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BRIEFLY WRIT

NEW SECTION

The publication of a new feature, "FIELD INQUIRIES," is pending the receipt of questions, comments, and suggestions from trial defense counsel. Do you have a comment, a complaint, or some news that other defense counsel may find useful? If you have something to say or questions to ask, let us know. See the "BRIEFLY WRIT" section of Vol. 11, No. 6, for other details and our address.

* * * * *

STAFF

We are pleased to announce the selection of CPT Joseph A. Russelburg as an Associate Editor. Captain Russelburg is our "USCMA WATCH" reporter on selected oral arguments before the United States Court of Military Appeals.

* * * * *

OVERVIEW

The lead article by CPT Robert M. Twiss (court-martial jurisdiction) provides a valuable presentation of the procedures and potential errors which may occur in the activation of Reserve and Guard members. Bob tells us how the discovery and use of these irregularities will reap effective results for our clients.

When was the last time you successfully raised an agency defense in a drug case? The article by Military Judge Stephen J. Harper presents a practical discussion of this defense. It reviews the holdings of the leading cases in the area and how they can be applied to tip the balancing test in your favor.

The initial client interview is one of the most critical stages of the attorney-client relationship. It is at this meeting that the defendant must gain the confidence in you that will enable him to trust you and accept your advice. The final article by Mr. Stephan H. Peskin suggests techniques to put your client at ease and elicit the most useful information from him. While it contains a few minor references to matters not strictly pertinent to court-martial practice, such as bail, it nonetheless discusses an approach that we all should consider.

AN ATTACK ON COURT-MARTIAL JURISDICTION: ACTIVATION
FROM THE ARMY NATIONAL GUARD AND ARMY RESERVE

Captain Robert M. Twiss, JAGC*

Introduction

Pursuant to statutory authority,¹ the President may activate a member of the Army National Guard or Army Reserve if that member:

- (1) is not assigned to, or participating satisfactorily in, a unit of the ready reserve;
- (2) has not fulfilled his statutory obligation; and
- (3) has not served on active duty for a total of 24 months.²

Consequently, some soldiers tried by court-martial are on active duty as a result of involuntary activation from Army National Guard or Army Reserve units. Trial defense counsel should carefully examine cases involving involuntary activation to determine whether military courts can properly exercise jurisdiction over the accused, and, in non-court-martial cases, to ascertain if such individuals can be released from active duty.

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1. 10 U.S.C. §673(a)(1976).

2. Id.

Jurisdictional Prerequisites

Jurisdictional matters should be reflected in the record,³ and once a jurisdictional issue is raised, the government has an affirmative obligation to establish jurisdiction over the accused.⁴ Governmental compliance with applicable regulations is essential in this regard, since a failure to comply with procedural requirements in activating members for unsatisfactory participation in training constitutes a denial of due process, invalidates the order to active duty, and negates court-martial jurisdiction over the accused.⁵ Army Regulation 135-91 outlines the circumstances under which reservists and national guardsmen may be activated, and the procedures governing that activation.⁶

Absences from Training

Enlisted members of the Guard or Reserve may not accrue five or more unexcused absences in any one year.⁷ Furthermore, members, although present at a scheduled unit training assembly, will not receive credit for attendance unless they are in proper uniform, present a neat and soldierly appearance, and perform their assigned duties in a satisfactory manner as determined by the unit commander.⁸ Members who do not receive

3. United States v. Alef, 3 M.J. 414 (CMA 1977).

4. Runkle v. United States, 122 U.S. 543, 7 S.Ct. 1141, 30 L.Ed. 1167 (1887); United States v. Barrett, 1 M.J. 74 (CMA 1977).

5. United States v. Kilbreth, 22 USCMA 390, 47 CMR 327 (1973); see Schatten v. United States, 419 F.2d 187 (6th Cir. 1969); Smith v. Resor, 406 F.2d 141 (1st Cir. 1969).

6. Army Reg. 135-91, Army National Guard and Army Reserve - Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures (25 July 1977) [hereinafter cited as AR 135-91].

7. Id. at paras. 4-9a(1), 4-11a.

8. Id. at para. 3-1a.

credit for attending a unit training assembly will be charged with an unexcused absence.⁹ Authority to excuse absences and authorize equivalent training rests with the unit commander or acting commander. However, state adjutants general (for ARNG) and general officer commanders (for USAR) are authorized to grant exceptions to unexcused absences.¹⁰

Procedures

To ensure that members fully understand their obligations, the prerequisite for satisfactory participation, and the consequences of unsatisfactory participation, the unit commander, unit personnel officer, or personnel NCO must counsel each newly-assigned enlistee. The member will be advised, inter alia, of service obligations, participation requirements, absences, reassignment and removal from assignment, and enforcement procedures.¹¹ Additionally, a statement must be secured from each member acknowledging that he understands the participation requirements and enforcement procedures. That statement must be filed in the member's Military Personnel Records Jacket [hereinafter MPRJ] as a permanent document.¹²

