutorial. The Court considered it immaterial that the chief of justice assigned trial counsel to cases; that he rated them on their efficiency reports; that his responsibility was to represent the best interests of the command rather than those of the individual soldier; and that working directly for him was the chief trial counsel, under whom served four trial counsel.

received from the Criminal Justice Section, if any, and what prior ex parte discussions the IO has had with the witnesses or with members of the CID or Military Police. If it appears that the IO is susceptible to challenge, such challenge can be made directly to the IO or by written communication immediately to the appointing authority.

In recent years it has become customary in some jurisdictions to appoint judge advocate officers as IO's. While this could, in the long run, aid counsel, such appointment might not always be in the best interest of the defense. Since the Manual requires that officers substituted for field grade line officers not only have legal training but experience, voir dire should cover the relationship between the lawyer IO and the Office of the SJA, prior knowledge of the case, and prior experience regarding the conduct of pretrial investigations. Although the Court in Payne seemed to feel that appointment of judge advocates alleviates many common objections to the lay magistrate, the proximity of the judge advocate IO to other members of his office involved in the administration of criminal justice needs to be explored and placed in the record.

3. Creation of a judicial atmosphere. While it is chiefly the responsibility of the IO to choose an appropriate place to hold the pretrial proceedings, to prescribe the uniform of the day, and to schedule the witnesses, counsel should attempt where possible to aid the IO regarding these details, especially where the IO may not be familiar with the conduct of Article 32 proceedings. Choice of an appropriately appointed conference room (as opposed to a messhall); class A uniform (as opposed to fatigues); and a schedule of witnesses that limits the proceedings to six hours a day at most adds emphasis to the gravity of the proceeding and the necessity for thorough, considered weighing of the evidence. Where possible, counsel should consistently refrain from informal conversations and off-the-record remarks. As, quite often, the only attorney present, defense counsel will frequently find that his conduct sets the tenor of the proceeding. He should use this advantage to create an atmosphere which supports the IO's view of himself as an independent and impartial judicial magistrate.

4. Rules of evidence. Although there is no statutory requirement that the rules of evidence be utilized during a

pretrial investigation, it is counsel's responsibility to object where appropriate to the IO's use of evidence which contains no indicia of reliability. One means of doing this is to initially request that the rules of evidence be applied to the hearing. Based upon the Court of Military Appeals' decision in Payne, it seems clear that the IO is required to consider only reliable evidence in making his factual determinations. Regarding documents, the IO's handbook requires him to determine whether documentary evidence in the file, such as extract copies of morning reports and copies of records of previous convictions, is properly authenticated.¹⁷ It is also clear that the IO is required to make a determination as to compliance with Article 31, UCMJ, and the Fifth Amendment. Search and seizure determinations are required of the IO as are Jencks Act determinations.¹⁸ Finally, an overall evidentiary determination is required, summarized as follows:

In making his report, it is the officer's responsibility to cull from his final product all extraneous matters and present only such evidence as in his opinion will be admissible at trial.¹⁹

Although these requirements serve to emphasize the basic incongruity of the pretrial investigation model as an informal proceeding presided over by a lay magistrate who is often required to make technical evidentiary rulings, the fact remains that counsel is forced to work within this framework. A request regarding the rules of evidence, especially where a judge advocate IO is appointed, and consistent objection to consideration of hearsay evidence and other unreliable forms of proof can aid counsel in controlling the types of information which become part of the record.

17. DA Pam 27-17, para. 2-2d(4).

18. See generally DD Form 457, Report of Investigation, dated 1 Oct 1969, item 9c; Payne, supra at 356, n. 11; United States v. Jackson, 33 CMR 884 (AFBR 1963).

19. MacDonald v. Hodson, 19 USCMA 582,583, 42 CMR 184,185 (1970).

5. Discovery. Although pretrial discovery has been characterized as a defense counsel's dream,²⁰ counsel may find that, what he does not ask for, he will not receive. This is especially true at the Article 32 investigation where the evidence is as yet unstructured. In this regard it is important to request by letter to the appointing authority that discoverable materials be produced "for use at the Article 32 investigation." Specific requests obviously will vary depending on the particulars of each case and the imagination of each counsel. Certain items should always be requested prior to the pretrial proceeding, however, and a notation of the results of the request placed in the record.

a. Copies of all evidence viewed by or explained to the IO. It is important that the record indicates to what materials, if any, the IO has been privy. Where documents exist, such as summaries of evidence, commander's notes, or police notes, these items can be made the subject of evidentiary objections.

b. Copies of the complete CID or MPI file including backup notes, initial interview worksheets, and cards which indicate the dates actions were taken. In this regard counsel may encounter reluctance on the part of officials to release CID backup files without a request from a military judge. Counsel should emphasize, when appropriate, that use of these documents is intended specifically for the pretrial proceeding and object on the record if the documents are not presented.

c. Jencks Act materials. The Jencks Act²¹ has been applied to military law since 1958²² and provides in part that:

Under 18 U.S.C.A. §3500 the defendant is entitled, "After a witness called by

20. Address by Edward Bellen, Esq., 20th Annual Belli Seminar, 26 June 1969.

21. 18 U.S.C. § 3500.

22. See, e.g., United States v. Heinel, 9 USCMA 259, 26 CMR 39 (1958). For more on the application of the Act to the military, see O'Brien, supra.

the United States has testified on direct examination, * * * to any written statement " * * * signed or otherwise adopted or approved by him" which is in the possession of the government and which relates to the subject matter as to which the witness has testified.²³

Again, it should be specifically stated in counsel's request that Jencks Act material is necessary for the purpose of examining witnesses at the pretrial proceeding. Additionally, counsel should insure that, where witnesses have been interviewed by agents from other posts, those offices are searched as well. In Combs,²⁴ the issue of destroyed evidence subject to the Act's discovery process was raised prior to trial when counsel requested a verbatim copy of the reporter's notes taken at the Article 32 investigation. Although it appeared that the notes had been destroyed in accordance with "usual and standard operating procedures" the Court held that "the accused's right under the Jencks statute to examine any statement within the purview of the law is absolute." The Court accordingly held that the testimony of the pertinent witnesses should have been stricken from the record, and "that dismissal of the charges, instead of declaration of a mistrial, was also the appropriate remedy because the notes were no longer available for transcription." In Jackson, supra, the Air Force Board of Review specifically held that the rights accorded an accused under the Act are available during an Article 32 investigation and that it was error for the IO to deny a defense counsel's request for an OSI agent's notes covering the substance of his testimony at the proceeding. Jencks Act material, therefore, can be utilized at the pretrial proceeding as both an impeachment tool and, where the material is not forthcoming due to loss or destruction, as grounds for the exclusion of government evidence.²⁵

23. Foster v. United States, 308 F.2d 751,755 (8th Cir. 1962) (emphasis from original).

24. Combs, supra at 873.

25. See generally United States v. Albo, 22 USCMA 30, 46 CMR 30 (1972); United States v. Haywood, 41 CMR 939 (AFCMR 1969).