Every unauthorized absence from a unit training assembly or multiple unit training assembly¹³ must be documented, and

9. Id.

10. Id. at para. 4-2.

11. Id. at para. 4-4.

12. Id.

13. A unit training assembly is a 4-hour block of training. A multiple unit training assembly (MUTA) is a series of 4-hour blocks, such as a 2-day weekend drill. Such a drill would include four 4-hour assemblies and would be designated a MUTA 4.

unit commanders must follow established procedures and ensure that the required documentary evidence is contained in the MPRJ before requesting that a member be activated.¹⁴

Following each unexcused absence, a letter of instruction must be delivered to the member advising him, in part, of the requirement to attend training assemblies, the number of assemblies he or she has missed, the criteria used by the command to grant excused absences, the procedures for requesting that an absence be considered excused, and the policy that five or more unexcused absences within one year may subject the member to activation with the United States Army.¹⁵ When the absence does not constitute the fifth absence within one year, the letter will be mailed to the member by certified mail, restricted delivery, return receipt requested. The regulation provides that mail refused, unclaimed, or otherwise undelivered does not amount to a defense to the unexcused absences when it was correctly addressed to the latest official mailing address furnished by the member to his unit.¹⁶

When a member accrues the fifth unexcused absence within a 12 month period, the unit commander must personally contact the member, if practicable, and furnish him with the letter of instruction. If personal delivery is impracticable, the letter will be forwarded by certified mail. If the notification is correctly addressed to the officially recorded address of the member, its nondelivery does not constitute a defense.¹⁷ Additionally, a statement indicating that the letter was personally delivered or explaining why it was not so delivered must be prepared by the unit commander. When the letter is not delivered, the commander's statement must verify that the address to which it was sent was the last address the member furnished.¹⁸ The member should also be

14. AR 135-91, para. 4-12.

15. Id.

16. Id.

17. Id. at para. 4-12b(7).

18. Id. at para. 4-12b(1)(a).

interviewed to determine if a cogent or emergency reason existed which prevented him from attending the training assembly,¹⁹ and the unit commander's statement must reflect his determination as to whether such a reason accounts for the fifth unexcused absence. The facts and circumstances upon which that determination is based must appear in the statement.²⁰

Notice of Unsatisfactory Participation and Activation

In addition to the letter of instruction for the fifth absence, the unit commander must make a diligent attempt to deliver a notice of unsatisfactory participation and a letter outlining the member's appeal rights.²¹ A member may be involuntarily activated only after the government complies with these procedures; the unit's failure to adhere to applicable regulations invalidates the activation.²² Upon being informed that he may be ordered to active duty, the member has the right to appeal the decision to the unit commander within 15 days if he considers the decision to be erroneous or alleges material error. In preparing his appeal, he may examine his MPRJ and all other documents supporting his activation in the presence of an authorized unit representative.²³ The member also has the right to request discharge based upon conditions which are permanent in nature, e.g., dependency, hardship, or employment necessary to maintain the national or community health, safety or interest. He may also request a delay in reporting for active duty based on conditions which are temporary in nature.²⁴

Counsel should closely examine the unit commander's testimony, or his statement in the member's MPRJ if he does not

19. Id. at para. 4-12.

20. Id. at para. 4-12**b**(1)(**b**).

21. Id. at para. 4-12**b**(2).

22. Hall v. Fry, 509 F.2d 1105 (10th Cir. 1975).

23. AR 135-91, para. 4-12**b**(2).

24. Id. at para. 4-12**b**(3)(**c**).

testify, and determine what steps he took to notify the member, why he felt the member's absences were not due to cogent or emergency reasons, and the facts and circumstances upon which he based his decision to activate rather than discharge the member. Often the member will not personally receive the notices described above. The commander must nonetheless investigate the cause of the member's absence and determine if cogent or emergency reasons existed which prevented the member from attending. Failure of the commander to do so is a procedural defect which will invalidate the activation.²⁵ Counsel should not accept "boiler plate" assertions of commanders that they investigated and found no cogent reason for the member's absence. They should ensure that the facts and circumstances underlying those conclusions are fully explained in the record.

The commander's decision to accept or reject a proffered excuse is not subject to judicial review,²⁶ but the record must reflect that the commander did, in fact, conduct an investigation and that there are facts to support his conclusion that the absence was unexcused. If there is no factual basis underlying the commander's conclusion that no cogent reason existed, the decision is not a discretionary administrative act consistent with military regulations.²⁷ Instead, it is an arbitrary and capricious act unprotected by the presumption of administrative regularity.

Written notices often will be sent to the member and be returned, undelivered, to the unit. The member may be activated after letters have been repeatedly returned, since mail which is "otherwise undelivered may not be used as a defense against unexcused absences when it is correctly addressed to the officially recorded address of the member."²⁸ There is no reason, however, why counsel should accept the validity of this provision in all cases. Clearly, members who refuse mail, or fail to pick up certified mail after proper notification, have no valid complaint of lack of notice.

25. See Sullivan v. Mann, 431 F.Supp. 695 (M.D. Pa. 1977).

26. O'Mara v. Zebrowski, 447 F.2d 1085, 1087 (3rd Cir. 1971); United States v. Greer, 394 F.Supp. 249 (D. N.J. 1975).

27. Id.

28. AR 135-91, para. 4-12b(7).

Arguably, however, that section of the regulation should not be literally applied if the member did not receive notice due to governmental negligence. Defense counsel should contend that paragraph 4-12b(7), AR 135-91, requires some affirmative act by the member to frustrate the delivery of mail before the defense of failure of notice is foreclosed.²⁹ Members may have an independent constitutional right to notice.³⁰ Even if there is no independent requirement of notice, however, it is a condition precedent to activation according to the regulation. To allow the government to plead that it complied

29. A number of Federal cases have held that AR 135-91 complies with due process requirements. See Hall v. Fry, supra note 22; Keister v. Resor, 462 F.2d 471 (3rd Cir. 1972), cert. denied, 409 U.S. 894, 93 S.Ct. 116, 34 L.Ed.2d 151 (1972); O'Mara v. Zebrowski, supra note 26; Raderman v. Kaine, 411 F.2d 1102 (2nd Cir. 1969), pet. for cert. dismissed, 396 U.S. 976, 90 S.Ct. 467, 24 L.Ed.2d 447 (1969); Russo v. Luba, 400 F.Supp. 370 (W.D. Pa 1975); Wolf v. Secretary of Defense, 399 F.Supp. 446 (M.D. Pa. 1975); United States v. Greer, supra note 26; Hoersch v. Froelike, 382 F.Supp. 1235 (E.D. Pa. 1974); Feeny v. Smith, 371 F.Supp. 317 (D. Utah 1973); Mellinger v. Laird, 339 F.Supp. 434 (E.D. Pa. 1972). None of these decisions, however, has interpreted a situation where a notice mailed to a member by his unit was subsequently mishandled by the government. Many cases have upheld that portion of the regulation, but only where the government demonstrated a conscious pattern by the member to avoid service of the notices. See United States v. Greer, supra note 26; Sullivan v. Mann, supra note 25.

30. Traditional due process analysis indicates that members would be entitled to certain protections, including notice. See Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The Supreme Court concluded in Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), that the analysis begins with a determination of the governmental function involved and the individual interests affected. In Reaves v. Ainsworth, 219 U.S. 296, 304, 31 S.Ct. 230, 233, 55 L.Ed. 225, 228 (1911), which has been relied upon repeatedly in the cases cited above, the court determined that "to those in the military or naval service of the United States the military law is due

with the regulation by sending the letter, when clearly it was not delivered because of governmental negligence, would render meaningless the regulatory requirement of notice.³¹

Challenge to Activation

Unfortunately, even if a procedural defect is proved, the member is not automatically entitled to a dismissal of charges for lack of jurisdiction. He may be deemed to have waived that defect when he reported for active duty.³² The member's conduct during his activation and entrance to active duty must have clearly demonstrated a challenge to the activation orders rather than an acceptance of military status. It is not necessary to file a writ of habeas corpus or to refuse to report in order to preserve the issue, although

30. (Footnote continued).

process." The Court reasons somewhat circularly, that although some due process is required, a military system which affords no procedural rights may nevertheless pass due process muster. However, in the instant case, military law creates a right of notice through AR 135-91. As such, the right to notice is protected by the due process clause of the Fifth Amendment. The attempt to take that away through para. 4-12b(7) does not appear to be consistent with the due process clause.

The Federal courts have not been willing to require a full hearing consistent with *Goldberg v. Kelly*, supra, prior to activation. *Keister v. Resor*, supra note 29; *O'Mara v. Zebrowski*, supra note 26; *Ansted v. Resor*, 437 F.2d 1020 (7th Cir. 1971); *Hickey v. Secretary of the Army*, 320 F.Supp. 1241 (D. Mass. 1971).

31. The United States Army Court of Military Review recently rejected an allegation of governmental negligence in *United States v. Garcia*, CM 438047 (ACMR 16 Nov. 1979) (unpub.).

32. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *United States v. Barraza*, 5 M.J. 230 (CMA 1978). But see *United States v. Kilbreth*, supra note 5.

either would probably be successful.³³ It is critical that the trial defense counsel exhaustively establish, on the record, everything the member did to protest his activation. If he did nothing, his challenge to the court-martial's jurisdiction will be unsuccessful.