6. Availability of witnesses. Although the statutory standard of confrontation for Article 32 investigations differs from the constitutional standard applicable to criminal trials, the Court of Military Appeals has refused to tie the availability of a serviceman to testify to a definition in terms of miles from the situs of the trial.²⁶ Rather, the Court has established a balancing test which weighs the significance of the witness' testimony against the relative difficulty and expense of obtaining the witness' presence at the investigation. Where counsel moves for the presence of a government witness over the use of his sworn testimony, he should endeavor where possible to place in the record evidence indicating the importance of the witness to the Government's case as well as evidence of counsel's inability to speak with the witness under oath. Evidence that leads to the conclusion that no military exigency or other extraordinary circumstance exists to deny the witness' presence should also be placed in the record along with a representation that if the witness will not be presented, counsel moves to depose the witness and postpone proceedings until the witness can be examined.²⁷

If counsel wishes to request a defense witness, he should petition the appointing authority as soon as possible to give the Government time to forward the request to the witness'

26. United States v. Ledbetter, supra. Paragraph 34d, MCM, 1969, provides in part: "All available witnesses, including those requested by the accused, who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused, and if counsel has been requested in the presence of accused and his counsel." Further, Article 32(b), UCMJ, provides that at the pretrial investigation "full opportunity shall be given to the accused to cross examine witnesses against him if they are available"

27. Chuculate and Chestnut, both supra; United States v. Jackson, 3 M.J. 597 (NCMR 1977); United States v. Cox, 48 CMR 723 (AFCMR 1974), pet. den. 23 USCMA 616 (1974).

commanding officer for a determination of availability.²⁸ Unless counsel feels it tactically unwise to divulge future defense witnesses during preliminary proceedings, it is suggested that the request comply as closely as possible to the Manual request utilized in courts-martial.²⁹ Where possible, counsel should indicate personal knowledge of the expected testimony of the witness and provide specific dates, places, and events which evidence a relationship between the witness and the accused.³⁰ In this regard, counsel should carefully consider his option to place extenuating and mitigating evidence before the IO in the form of testimony by former commanders and supervisors. If the accused has been in the service a number of years, these types of witnesses will normally be located on other posts. When making his request, counsel should point out the IO's responsibility to investigate thoroughly not only those facts surrounding the alleged offense, but also those facts which will aid him in a

28. The Manual provides that "[O]rdinarily, application for attendance of any witness subject to military law will be made to the immediate commanding officer of the witness, who will determine the availability of the witness." Paragraph 34d, MCM, 1969. CMA has opined that "[a]vailability is a question of law ultimately to be resolved . . . by the trial judge. Neither the witness' inclination to attend nor his commander's desire to order his attendance at a pretrial investigation is conclusively determinative." United States v. Ledbetter, supra at 44, n. 15.

29. "A request for the personal appearance of a witness will be submitted in writing, together with a statement, signed by counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other matter showing that the expected testimony is necessary to the ends of justice." Paragraph 115a, MCM, 1969.

30. See generally United States v. Young, 49 CMR 133 (AFCMR 1974) (offer of proof regarding expected testimony of witnesses not established where no member of the defense had interviewed requested witnesses); United States v. Carey, 1 M.J. 761 (AFCMR 1975).

recommendation regarding disposition of the case "in the interests of justice."³¹

While requests for civilian witnesses are handled differently by the Government because the IO lacks authority to order their presence,³² counsel should, where appropriate, make the same representations in his request as he makes for military witnesses. In addition, counsel should place in the record his willingness to travel to the situs of the civilian witness and continue the proceeding there or take a deposition. These representations should significantly strengthen counsel's request in the eyes of the trial judge and appellate courts should the witness be denied.³³

Seeking Relief

It appears to be statutorily mandated that failure to follow the requirements of Article 32 does not constitute jurisdictional error³⁴ and judicially mandated that if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right without regard to whether such enforcement will benefit him at trial.³⁵ Neither of these maxims, however, carry much weight in a vacuum. In Combs, for example, failure to produce Jencks Act matter which had been destroyed prior to trial required dismissal of the charges instead of declaration of a mistrial, because the notes were no longer available for transcription. In United States v. Lucas, 2 M.J. 387 (AFCMR 1977), on the other hand, the accused was denied the presence of a requested witness whose statements were incorporated in the Article 32 investigation because such denial did not result in prejudice to the accused's substantial rights in that the "evidence of the accused's guilt [was] strong and compelling" and there was no indication in the witness'

31. Article 32, UCMJ.

32. Chuculate, supra at 146 (Cook, J., concurring).

33. Chestnut, supra.

34. Article 32, UCMJ.

35. United States v. Mickel, supra.

statement "that his appearance as a witness would have affected the findings reached by the court-martial."³⁶ Although a motion for appropriate relief, e.g., requesting a new Article 32 investigation, is generally the relief sought, counsel should not be unmindful of the possibility of moving for dismissal of the charges.

1. Motion for appropriate relief. The Manual for Courts-Martial recognizes this motion as the one most appropriate when counsel alleges a defect in pretrial proceedings.³⁷ Counsel should initially identify each defect and objection to the proceeding and enunciate as clearly as possible how these defects have prejudiced his client's substantial rights. Inability to properly prepare for trial due to denial of statutory rights to cross examine witnesses, consideration of inadmissible/unreliable evidence by the IO, and a challenge to the independence and impartiality of the IO are but three of the common reasons for requesting appropriate relief. Needless to say there are numerous approaches which can be taken. Without well demonstrated prejudice, however, the motion will normally not be granted.³⁸ Secondly, counsel should tailor the motion to the relief requested. If counsel merely wishes time to depose a witness prior to trial, he should so request. If, on the other hand, it is advantageous to request a new Article 32 investigation, counsel should demonstrate not only how prior defects have prejudiced his

36. Id. at 390.

37. Paragraph 69c of the Manual provides in part:

A substantial failure to comply with the requirements of 34 and Article 32 may be brought to the attention of the Court by a motion for appropriate relief. Such a motion should be granted only if the accused shows that the defect in the conduct of the investigation has in fact prevented him from properly preparing for trial or has otherwise injuriously affected his substantial rights.

38. Cruz and Mickel, both supra.

rights but also how merely reopening the Article 32 investigation will not adequately cure the prejudice.

2. Motion to dismiss. Although other pretrial defects may be grounds for counsel to move to dismiss the charges at trial,³⁹ an allegation of "baseless charges," e.g., that the charges have been referred to the court on the basis of insufficient evidence and a failure to afford military due process, should be considered by counsel.

a. Baseless charges. A general court-martial convening authority may not refer a charge to a general court-martial unless he has determined that the charge alleges an offense under the UCMJ and is warranted by evidence indicated in the report of investigation.⁴⁰ A motion to dismiss requests the military judge to examine the record of investigation. If he determines that the record does not contain that level of evidence necessary to refer a case to trial, the charge should be dismissed as baseless. In addition, counsel may point to MacDonald, supra, and the other evidentiary responsibilities of the IO, indicate those areas where inadmissible or inherently unreliable evidence remains in the record of investigation, and move for dismissal because the charges were referred based on this inappropriate evidence.⁴¹

b. Military due process. It has long been the law that violation of certain basic concepts of fairness and statutory protections outlined in the UCMJ which materially prejudice the substantial rights of the accused require dismissal of the charges.⁴² Counsel should test the objections made at the proceeding against the statutory rights afforded the accused, e.g., impartial IO, availability of witnesses, denial of adequate representation due to IO denying defense request for a continuance, etc., and outline in the motion how the accused has been harmed. In addition, explanation of

39. Combs, supra at 7.

40. Paragraph 35b, MCM, 1969.

41. See also discussions in 10 The Advocate 267,268 (1978); United States v. Engle, 1 M.J. 387,389, n. 4 (CMA 1976).

42. United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

why merely ordering a new hearing will not obviate the harm caused by the violations will significantly strengthen the motion.