Due Process

For those members who were activated prior to February 1978, there is the secondary issue of whether AR 135-91 draws distinctions based on gender, in violation of the Fifth Amendment.³⁴ Army Regulation 135-91 draws sexually-based distinctions between members whose drill participation is unsatisfactory. Male members who fail to satisfactorily participate are ordered to active duty for a period of 24 months, less prior active service time, while women members who enlisted prior to 1 February 1978 are recommended for discharge from the Reserves or National Guard.³⁵ While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustified as to be violative of due process.³⁶ The concepts of equal protection and due process of law, which stem from our American ideal of fairness, are not mutually exclusive.

33. United States v. Kilbreth, supra note 5. Of course, if the member had previously filed a writ of habeas corpus, the issue would most likely have been decided and the member estopped from raising it again at his court-martial.

34. This issue was recently addressed by the United States Army Court of Military Review in United States v. Garcia, supra note 31. The Court held that AR 135-91 is constitutional.

35. AR 135-91, para. 6-11 (C2, 1 Dec 1978); AR 135-91, para. 6-11 (C1, 15 July 1978).

36. Frontiero v. Richardson, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583, 594 (1973); Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218, 222 (1964); accord, Shapiro v. Thompson, 394 U.S. 618, 641-42, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600, 619 (1969); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

While cases involving Federal statutes do not directly invoke the Fourteenth Amendment equal protection clause, Federal classifications must normally meet equal protection standards in order to pass due process muster.³⁷ In applying the equal protection clause, the Supreme Court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of people in different ways.³⁸ The equal protection clause, however, denies to the states the power to require that unequal treatment be accorded to persons depending on their statutory classification, if that classification is founded upon criteria unrelated to a permissible statutory objective. Classifications must be reasonable rather than arbitrary, and must rest upon some distinction fairly and substantially related to the object of the legislation, so that all persons similarly situated shall be treated alike.³⁹

Classifications based on sex, like classifications based upon race, alienage and national origin, are inherently suspect and therefore subject to strict judicial scrutiny.⁴⁰ Sex, like race and national origin, is an immutable characteristic determined solely by virtue of conception or birth. The

37. See *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Bolling v. Sharpe*, supra note 36.

38. *McDonald v. Board of Education Commissioners*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Railway Express Agency v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 553 (1949); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); *Barbier v. Connally*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885).

39. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989, 990-91 (1920). Royster was a corporate taxation case distinguishing domestic corporations which were strictly interstate in nature from those which were both inter and intrastate in operation.

40. *Frontiero v. Richardson*, supra note 36; *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

imposition of special disabilities upon the member of either gender on the basis of sex would seem to violate the "basic concept of our system that legal burdens should bear some relationship to individual responsibility"41 Sex can be distinguished from such non-suspect statuses as intelligence or physical disability, since its characteristics frequently bear no relation to ability to perform or contribute to society.42 To withstand constitutional challenge, classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.43 A state which adopts a suspect classification bears a heavy burden of justification,44 which, although variously formulated, requires the state to meet rigid standards of proof. In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that the use of the classification is necessary to accomplish its purpose or safeguard its interest.45

In Graham v. Richardson,46 an alienage case regarding public assistance, the United States Supreme Court dealt with the standard of proof to which the government would be held. The Court found that when a suspect classification is employed, that classification must be necessary to promote a compelling state interest. When the Federal government distinguishes

41. Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 175, 92 S.Ct. 1400, 1407, 31 L.Ed.2d 768, 779 (1972); accord, Frontiero v. Richardson, supra note 36.

42. See Developments in the law - Equal Protection, 82 Harv. L. Rev. 1065, 1073-74 (1969).

43. Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 220 (1976).

44. McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222, 231 (1964).

45. In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

46. 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1970).

between various classes of people, such as male and female members of the National Guard or Army Reserve, it clearly has the burden of showing why that classification should be utilized. It is also clear that some standard higher than a rational state interest is necessary to fulfill that requirement. The government must at least show that its objective is important (as opposed to reasonable or rational), and that the classification is necessary to achieve that objective.⁴⁷

The purpose of each reserve component is to provide trained units and qualified persons for active duty in the armed forces in time of war or national emergency and at such other times as the national security requires; to fill the needs of the armed forces whenever necessary; and to procure and train additional units and qualified persons to accomplish planned mobilization.⁴⁸

Statutes and regulations allow women to enlist to fill vacancies in the Ready Reserve and National Guard.⁴⁹ In fact, 44% of Army Reserve non-prior service enlistees in 1976 were women.⁵⁰ If the reserve units in which these women are enrolled should be activated due to war or national emergency,⁵¹ the women in those units would be activated along with the men. There is no governmental interest whatever in excluding women from activation with those units. To the contrary, if women were excluded from activation, those units would be crippled and unable to perform their mission of integrating into the active Army because of the large number of women now in reserve units. If women can be activated en mass into the active Army, there certainly can be no justifiable purpose

47. In re Griffiths, supra note 45.

48. 10 U.S.C. §262 (1976).