Because the Article 32 investigation appears to be in a state of redefinition at the present time, it is suggested that counsel frame his motion regarding pretrial defects as a motion to dismiss or, in the alternative, a motion for appropriate relief. In this fashion, the military judge will be required to test the defects and prejudice alleged twice, first to determine if they are so onerous as to require dismissal and then, if not, to determine if the curative relief requested should be granted.⁴³

Conclusion

Two basic considerations regarding the present law of pretrial investigations should be emphasized. Although appellate courts appear to be amenable to reviewing the pretrial hearing with an eye toward insuring that an accused is in fact afforded every right guaranteed him, the doctrine of waiver is still very much alive. Where counsel views the proceedings as merely a pro forma anachronism, where he is unprepared imaginatively to create a record of objections, and where he fails at trial to review those objections, his post-conviction complaints regarding pretrial defects will not be heard. Consistent and strenuous participation in the proceedings, on the other hand, will force the courts to involve themselves in reviewing these pretrial procedures and subject their defects to the judicial light of day.

43. Paragraph 67f, MCM, 1969.

THE "JENCKS ACT" - A RECOGNIZED TOOL FOR THE
MILITARY DEFENSE COUNSEL

Captain Kevin E. O'Brien*

The so called "Jencks Act"¹ was passed by Congress as a result of the Supreme Court's decision in United States v. Jencks, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). Jencks was convicted of violating Section 9h of the National Labor Relations Act² by filing an affidavit falsely stating that he was not a member of the Communist Party. Crucial testimony was provided by two paid government informants, who stated on cross-examination that they had made regular oral and written reports to the FBI on matters about which they had testified. The Supreme Court held that the trial judge should have ordered the production of these statements for defense inspection. In disapproving the practice of submitting government documents to the trial judge for a ruling on relevancy and materiality without hearing the accused, the Court concluded:

Because only the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

Id. at 668-669, 77 S.Ct. at 1013, 1 L.Ed.2d at 112 (1957).

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1. 18 U.S.C. §3500.

2. 10 U.S.C. §1001.

Congress became concerned over the application of this ruling to entire investigative files, grand jury testimony, and other similar material. The result of their concern was the Jencks Act.³

The Jencks Act prohibits any statement or report of government witnesses in possession of the United States from being the subject of a subpoena, discovery, or inspection until after that witness has testified on direct examination in the trial of the case. At that time, the defense acquires a right only to those statements which relate to the subject matter on which the witness has testified. If there is a dispute over the applicability of the Jencks Act, the trial judge must decide the issue by examining the statements or reports in camera. The trial judge is required to strike the testimony of the witness or declare a mistrial if the Government fails to comply with the order of the court to produce a witness' statements. The term "statement" refers to: (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) any stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; and (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As the definition of "statement" indicates, Congress was only concerned with the production of those statements which could be properly called the witness' own words. Summaries of oral statements which evidence a substantial selection of material or which were prepared after the interview without complete notes or statements which contain an agent's interpretations or impressions are not produceable under the Act.⁴ An agent's report of an interview of a witness after the witness has testified is not produceable,⁵ but a report

3. U.S. Code and Congressional and Administrative News, 85th Congress, First Session 1957, p. 1862.

4. Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959).

5. United States v. Valdes, 545 F.2d 957 (5th Cir. 1977).

read back to the witness, verified by him, or substantially verbatim, will be subject to the Act.⁶ A writing prepared by a government lawyer relating to subject matter of the testimony of a government witness is produceable if the writing is signed or otherwise adopted by the government witness.⁷ There is no exception in the act for a government counsel's work product.⁸ A transcript of a witness' testimony in a prior trial or in a pretrial hearing is not within the coverage of the Act.⁹ The Act does not apply to a court's witness.¹⁰

A request is necessary to trigger the production requirement of the Act. The failure of the Government voluntarily to produce a statement is not error.¹¹ The Act only applies to those statements in the possession of the prosecutorial arm of the federal government.¹² It does not apply to a presentence report prepared by order of the court.¹³

6. United States v. Chitwood, 457 F.2d 676 (6th Cir. 1972).

7. Goldberg v. United States, 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603 (1976).

8. Id.

9. United States v. Harris, 542 F.2d 1283 (7th Cir. 1976); United States v. Covello, 410 F.2d 536 (2d Cir. 1969). But cf. United States v. Jackson, infra, and United States v. Matfield, infra (military due process may require that such material be made available to the defense).

10. United States v. Hutul, 416 F.2d 607 (7th Cir. 1969).

11. United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975).

12. United States v. Dansker, 537 F.2d 40 (3rd Cir. 1976); United States v. Ehrlichman, 389 F.Supp. 95 (D.C.D.C. 1974) (verbatim testimony before a congressional committee is not subject to the Act).

13. United States v. Dansker, supra.

There is no question that the Jencks Act applies to the military.¹⁴ Although the Jencks Act may not specifically apply in a given situation, "military due process" itself may require that a statement be produced. In United States v. Jackson, 33 CMR 884 (AFBR 1963), the Air Force Board of Review dealt with the question of whether the Jencks Act applied at Article 32 investigations. The Board held that if an investigating officer calls a government law enforcement agent as a witness and the accused makes a demand for a prior statement which otherwise falls within the purview of the Jencks Act, he would be entitled to it.¹⁵ The Board determined that the Jencks Act would apply in this situation because of "fundamental fairness under the general concept of military due process."¹⁶ By this ruling, the Air Force Board of Review seemingly expanded the effect of the Jencks Act by extending it to proceedings other than the actual trial of an accused. Further, the Army Court of Military Review has held that, although the transcript of the testimony of a witness at another trial or tapes thereof in the hands of a contract court reporter do not come within the language of the Jencks Act, "military due process" may demand that the defense be afforded access to such matter.¹⁷

The timing of the request and the purpose for which the statements are requested must be considered before a defense counsel invokes the provisions of the Jencks Act. In United States v. Burrell, 5 M.J. 617 (ACMR 1978), the trial defense counsel requested tapes of the Article 32 investigation at an Article 39(a) session. The problem, however, was that these tapes had been erased prior to trial. In ruling that the Jencks Act did not apply to the defense counsel's request,

14. United States v. Albo, 22 USCMA 30, 46 CMR 30 (1972); United States v. Walbert, 14 USCMA 34, 33 CMR 246 (1963); United States v. Augenblick, 377 F.2d 586 (Ct.Cl. 1967), reversed on other grounds, 393 U.S. 340, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969).

15. Id. at 890.

16. Id.

17. United States v. Matfield, 4 M.J. 843 (ACMR 1978).

the court noted that the request was made before any government witness had testified and concluded:

The act is not an instrument of pretrial discovery for use in planning trial strategy or tactics and appellant's attempt to use the Act for that purpose was improper. The appellant's request was, therefore, premature and the denial by the military judge was not a violation of the Jencks Act.

Id. at 619.

The Court's decision in Burrell, however, is somewhat clouded by the more recent decision of the Court of Military Appeals in United States v. Jarrie, 5 M.J. 193 (CMA 1978). In Jarrie, an informer reported a drug transaction to the military police. Approximately two weeks later, an OSI agent verified the notes that he had taken during his previous conversation with the informer. Nine months later, the agent prepared a written statement which the informer signed. In this statement, the agent deleted from the original notes matters which he considered extraneous, including the names of two eyewitnesses to the purported transaction. The agent then destroyed his original notes in accordance with the discretion provided to him by the investigative organization. One of the eye witnesses was called by the defense and flatly contradicted the testimony of the informant. Neither the agent nor the informant could recall the second witness' identity. Because of the destruction of the original notes, the Government was unable to comply with the defense counsel's request that the original notes of the agent be produced after the informer had testified. The military judge denied the defense counsel's motion to strike the testimony of the informer.