49. Id. §510(c).

50. H. R. Rep. No. 95-914, 95th Cong., 1st Sess. 22, reprinted in [1977] U.S. Code Cong. & Ad. News 538.

51. 10 U.S.C. §671 (1976).

in prohibiting women from being activated individually into the active Army.⁵²

Recent amendments to Article 2, UCMJ,⁵³ should not affect the servicemember involuntarily activated from the Army Reserve or Army National Guard.⁵⁴ In order to avoid waiver

52. The government has argued that there is a compelling interest in maintaining a strong fighting force and that this interest is undermined by activating women from the ready reserve. (Oral argument in *United States v. Garcia*, supra note 31).

53. Uniform Code of Military Justice, Art. 2, 10 U.S.C. §802 [cited as UCMJ].

54. Public Law 96-107 was signed into law by the President on 9 November 1979. Article 2, UCMJ, 10 U.S.C. §802 was amended as follows:

(1) By inserting "(a)" before "The" at the beginning of such section; and

(2) By adding at the end thereof the following new subsections:

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who -

(1) Submitted voluntarily to military authority;

(2) Met the mental competency and minimum age qualifications of Sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) Received military pay or allowances; and

(4) Performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

of a procedural defect, a member must challenge his activation and make known his or her objection. Such a person obviously did not submit voluntarily to military authority as required by Article 2(c)(1), UCMJ, a condition precedent to a constructive enlistment. By definition, involuntary activation of a member cannot be the voluntary enlistment identified in Article 2(b), UCMJ, as a condition precedent to valid enlistment under that subsection. In fact, the legislative history specifically provides that the new subsection is not intended to affect reservists not performing active service. It is intended to reach only those persons entering the active armed forces who meet the four statutory requirements.⁵⁵

Conclusion

Trial defense counsel should watch for instances of involuntary activation among their clients. Numerous procedural requirements must be satisfied in order for jurisdiction to attach, and counsel should examine the accused's records in depth to determine if these requirements were met. Even if procedural defects are discovered, keep in mind that in personam jurisdiction may nonetheless lie if the member has not protested activation. In those cases where the issue is raised, the record should be developed to the fullest extent in order to maximize the chances for a successful attack on jurisdiction.

55. S. Rep. No. 96-197, 96th Cong., 1st Sess. 121-23 (1979).

THE DEFENSE OF AGENCY....A HANDY TRIAL
TOOL FOR THE OFFENSIVE MINDED

Major Stephen J. Harper, JAGC*

The defense of agency in drug cases is founded on the legal principle that:

When narcotics are obtained from a seller, at no profit, by an accused at the request of a government informer and for no other reason, there can be no conviction for selling to his principal.¹

This often-cited quote, purporting to state in a single sentence the test for determining the applicability of the defense of agency, seems at first blush to be reflective of "black-letter" law. Yet, the tactical ease with which this defense may be raised at any point in the trial proceeding and the myriad factual considerations attendant to any meaningful analysis of the defense interject significant complexity into the task of resolving the issue. The situation is further complicated by the fact that wrongful transfer of drugs is not a lesser included offense of wrongful sale,² thus raising additional considerations for all concerned. It is the purpose of this article to explore these problems and to suggest a beneficial method to be used in resolving the issues.

*MAJ Harper, a Circuit Judge, Fifth Judicial Circuit, Frankfurt, Federal Republic of Germany, is a 1968 graduate of the United States Military Academy. He served as an Infantry Officer from 1968-1971, with a tour in Viet Nam; received his J.D. from the University of Alabama Law School in 1974; and is a graduate of the JAG Advanced Course.

1. United States v. Henry, 23 USCMA 70, 73, 48 CMR 541, 544 (1974).

2. United States v. Maginley, 13 USCMA 445, 32 CMR 445, aff'g 32 CMR 842 (AFBR 1962); United States v. Smith, 45 CMR 619 (ACMR 1972).

As is true for any defense, the defense of agency may be raised solely by the testimony of the accused or it may be raised by other competent evidence.³ It may also appear during the providence inquiry as a matter inconsistent with the accused's plea to a specification alleging wrongful sale. Hopefully the trial defense counsel will have recognized the issue prior to any attempt to plead guilty to a specification alleging wrongful sale, since the discovery of the improvidence alerts the prosecution that it may be necessary to amend the specification or to charge wrongful sale and wrongful transfer in the alternative.