On appeal, the Court of Military Appeals held that the Jencks Act would apply to the agent's written notes because the witness' verification of them transformed them into his own work. The Court refused to apply a judicial exception of "good faith" destruction. Because of the prejudice to the accused, the Court reversed the conviction. Presumably, the prejudice to which it alluded was that the appellant was unable to secure the name of a possible witness

to the drug transaction. In reversing Jarrie's conviction, the Court seems to have ignored the purpose of the Jencks Act. As pointed out by Judge Cook in his dissent, the Act was meant to limit the right to a witness' statement to its use on cross-examination for impeachment purposes. The Jencks Act does not grant a general right of discovery.¹⁸

The Air Force Court of Military Review followed Jarrie in United States v. Scott, 6 M.J. 547 (AFCMR 1978). In Scott, the defense counsel requested a verbatim transcript of the Article 32 investigation for possible use on cross-examination at trial. The verbatim recording was negligently destroyed by the Government after the completion of the investigation but before trial. The Court initially noted that the Government conceded that the Jencks Act applied to statements made during an Article 32 investigation.¹⁹ As in Jarrie, the Court refused to find a judicial "good faith" exception to the Jencks Act. Although the Court recognized that an Article 32 investigation does not require a verbatim record, the Court defined the Government's obligation to secure evidence in its possession with the following words:

Ordinary prudence dictates that evidence be properly secured until litigation is completed. Thus, the Government had a duty to maintain this evidence even in the absence of a defense request for its production.

Id. at 549. Because of the military judge's failure to exclude the testimony of the witnesses, the Court set aside the findings and ordered a rehearing.

Not every Jencks Act violation requires reversal. The circumstances must be considered to determine the extent to which the error might have been prejudicial.²⁰ A reversal

18. United States v. Jarrie, supra, at 196 (Cook, J., dissenting).

19. Citing United States v. Combs, 28 CMR 866 (AFBR 1959). But see United States v. Haywood, 41 CMR 939 (AFCMR 1969).

20. United States v. Albo, supra.

will follow where the facts and circumstances are insufficiently developed at the trial, to permit appellate courts to adequately review the issue.²¹ In Albo, the trial judge refused to order the Government to produce witness' notes for possible impeachment purposes. Since the notes were not attached to the record, it was impossible to conclude on appeal that the error was harmless.

In this situation, a civilian appellate court would have returned the record to the trial court with instructions for it to inquire into the applicability of the Jencks Act and into any prejudice that may have resulted from its violation.²² The Court in Albo set aside the finding and sentence because they concluded that a court-martial has no continuing existence. There is no regular procedure for ordering the case remanded for a determination by the trial court on the applicability of the Jencks Act.²³ In a summary disposition, the Court of Military Appeals followed Albo in United States v. Herndon, 5 M.J. 175 (CMA 1978).²⁴ It is interesting, however, to note the concurring opinion in which Judge Cook rejected the Court's remedy in Albo for a Jencks Act violation when the trial judge fails to conduct the required examination of the material and the documents are not a part of the appellate record. He would have directed a limited rehearing to determine whether the Jencks Act violation prejudiced the accused.²⁵

21. Id.

22. Campbell v. United States, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed.2d 428 (1961).

23. United States v. Albo, supra, at 835.

24. In Herndon, the military judge refused to order the production of the CID case activity notes.

25. Id. at 170.

Conclusion

The Jencks Act can be a useful tool for defense counsel at trial.²⁶ There is no need to show that a witness' statement is inconsistent with his testimony on direct examination before it must be produced. Trial defense counsel should attempt to invoke the provisions of the Jencks Act even at Article 32 investigations and be prepared to make a motion to the investigating officer for preserving the tapes themselves. See United States v. Burrell, *supra*. In cases involving informants, counsel should determine whether any written reports, or oral reports later reduced to writing and affirmed, were made. In addition to requesting all statements from the Government after a government witness has testified on direct examination, defense counsel should ask the witness if he made any other pretrial statements that were not produced under his original request. There is always a possibility that the witness made a statement to the company commander or CQ that never came to the attention of the trial counsel.

If a witness signs a statement or otherwise adopts notes prepared by a trial counsel, they must be produced upon request after the witness has testified on direct examination at trial, even though the statement or notes might fall within the trial counsel's "work product." Whenever possible, prejudice should be demonstrated on the record if a defense counsel's request is denied. Although the purpose of the Jencks Act is to aid the trial defense counsel in his cross-examination of a government witness, it may prove to be of great assistance in the presentation of his own case.

26. For more on the defense's right of discovery, see United States v. Mougenel, discussed in the Case Notes section of this issue.

DOUBLE JEOPARDY: CHANGES BY THE SUPREME COURT
AND THEIR EFFECT ON THE MILITARY

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On 14 June 1978, the Supreme Court of the United States announced opinions in five cases dealing with the Double Jeopardy Clause of the Fifth Amendment.¹ This article will examine the impact of those decisions on trials by court-martial. While several of them apparently will have little or no present impact, others might have already changed the concept of double jeopardy in the military.

A Potential Bombshell

The case which has the greatest potential impact to practice in the military is Crist v. Bretz. The Court, in a six to three decision, held that the federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn, is an integral part of the Fifth Amendment guarantee against double jeopardy made applicable to the states by the Fourteenth Amendment.² In Crist, the prosecution asked the trial judge to dismiss the entire information after the jury was empaneled and sworn but before the first witness was called, so that a typographical error in the information

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1. Burks v. United States, ___ U.S. ___, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, ___ U.S. ___, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); Crist v. Bretz, ___ U.S. ___, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); Sarabria v. United States, ___ U.S. ___, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); United States v. Scott, ___ U.S. ___, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

2. In trials by judge alone, jeopardy attaches once the court begins to hear evidence. See Fass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

could be amended. The judge granted the motion and dismissed the jury. At a second trial, before a different jury, the defendants moved to dismiss the amended information, arguing that the Double Jeopardy Clauses of the United States and the State of Montana Constitutions barred a second prosecution. The trial judge denied the motion and the defendants were convicted of the amended charges.

On appeal, the United States Supreme Court reversed the convictions. The need to protect the interest of an accused in retaining a chosen jury is of paramount concern, the Court reasoned. Moreover, the Court emphasized the considerations of the finality of judgments and the minimization of exposure to the harrowing experience of a criminal trial in reaching its conclusion.

The military rule in this regard has been that double jeopardy attaches after the introduction of the first evidence in a court-martial with members.³ An analysis of the treatment of the double jeopardy clause by the military appellate tribunals indicates that the military rule may no longer be tenable in light of Crist v. Bretz.

In 1960, the United States Court of Military Appeals discarded its earlier view⁴ that a military accused's right to "military due process" consisted of the full protection of the statutory rights as granted by Congress, and not necessarily any constitutional rights. United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960). The Court said that "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."⁵

3. Uniform Code of Military Justice, Art. 44(c), 10 U.S.C. §844(c); Manual for Courts-Martial, United States, 1969 (Revised edition), para. 215b.

4. See H. Moyer, Justice in the Military (1972), §2-105 [hereinafter cited as Moyer], and cases cited therein.

5. Id. at 246, 247.

Since Jacoby, the Court of Military Appeals has decided on an ad hoc basis which provisions of the Bill of Rights are "inapplicable by necessary implication." It seems that whenever statutory requirements have been broader than the Bill of Rights, the Court of Military Appeals has acknowledged the applicability of constitutional standards, while focusing at the same time on the provisions of the Uniform Code of Military Justice [hereinafter UCMJ] as setting the standards on questions of procedure.⁶ Until now, the Court has respected the strictures of the Fifth Amendment but Article 44 has formed⁷ the boundary for double jeopardy protection in the military.

Article 44, UCMJ, provides:

(a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article. (Emphasis added)

6. Moyer, supra, at §2-107.

7. Willis, The Constitution, the United States Court of Military Appeals and the Future, 57 Mil. L. Rev. 27,43 (1972) [hereinafter cited as Willis].

In United States v. Wells,⁸ the Court of Military Appeals referred to Article 44(c), UCMJ, and said that "the fact that Congress singled out for special consideration the withdrawal of charges" after the introduction of evidence "indicates a disposition to regard the time of jeopardy in the military as the beginning of the presentation of evidence."

In United States v. Richardson,⁹ the Court of Military Appeals acknowledged the Supreme Court's statement that the Fifth Amendment's Double Jeopardy Clause may be invoked at a court-martial proceeding but implied that Article 44, UCMJ, was as broad as the constitutional protection.¹⁰ As recently as 1976, the Army Court of Military Review held "that the defense of former jeopardy is one of constitutional dimensions which we must accept though raised for the first time on appeal."¹¹

Since the Double Jeopardy Clause may be invoked at courts-martial¹² and since the constitutional definition of the time that jeopardy attaches is now broader than the military's definition, the likelihood is strong that the current military rule in courts-martial with members must yield to the constitutional rule announced in Crist v. Bretz, supra.¹³ As the Supreme Court elucidated in that case, "We agree with the Court of Appeals that the time when jeopardy attaches in a jury trial serves as the lynchpin for all double jeopardy jurisprudence." Id. 98 S.Ct. at 2162 (emphasis added).

8. 9 USCMA 509,512, 26 CMR 289,292 (1958).

9. 21 USCMA 54, 44 CMR 108 (1971).

10. Willis, supra, at 43.

11. United States v. Johnson, 2 M.J. 541,546 (ACMR 1976) (emphasis added).

12. Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974, (1949), rehearing denied 337 U.S. 921, 69 S.Ct. 1152, 93 L.Ed. 1730 (1949); United States v. Richardson, supra.

13. The Court of Military Appeals has never held a provision of the UCMJ unconstitutional. The Crist v. Bretz decision may force the issue.

Decisions of Lesser Impact

The remaining four recent Supreme Court cases will probably change the application of the double jeopardy clause in other federal courts more extensively than in military courts because of the different statutes which govern appeals by the Government in the two systems. Burks v. United States, and Greene v. Massey, both supra, decided that an accused may not be subjected to a second trial when the conviction in his original trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict. The Double Jeopardy Clause prohibits the second trial, and the appellate court must order an acquittal. The Court pointed out that reversal for trial error, as distinguished from insufficiency of the evidence, does not constitute a decision that the Government had failed to prove its case. However, reversal for evidentiary insufficiency means that there was a failure on the part of the Government to prove its case when it had the opportunity. Allowing the Government a "second bite at the apple" after an acquittal by an appellate court would negate the purpose of the Double Jeopardy Clause. The Burks and Greene cases do not change the present military rule preventing Government rehearings after appellate reversals because of insufficient evidence.¹⁴

In Sanabria v. United States, supra, an acquittal was based upon an incorrect evidentiary ruling by the trial judge. The Supreme Court held that the Government could not appeal from an acquittal under such circumstances. As with Burks and Greene, this holding does not appear to impact upon present military practice.¹⁵

The final double jeopardy case decided on 14 June 1978, United States v. Scott, allows the Government to appeal the termination of a trial by a successful defense motion, if the grounds for the motion did not involve insufficiency of the evidence. This case provides a sound rationale for

14. See UCMJ, Articles 66, 67, 10 U.S.C. §§866, 867.

15. UCMJ, Article 62, 10 U.S.C. §862, prohibits the reconsideration by the government of trial level findings of not guilty.

Article 62(a), UCMJ, 10 U.S.C. §862(a).¹⁶ When a defendant chooses to avoid conviction, not because of insufficiency of the evidence, but because of a legal claim that he can not be prosecuted even if he is guilty, the defendant, by deliberately choosing to seek termination of the trial, suffers no injury cognizable under the Double Jeopardy Clause, even if the Government is permitted to appeal from such a trial court ruling favorable to the defendant.¹⁷

Conclusion

In light of Crist, it appears that a plausible defense argument can be made that in the military the time at which double jeopardy attaches is when the court members are empaneled and sworn. The other Supreme Court cases discussed in this article apparently only serve to reinforce the constitutionality of present military practice. If the time should come when the justice system is taken out of the convening authority's hands, however, the latter cases will become important in any new statutory scheme regulating military appeals.

16. Article 62(a) permits the convening authority to request reconsideration of the dismissal of a specification, on motion by the defendant, if the dismissal does not amount to a finding of not guilty. In United States v. Ware, 1 M.J. 282 (CMA 1976), the Court of Military Appeals held that the trial judge is only required to "reconsider" his decision, not to reverse it.

17. United States v. Scott, supra, 98 S.Ct. at 2199. It is noteworthy that a similar situation arose in United States v. Dettinger, 6 M.J. 505 (AFCMR 1978), USCMA Miscellaneous Docket No. 78-74/AF, argued 16 Jan. 1979 (CMA 1979). At a pretrial hearing, the military judge dismissed the charges on the ground that the delays in the preferral of charges violated provisions of the Air Force Military Justice Guide. The Air Force Court of Military Review granted the Government's petition for extraordinary relief and reversed the military judge's dismissal of the charges. Whether military appellate courts have jurisdiction to grant extraordinary relief to the Government in the absence of specific statutory authority is now awaiting decision by the Court of Military Appeals.

CASE NOTES

FEDERAL DECISIONS

STOP AND FRISK -- AUTOMOBILE

Jones v. United States, 24 Crim. L. Repr. 2026 (D.C. Cir. 1978)

A police officer was patrolling a city block where there had been problems with drug trafficking and robberies. There had been no reported crimes on the night in question, however.

The officer observed two men sitting in a parked car with the inside dome light on. The passenger was smoking a cigarette and, as the officer came closer, he made a quick movement as though trying to hide something. The officer suspected it was a weapon. The officer approached the parked car and ordered the occupants out. When they did so, the officer observed marijuana on the front seat.

The United States Court of Appeals for the District of Columbia held that ordering the occupants out of the vehicle amounted to a "seizure" which violated the Fourth Amendment. Although the officer could freely approach the car to make inquiries, there were no "specific and articulable" facts present here to justify the "seizure." Cf. Pennsylvania v. Mims, 434 U.S. 106 (1977) (once a motorist has been lawfully detained for a traffic violation, the officer may order the driver out of the vehicle without violating the Fourth Amendment).

WARNINGS TO ACCUSED REQUIRED BEFORE ADMINISTERING POLYGRAPH

United States v. Little Bear, 24 Crim. L. Rptr. 2077 (8th Cir. 1978)

Although finding the confession which the accused made during a polygraph examination voluntary, the United States Court of Appeals for the Eighth Circuit has ruled that, before a polygraph examination may be administered to an accused, he must be told that he has the right to (1) refuse the test, (2) discontinue the test at any point, and (3) decline to answer any particular questions. The Court explained that

the accused's knowledge of these rights would "remove or mitigate the pressures toward self-incrimination generated by the polygraph situation." Id. at 2078.

COURTS OF MILITARY REVIEW DECISIONS

OFFICIAL RECORDS -- LAB REPORTS

United States v. Alberti, SPCM 12764 (ACMR 29 November 1978)
(unpub.) (ADC: Major Hostler)

When trial counsel offered into evidence a machine copy of a laboratory report in an attempt to prove the identity of certain substances as amphetamines, defense counsel objected, contending that, as a business entry, it was subject to the best evidence rule, and the original was readily available in the local CID office. The military judge sustained the defense counsel's objection on the basis stated, but admitted the document as an official record because the best evidence rule does not apply to official records.