To determine whether an accused has the defense of agency available as defense to a charge of wrongful sale, each case must be closely examined to determine the extent of the accused's involvement in the transaction and his purpose for being a party to the transaction. Note that the applicability of the defense will not be determined solely by commercial sales law principles.⁴ When an accused has actively assisted the parties to the sale and has substantially and purposefully associated himself with the transaction, he may be rightfully convicted for the wrongful sale of the drugs.⁵ The defense of agency is available only to one who has acted solely as a procuring agent for the buyer.⁶

Certain factors which have been relied upon by the appellate courts in applying the defense of agency should now be considered. In an effort to simplify this analysis, these divers factors will be presented in T-block format. There will be two basic divisions in the T-block: (1) factors supporting the accused's claim to the agency defense, and (2) factors refuting the accused's claim to the agency defense.

3. United States v. Stewart, 20 USCMA 300, 43 CMR 140 (1971); United States v. Pacheco, 46 CMR 555 (ACMR 1972).

4. United States v. Henry, supra note 1. But see United States v. Whitehead, 48 CMR 344 (NCOMR 1973).

5. United States v. Maginley, supra note 2, 32 CMR at 848-49; accord, United States v. Fruscella, 21 USCMA 26, 44 CMR 80 (1971).

6. United States v. Fruscella, supra note 5; United States v. Scott, 49 CMR 213 (AFCMR 1974); United States v. Durant, 45 CMR 672 (ACMR 1972); United States v. Wampler, 44 CMR 638 (ACMR 1971).

Factors Supporting the
Accused's Claim

1. The accused made no profit on the transaction.⁷
2. Merely making a profit is not alone sufficient to overcome the defense of agency.⁹

Factors Refuting the
Accused's Claim

1. The accused made a profit on the transaction.⁸
2. The accused desired to make a profit on the transaction.¹⁰

7. United States v. Horne, 9 USCMA 601, 26 CMR 381 (1958) (an accused is not a seller when he is requested to obtain drugs and makes no profit on the transaction). See also United States v. Suter, 21 USCMA 510, 45 CMR 284 (1972); United States v. Noble, 46 CMR 1211 (NCOMR 1973); United States v. Durant, supra note 6, at 674; United States v. Pople, 45 CMR 872 (NCOMR 1971).

8. United States v. Young, 2 M.J. 472 (ACMR 1975) (when the accused's motive for his participation in the transaction was to make a profit as a businessman, the defense of agency was foreclosed, unless the acts of the government agent were "shocking to the universal sense of justice"); United States v. Pacheco, supra note 3, at 556 (when the financial profit realized by the accused resulted from a scheme devised by a law enforcement officer and adopted by the accused at the law enforcement officer's insistence, the accused was not a seller). Perhaps this is the type of "shocking" activity contemplated by the Court in United States v. Young, supra at 477. See also United States v. Martinez, 3 M.J. 600 (NCOMR 1977); United States v. Calhoun, 47 CMR 113 (AFCMR 1973).

9. Id.

10. United States v. Hodge, 48 CMR 576 (AFCMR 1974). pet. denied, 23 USCMA 609, 48 CMR 999 (1974) (when the defendant actively negotiated in hope of turning a profit, the fact that he realized none is inconsequential).

Factors Supporting the
Accused's Claim

Factors Refuting the
Accused's Claim

3. The accused acted at the buyer's (government agent) request and in accord with the buyer's instructions.¹¹

3. The absence of a profit or profit motive is not alone determinative.¹²

4. The accused used the buyer's money to procure the drugs.¹³

4. The accused asked the buyer if he wanted to buy drugs.¹⁴

11. United States v. Francis, 44 CMR 781 (NCOMR 1971) (the accused who was initially approached by the confidential informant and instructed to "set up" a "prospective sale" and accordingly acted as a conduit of information between the confidential informant and the supplier was not a "seller" of the drugs). See also United States v. Fruscella, supra note 5.

12. United States v. Lewis, 49 CMR 734 (AFCMR 1975) (when the primary purpose of the accused's errand was to procure drugs for himself and the quantity acquired for the confidential informant was "incidental," the absence of a profit motive on the part of the accused is not determinative).

13. United States v. Fruscella, supra note 5; United States v. Simmons, 2 M.J. 758 (AFCMR 1977) (the courts seem to feel that use of the confidential informant's money to procure the drugs is a strong indication of the absence of a business-like profit motive on the part of the accused); United States v. Calhoun, supra note 8, at 115. But, given compelling factors refuting the accused's claim of the agency defense, the fact-finder may justifiably conclude beyond a reasonable doubt that the defense of agency has been overcome.