Although the Army Court of Military Review agreed with the military judge's decision on the application of the best evidence rule to business entries and official records, it refused to "elevate a laboratory report to the level of an official record. [To do so] would create an inference that the chemist performed his duty properly, and unless evidence to the contrary is presented by an accused, he would not have the right to summon the chemist for cross-examination." The Court did uphold the lab report's qualification as a business entry, and, subjecting it to the best evidence rule, concluded that the document was improperly admitted.

CHAIN-OF-CUSTODY RECEIPTS -- HEARSAY PROBLEM

United States v. Hendricks, NCM 780276 (NCMR 9 June 1978)
(unpub.)

Strictly construing the controversial "footnote 7" in United States v. Nault, 4 M.J. 318, 320, the Navy Court of Military Review has ruled that a chain-of-custody form was

improperly admitted at trial because it constituted incompetent hearsay. This approach to Chief Judge Fletcher's language departs from the Army Court's opinions, which view footnote 7 as obiter dicta and chain-of-custody receipts as business report exceptions to the hearsay rule. See, e.g., United States v. Watkins, 5 M.J. 612 (ACMR 1978); United States v. Porter, 5 M.J. 759 (ACMR 1978).

POLYGRAPH RESULTS DISCOVERABLE BY DEFENSE

United States v. Mouganel, 6 M.J. 589 (AFCMR 1978)

Prior to trial, defense counsel interviewed an informant who admitted that he had been given two polygraph examinations and that the examiner informed him that he had failed the second one. Counsel surmised that he had failed the first test, also.

At trial, defense counsel moved the military judge to order the Government to provide him with, inter alia, the results of the polygraph tests. The judge refused to order the release of the tests' results, but did order the production of the questions and answers used therein.

On appeal, the Government argued that the correctness of the trial judge's ruling was based on paragraph 142e of the Manual for Courts-Martial, which prohibits the admission of the results of a polygraph into evidence. Since the results are inadmissible, they could not properly become the subject of defense discovery.

The Air Force Court of Military Review rejected this contention, pointing to a weightier Manual provision, paragraph 115c, which allows the defense, within certain limitations, access to "documents or other evidentiary materials . . . in the custody and control of military authorities." This language does not encompass only "admissible evidence:"

We believe that the language in the Manual is broad enough to include any matters which are relevant to the case and can be reasonably provided. (Cite omitted). In this case, the results

of the polygraph tests cast serious doubt on the informant's reliability; they are thus both relevant and may be reasonably provided.

Id. at 591.

Moreover, the Court reiterated the Government's general duty, as set forth by the Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to disclose material evidence favorable to the defense, upon request. Evidence relating to the credibility of a government witness falls within the duty of disclosure:

Although not admissible in courts-martial, the results of polygraph tests indicating the informant was untruthful could be of great benefit to the accused in preparing for trial. . . . [T]here is a distinct likelihood that the results may have been effectively utilized in preparing the cross-examination of the informant, or by leading to evidence regarding the informant's reliability thereby affecting the court's findings as to the specification in question.

Id. at 592.

PRESENTENCING EVIDENCE -- IMPROPER REBUTTAL

United States v. Reis, SPCM 13464 (ACMR 11 December 1978) (unpub.) (ADC: Captain Perrault)

Prior to sentencing, appellant made an unsworn statement detailing his family background, his interests, and his plans for the future. He made no mention of his military service, but did state that he had no convictions or juvenile delinquency adjudications. In rebuttal, the military judge permitted trial counsel to call three members of appellant's chain-of-command, who testified that appellant's "general military character" was substandard.

The Army Court of Military Review held that appellant's statement that he had no prior convictions could not be rebutted by general military character, citing United States v. Blau, 5 USCMA 232, 17 CMR 232 (1954); United States v. Watts, 24 CMR 384 (ABR 1957); and paragraph 75c(2)(4) of the Manual for Courts-Martial. Although appellant's declaration did put his conduct into evidence, the Court viewed the Government's evidence as "too general to be proper rebuttal." The Court did intimate, however, that, had the defense presented evidence concerning appellant's military career, the Government's evidence would have withstood appellate scrutiny.

POST-TRIAL REVIEW -- DISQUALIFICATION OF SJA

United States v. Sullivan, CM 437216 (ACMR 14 December 1978) (unpub.) (ADC: Captain Carroll)

Construing the rule of United States v. Engle quite strictly, the Army Court of Military Review has held that an SJA whose pretrial advice was challenged at trial because he had misadvised the convening authority that the maximum punishment which the accused could receive included twenty years confinement at hard labor (rather than the correct period of four years) was not disqualified from reviewing the accused's case:

In United States v. Engle, 1 M.J. 387, 389-90 (CMA 1976), the Court of Military Appeals said, "To review the accused's challenge of the correctness of the denial of his motion for a new pretrial advice, the staff judge advocate, necessarily, had to deal not just with his previous legal opinions, but with the factual sufficiency of his own earlier work." (Footnote omitted) (emphasis added). The Court held in Engle that a staff judge advocate who found himself in such a position was disqualified from preparing the post-trial review. In the instant case, however, the only question presented by the challenge to the pretrial advice was purely legal, i.e., the maximum punishment for

cocaine offenses in the wake of United States v. Jackson [3 M.J. 101, 102, n.3 (CMA 1977)]. Engle therefore does not require the disqualification of the staff judge advocate. See United States v. Brouillette, 3 M.J. 767 (AFCMR), pet. denied, 4 M.J. 90 (CMA 1977).

POST-TRIAL REVIEW, DEFENSE REPLY, SJA ADDENDUM --
GUIDELINES ON PRESENTING THESE DOCUMENTS TO
CONVENING AUTHORITY PROVIDED BY AFCMR

United States v. Redding, ACM S24626 ___ M.J. ___ (AFCMR 20
November 1978)

In his rebuttal to the staff judge advocate's review, trial defense counsel noted that the accused had plead not guilty to all charges and specifications, rather than guilty, as stated in the review. In examining the review, the Air Force Court of Military Review could not find the mistake. Faced with this discrepancy, the Court procured a copy of the original draft and found the challenged advice. The Court concluded that the SJA chose to correct the mistake in the body of the review itself, rather than in an addendum thereto. The Court condemned this practice and held that the review served on defense counsel should be identical to the one submitted to the convening authority. Any changes after service on defense counsel must be made by means of an addendum. This procedure would prevent the practice of substantially changing the review after counsel's examination, thereby depriving him of his right to scrutinize and comment on it, as provided in United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975). Since the convening authority was properly advised, however, the accused in this case was not prejudiced.

STATE COURT DECISIONS

MARIJUANA IDENTIFICATION

State v. Vail, 24 Crim. L. Rptr. 2185 (Minn. Sup. Ct. 1978)

The Minnesota Supreme Court reversed the defendant's conviction because the prosecution had failed to prove the

identity of a substance as marijuana. At trial, the State called three witnesses (one of whom was a chemist), who testified that the substance visually appeared to be marijuana. In addition, the positive results of three laboratory tests (microscopic identification, Dugenois-Levine, and thin layer chromatography), which were performed by the chemist, were admitted into evidence.

The defendant attempted to undermine the probative value of this evidence by pointing out the limited qualifications of the two laymen witnesses to make visual identifications and showing that the chemist did not have sufficient botanical training to conclusively identify marijuana microscopically. Also, reagents used in the Dugenois-Levine test were not tested to assure identity or purity, nor was there a notation regarding the atmosphere saturation in the thin layer chromatography test tank. A sample plate and a vapor sample were not preserved. The failure to purify samples prior to testing left the possibility that other natural substances had led to misleading results.