14. United States v. Scott, supra note 6, at 217 (persistent activity by the accused in suggesting the transaction, setting it up, and his personal efforts to ensure its completion overcame the defense of agency); United States v. Wampler, supra note 6, at 639.

Factors Supporting the
Accused's Claim

Factors Refuting the
Accused's Claim

- | | |
|---|--|
| 5. The accused did not set the price, or he merely quoted the "going rate" for the drugs. ¹⁵ | 5. The accused "fronted" the money for the purchase. ¹⁶ |
| 6. The buyer was a friend of the accused. ¹⁷ | 6. The accused actively negotiated the price. ¹⁸ |

15. United States v. Suter, supra note 7, at 514, 45 CMR at 288. (when the accused merely quoted the "going rate" for the drugs, he was not so substantially and purposively involved so as to become the seller); United States v. Noble, supra note 7, at 1217.

16. United States v. Suter, supra note 7, at 514, 45 CMR at 288; United States v. Whitehead, supra note 4, at 350; Adams v. United States, 220 F.2d 297 (5th Cir. 1955) (the accused's use of his own funds to make the purchase from his supplier seems to be considered by the courts as strong indicium of his business-like profit motive). See generally cases cited note 13 supra.

17. United States v. Noble, supra note 7, at 1217 (even where the accused procured the drugs for a friend of the confidential informant who was the accused's good friend, the Court considered this as a strong factor weighing in favor of the applicability of the defense of agency, even though he only met this "mutual friend" at the time of the transaction.

18. United States v. Curtis, 1 M.J. 861, 864 (AFCMR 1976) (the defense of agency was not even "reasonable" when the accused acted on his own behalf in a most aggressive pursuit of the transaction; active negotiation of the price is part of an aggressive pursuit); United States v. Foster, 49 CMR 421 (ACMR 1974); United States v. Hodge, supra note 10, at 578-79.

Factors Supporting the
Accused's Claim

Factors Refuting the
Accused's Claim

7. The supplier was a casual acquaintance of the accused.¹⁹

7. The supplier was a close friend of the accused.²⁰

8. The accused was a conduit of information between the buyer and seller.²¹

8. The buyer was a recent acquaintance of the accused.²²

9. The accused merely passed the drugs and money from one party to the other.²³

9. The accused made assertions about the quality of the drugs and/or instructed the buyer on their use.²⁴

19. United States v. Noble, supra note 7, at 1217 (this factor weighs in favor of the conclusion that the accused was acting solely for the benefit of the buyer/confidential informant).

20. United States v. Whitehead, supra note 4, at 349 (this factor indicates that the accused was a dual agent for the supplier and the buyer/confidential informant and, thereby, destroys the defense of agency); United States v. Richards, 47 CMR 675 (ACMR 1973); accord, United States v. Scott, supra note 6, at 217.

21. United States v. Francis, supra note 11, at 783.

22. United States v. Suter, supra note 7; United States v. Whitehead, supra note 4, at 350. See generally cases cited notes 17, 19 and 20 supra.

23. United States v. Durant, supra note 6, at 674 (when the accused made no profit and was not in the "business" of selling, he "at most" passed the drugs from the supplier, who was the seller, to the buyer and returned with the buyer's money to the seller; as a mere "conduit" the accused cannot be convicted of sale).

24. United States v. Curtis, supra note 18, at 863 (such activity by the accused is an indication, either expressed

Factors Supporting the
Accused's Claim

Factors Refuting the
Accused's Claim

10. The buyer was aware of the identity of the supplier but insisted that the accused make the deal.²⁵

10. The accused obtained the drugs on very short notice.²⁶

11. The accused had sold drugs on prior occasions.²⁷

12. The accused arranged the meeting place between the parties and transported the buyer to this place whereupon he made introductions.²⁸

24. (Footnote continued).

or by permissive inference, that the accused is in the "business" of selling drugs); *United States v. Lewis*, supra note 12, at 737; *United States v. Foster*, supra note 18, at 424.

25. *United States v. Noble*, supra note 7, at 1217.

26. *United States v. Curtis*, supra note 18, at 864; *United States v. Whitehead*, supra note 4, at 350.

27. *United States v. Young*, supra note 8, at 475. *United States v. Foster*, supra note 18 (where the accused has on prior occasions sold drugs and realized profits, such flies in the face of his claim that he was acting solely as the agent of the unrelated buyer in the case being tried).

28. *United States v. Scott*, supra note 6, at 217 (see annotation at note 14).

Factors Supporting the
Accused's Claim

Factors Refuting the
Accused's Claim

13. The accused did not mention that he was getting the drugs from a supplier.²⁹

Instructions

After the evidence has been received and prior to the arguments of counsel, it will be necessary to correlate the facts of the case to the instructions of law desired by the parties. The standard instruction in the Military Judges' Guide³⁰ provides a framework upon which the trial judge can form an instruction for court members. However, it is apparent that the standard instruction will not be sufficient in many cases, and trial defense counsel should consider drafting an instruction which will be appropriate to the facts of his particular case.