The trial judge found favor with the defendant's position and decided that the prosecution evidence was insufficient to prove the identity beyond a reasonable doubt. However, he went on to consider inferences identifying the substance from non-scientific evidence. These were: (1) the large amount (220 pounds) of marijuana sold by the defendant; (2) the sale price of \$120 per pound; (3) the defendant's own statement that the substance was marijuana; and (4) the inference that a person dealing in large amounts of drugs would be sophisticated enough to have run his own tests before bringing the same from his own supplies.

The non-scientific factors, the appellate court held, did not advance the prosecution's burden of proof. Addressing each of them, the Court determined: (1) Since proof of actual identity is necessary to support a conviction, the defendant's personal belief of the identity was insufficient; (2) the price charged by the defendant only manifested an assertion of his belief and not the actual identity; (3) there was "no necessary relationship" between the quantity and the identity; (4) the conclusion that there is a commercial practice of testing among large volume sellers was purely speculative and unsupported by the evidence.

STOP AND FRISK

In re Tony C., 23 Crim. L. Repr. 2552 (Cal. Sup. Ct. 1978)

Two black youths, walking down a sidewalk on a weekday afternoon, were stopped by a patrolling police officer after he observed them separate for a short time. He felt that they were truant from school and that their actions indicated one of the youths was acting as a lookout for the other while a burglary was being committed. He had been told "three male blacks" were being sought for burglaries in that neighborhood. The California Supreme Court held that the "stop" did not meet the "reasonable suspicion" standard of Terry v. Ohio, 392 U.S. 1 (1968). The Court held that it was not reasonable for the officer to suspect the two youths he stopped. The officer's stop must be based on an objectively reasonable suspicion, as well as his own subjective suspicion. It was not objectively reasonable to suspect that any minor walking on the streets during school hours was engaged in criminal activity. The prior reported burglaries did not make the situation sufficiently suspicious to allow the stop.

MISCELLANEOUS

WARRANTLESS ARREST -- PROBABLE JURISDICTION NOTED BY SUPREME COURT

People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, prob. juris. noted sub nom. Payton v. New York, No. 78-5420, 24 Crim. L. Rptr. 4132 (U.S. Sup. Ct. December 11, 1978)

The Supreme Court has noted probable jurisdiction in Payton v. New York, in which the following question is presented:

Do [certain sections of the former New York Code of Criminal Procedure], authorizing forcible police entry into private dwelling for purposes of arrest without warrant and without exigent circumstances contravene Fourth Amendment?

The New York Court of Appeals held that the arrest of the defendant was properly effectuated without an arrest

warrant or without attendant exceptional circumstance in a private dwelling, because the apprehending officer did have probable cause to make the arrest. This position is contrary to that taken by a number of federal circuit courts of appeal (United States v. Reed, 572 F.2d 412 (2d Cir. 1978); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970)), as well as several state courts (Commonwealth v. Williams, 24 Crim. L. Rptr. 2241 (Pa. Sup. Ct. 1978); People v. Ramey, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976); Commonwealth v. Forde, _____ Mass., 329 N.E.2d 717 (1975)). (See 10 The Advocate 150 (1978), for a discussion of the Reed case). Hopefully, the Supreme Court will resolve this controversial issue.

In the military, United States v. Jamison, 2 M.J. 906 (ACMR 1976) holds that, in the absence of a valid warrant or authorization by a proper official, an apprehension may be effectuated in a private dwelling (military quarters) only when exigent circumstances are present. In United States v. Watkins, CM 436767 (ACMR 30 November 1978) (unpub.), the Court refused to expand the Jamison warrant/authorization requirement to an arrest in a barracks room, however. The issue of whether a warrantless apprehension may be carried out in a barracks room unless unusual circumstances are present is pending before the Court of Military Appeals. United States v. Davis, pet. granted, 4 M.J. 15 (CMA 1977).

"BOOKER ISSUE" GRANTED BY CMA

United States v. Rembert, 5 M.J. 910 (ACMR 1978), pet. granted, No. 36,578 (CMA 14 December 1978) (ADC: Major Vallecillo)

The United States Court of Military Appeals has granted review on whether the Army Court of Military Review was correct in holding that a properly executed nonjudicial punishment form on which appellant was merely required to check boxes apparently indicating that he waives counsel and trial by court-martial evidences a knowing, voluntary, and intelligent waiver in accordance with United States v. Booker, 3 M.J. 443 (CMA 1977), republished 5 M.J. 238 (CMA 1977), opinion on reconsideration, 5 M.J. 246 (CMA 1978). Counsel are advised that in this particular case the trial defense attorney objected to the admission of the Article 15 forms.

"SIDE-BAR"

or

Points to Ponder

1. Is the reading into the record of trial, in the presence of the court members, the names of officers who have preferred, investigated, and recommended disposition of the charges pre-judicial error? This issue was recently presented in a constitutional context before the Army Court of Military Review in United States v. Barclay, M.J. (ACMR 20 Dec. 1978) and resolved against the appellant. Appellant contended that the reading of these names amounted to a denial of his right to confront the officers, whom he considered witnesses against him, under the Sixth Amendment. The Court explained that the announcement of the names is required by paragraph 62b of the Manual for Courts-Martial, and that its purpose is to assure that no disqualified servicemember is among the membership of the court. The Court rejected the constitutional challenge, deciding that the mere reading of names did not disclose the specific results of the pretrial investigation, nor the recommendations of the officers who forwarded the charges. "Since the announcement . . . did not place before the court any 'testimony' by the accuser, investigating officer, or person forwarding the charges, there was no violation of appellant's right to confront adverse witnesses."

It is significant, however, that the Court, in reaching its decision, specifically noted the absence of a defense objection at trial. This suggests that perhaps, in an appropriate case, where timely objection is made, a different result will be reached. Counsel who contemplate pursuing this matter at trial probably will have a greater chance of success, not by challenging the reading of the names itself, but by simply requesting that it be done at an Article 39(a) session. During the challenge preliminaries, the court members can be asked if they had preferred, investigated, or forwarded the charges with recommendation as to disposition. This will assure that no disqualified member sits, as well as eliminate the perceived prejudice to the accused.

2. The difficulty in making an all-encompassing discovery motion. In a case received by Defense Appellate Division, trial defense counsel submitted to the convening authority the following "Request for Discovery," in which, at first glance, it seems that he asked for everything but the kitchen sink:

Subject: Request for Discovery

To: Commander
Fort Swampy

1. Please take notice that the defendant, (name) (unit), through and by his undersigned attorney, will move the Court at the earliest possible time for the opportunity to read and copy, or be provided with copies, of the following:

a. All statements, whether hearsay or not, whether reduced to writing or not, and all notes of statements of any witness or any person known to the government with relevant knowledge regarding the charges herein, including those of any confidential informants.

b. All statements, remarks, or words spoken by the accused from the time he was first questioned or interviewed in connection with any of the charges, to the present, whether reduced to writing or not.

c. The reports of CID or MPI investigators who spoke to witnesses or otherwise participated in the investigation in this case, whether included in any report or not, to include all photographs, slides, diagrams, sketches, and drawings pertaining to this case.

d. All laboratory tests, field tests and reports thereof to include relevant chain of custody document(s) from the time of seizure to the present,

including any efforts to obtain fingerprints regardless of the degree of success.

e. The names of all government witnesses, whether or not they may be called in the trial.

f. A list of the government's proposed exhibits.

g. If applicable a complete copy of the Article 32 investigation conducted in said case.

h. All information of whatever form, source, or nature which tends to exculpate the defendant through an indication of innocence or through the potential impeachment of any particular prosecution witness.

i. Any military police or other police agency files, reports, or other materials, civilian or military, pertaining to or concerning any potential prosecution witnesses.

j. A list, including the names and addresses, of any expert witnesses who may be called in the government's case or who have been consulted by the government in the preparation of its case.

k. The following information with respect to any and all line-ups that may have been conducted in connection with this incident:

(1) The dates and times in question;

(2) The names and addresses of individuals conducting the line-ups;

(3) The names and addresses of all persons present at the line-ups;

(4) Any photographs, diagrams, statements, tape recordings, sketches or notes taken at the line-ups;

(5) The names and addresses of all individuals who were singled out or otherwise identified at any line-up and the circumstances surrounding their identification;

(6) A description of the procedures followed at the line-ups;

(7) Copies of all regulations, instructions, or procedural guides relevant to line-up proceedings whether utilized therein or not.

1. If applicable, a copy of any pre-trial advised prepared for the Convening Authority.

2. This request should be considered as continuing in nature from the present date up to and including the date of trial on the merits.

As sweeping as this motion is, it still turned out to be inadequate (using 20-20 hindsight) in one important respect. In all fairness to the trial defense counsel, we doubt that any attorney would have foreseen the following. (Indeed what follows was ably and zealously challenged by defense counsel before the convening authority and currently constitutes a major issue on appeal before the Army Court of Military Review.)

After he was tried and, pursuant to his pleas, convicted of a number of drug charges by general court-martial, the accused was immediately turned over to civilian authorities, who had a warrant for his arrest on civilian drug charges. This was the first time that the accused and his defense counsel were apprised of the civilian charges. The chief of

military justice, however, had been aware of these charges two weeks before the court-martial trial, but failed to inform trial counsel, defense counsel, the accused, the SJA, the convening authority, or anyone else. On his own, this officer elected to allow the accused to be tried by the military before turning him over to the civilians, and even made arrangements with the civilian authorities to assure that they would not seek the accused's release from the military until the completion of the court-martial.

In his response to the staff judge advocate's review, trial defense counsel strongly protested the non-disclosure. Counsel asserted that, if either he or the accused had been informed of the civilian arrest warrant, the accused "probably" would not have pleaded guilty to the military charge, and that he probably would have "changed his legal tactics as well . . . for example (by) request(ing) the presence of the laboratory analyst" In sum, counsel's position was that the non-disclosure of the civilian warrant prevented him from rendering complete, fully-analyzed advice to his client, deprived his client of the effective assistance of counsel and thereby affected the providence of the pleas of guilt. The post-trial contention of trial defense counsel is not what we stress in this writing, however. What we do emphasize is the difficulty a defense counsel encounters in trying to devise an all-encompassing discovery request. Imagination is no doubt essential in putting the request together, but is there not a point where the request simply becomes far-fetched? If trial defense counsel in this case had requested information on whether the military knew of civilian charges and an outstanding arrest warrant, perhaps the military would have been obligated to divulge these matters. But, again, how would any attorney have known to ask that at the time?

3. The United States Supreme Court has held that the systematic exclusion of women from juries violates the requirement of the Sixth and Fourteenth Amendments that petit juries must be selected from a fair cross section of the community. In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Supreme Court held unconstitutional a process by which women could not serve on juries unless they filed a declaration of a willingness to do so. Because of this exemption policy, even though women constituted 53% of the population eligible for jury duty, they made up less than 1%

of the number of persons whose names were selected from the jury wheel in the year Taylor's jury was chosen. In the most recent case in the area, the Court addressed the converse situation in Taylor and ruled that the State of Missouri's method of automatically exempting any woman from jury duty who requested not to serve likewise violated the Constitution. Duren v. Missouri, 24 Crim. L. Rptr. 3037 (1979). In the area from which Mr. Duren's jury was selected, women comprised about 54% of the adult population. However, in the period during which the jury was chosen, only 15% of those on the weekly venires were women. The jury which heard Duren's case was selected from a 53-person panel, which included five women; all 12 jurors were men.

Today, women constitute 8% of the Army's personnel; in FY 1984 this composition is expected to increase to 12%. (Army Times, 8 Jan. 1979, p. 35). With the number of women soldiers increasing daily, counsel should familiarize themselves with the Taylor and Duren cases. Counsel stationed at installations where women make up a significant proportion of the assigned personnel should be particularly aware of them. Although no military court has, to date, ruled that the membership of a court-martial must be drawn from a cross section of the community, it is an axiom of military jurisprudence that "a group or class of members may not be excluded from court membership on irrelevant or irrational grounds." United States v. Boney, 45 CMR 714 (AFCMR 1972). Recently, in United States v. Whaley, CM 437396 (ACMR 19 Jan. 1979) (unpub.), the Army Court of Military Review reversed the accused's conviction, finding merit in his contention that the convening authority deliberately excluded personnel below the grade of E-6 from court-martial membership.

Raising the issue requires the accused to establish a prima facie case of "systematic exclusion." In Duren, the defense carried its burden by showing:

- (1) that the group [women] alleged to be excluded was a 'distinctive' group in the community;
- (2) that statistical data established the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of such persons in the community [15% v. 54%]; and
- (3) that this underrepresentation was due to systematic exclusion of the group in the jury selection process [underrepresentation for a one-year period].

Duren at 3039. Upon the demonstration of a prima facie case, the Government assumes the burden of justifying the exclusion by showing that selecting a fair and proportionate percentage of the group in question would "be incompatible with a significant state interest." Id. at 3040.

Raising the issue in the military necessarily involves the same "numbers game" which faced Mr. Duren. Statistical data on women and other "distinctive groups" are available at the local AG office; court-martial convening orders are, of course, readily available in the SJA office. The difficulty arises in gaining access to the listings of prospective court members which are submitted to the convening authority for selection. It is suggested that an informal request for these listings be initially made to the staff judge advocate. If the request is denied, a formal written request should be posed to the convening authority. If this approach fails, the final alternative is to move the military judge, pretrial, to order the Government to tender the information to the defense.

"ON THE RECORD"

or

Quotable Quotes from Actual Records of Trial Received in DAD

* * * * *

MJ. (to TC): I'm not sure what evidentiary theory that would be admissible on.

DC: Grasping for straws.

* * * * *

Q (to defense witness testifying in E & M): The panel has the duty later to adjudge an appropriate sentence for Specialist B One of the possibilities open to them is confinement, or in normal terms, jail time. Do you have any first-hand knowledge of conditions in jail?

A: Yes, sir, I do.

Q: How is that?

A: I was in jail myself for a couple of months.

* * * * *

TC: The Government would submit that heroin is one of the most dangerous, if not the most dangerous and lascivious drug that affects the Army today.

* * * * *

Q: Do you know the name of the Navy base?

A: I really don't know the name of the base, but it is about 12 blocks from my home.

Q: Is it an abduction base?

A: Yeah, I think so, Sir.

* * * * *

DC: Did you buy a lot of furniture with the money that you made by selling drugs?

W: Did I buy a lot of furniture?

TC: I object, Your Honor

MJ: On what grounds?

TC: I think that counsel is going to ask him about his furniture.

MJ: Well, that is pretty obvious.

* * * * *

MJ: What is the defense's concept of lesser included offenses, if any, that are in issue and why?

DC: The defense's position, sir, would basically be all or nothing at all if we were offered that option. In other words, if the government is contending specifically that there is an attempted murder, then we would request that the government be held to that charge and not the lesser included.

MJ: And knowing that I won't buy that one, what is your fallback position?

DC: In that light, sir, we see that basically there are a number of potential lesser includeds, the aggravated assault --

MJ: The one he attempted to plead guilty to?

DC: Right, sir.

* * * * *

MJ: Do you wish the witness permanently excused?

TC: He is permanently excused by the Government, Your Honor.

MJ: Yes - but he's a defense witness.