Conclusion

The existence of no single factor, including a profit by the accused, will, in all cases, overcome the defense of agency. In the end, the fact finder must apply a balancing test in order to determine the issue. The government's case must satisfy the fact-finder beyond a reasonable doubt that the defense of agency is resolved against the accused.³¹ Counsel and the trial judge must remain constantly aware of the law of agency and the relationship of the facts of each particular case to this law in order to insure that it is fully and justly litigated.

29. United States v. Lewis, supra note 12, at 736.

30. Dept. of Army Pam. 27-9, Military Judges' Guide, para. 4-145 (as amended by Military Judge Memo. No. 90, 19 Oct. 1973) [hereinafter cited as Military Judges' Guide].

31. See United States v. Lombardi, 14 USCMA 466, 34 CMR 246 (1964) (once an affirmative defense is raised, the government must prove beyond a reasonable doubt that the accused does not have the benefit of the defense); Manual for Courts-Martial, United States, 1969 (Revised edition), para. 214; para. 6-1, Military Judges' Guide, supra note 30.

ATTORNEY-CLIENT INTERVIEW

STRATEGY AND TACTICS

Stephan H. Peskin*

The initial client interview is the most important discussion counsel and client will have. It is at this first meeting that the attorney-client relationship must develop, that the roles must be set, and the facts learned. Unfortunately, all too often this meeting takes place with the client in custody.

If the client is incarcerated, it is imperative that counsel meet with him as soon as possible. By arriving at his side at the earliest possible moment, counsel will be in a position to prevent the client from waiving important constitutional rights.

It is essential at this initial jailhouse meeting that counsel's presence be officially noted by the authorities. While this might appear to be an unnecessary formality, it may make a difference at a later date should an issue arise concerning the volition of a confession. It should become part of counsel's routine policy on arriving at the police station to demand that the time of his appearance be noted in the official blotter or log book. This is as important in the rural areas as it is in the metropolitan areas. While the desk officer may be your friend and drinking buddy, an official blotter entry, made in the normal course of business by an authorized representative, may be just the "memory jogging" device necessary several months later during a contested motion to suppress.

Of equal importance with your arrival on the scene is your admonition to your client. Privacy is hardly pervasive under such circumstances. The client must be told that details will come at a later date when it will be more appropriate to his position.

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When we are first faced with a frightening experience we often find ourselves talking to anyone around us. It is a normal human reaction. Our effort is to alleviate our fear through the cathartic of verbosity.

The client is no different. He will talk to everyone around him. A police officer is trained to utilize this prolixity to its optimum. Those first hours after an arrest are ideal for an informal chat with the prisoner. Much information can be learned, information which may later come back to haunt the client. Your admonition to the client cannot be repeated too often: Do Not Talk To Anyone! If he feels the need to talk to someone that is why you are there.

Immediate Factors

In those jailhouse situations, your conversation with the client should deal only with the most immediate factors, bail and arraignment. Get from the client the relevant information which can be put into your presentation for bail. Find out all there is to know about his roots in the community: where he lives, with whom, for how long, where he is employed and for how long, what is his salary, what is his position? Does he own any property within the jurisdiction of the court? What is his prior criminal record?

Take the names, addresses, and phone numbers of all people who can be called to substantiate the information he gives you. Do not worry about the facts of the arrest or of the charges. You can learn them from the police. When the opportunity presents itself to interview the client in the privacy of your office, you can begin to examine the facts surrounding his involvement in the crime.

The general rule is to make the client feel at ease in your presence. This can be as basic as the manner in which your office is furnished.

For example, we interview our clients in a room which is designed as a library or living room. The walls are covered with law books, easy chairs and couches are provided, and I join the client away from my desk to keep the interview as low keyed as possible.

In a criminal case where the client has gone through, or is about to go through, the trauma of an arrest the last thing he needs to deal with is an authoritarian figure.

Prime The Pump

To keep the client completely at ease, keep the initial questioning simple. At this early stage try to learn as much about him as possible. Have the client tell you about his family, his work, his social activities, and recreation. An important step in determining the facts of the case is to have your client primed to tell the truth. By beginning your interview in this informal manner you begin to prime the pump, for he feels comfortable answering truthfully these simple questions.

Parenthetically, you will undoubtedly learn some interesting facets of your client's life-style which should be kept in mind when discussing your fee arrangements with him.

Record The Interview

To be able to devote my total concentration to the client I normally schedule these interviews in the evening or on the weekends, when there will be minimal disturbances from the normal office routine. I also make it a practice to record my interviews, with the client's knowledge and consent. The recording serves two purposes. It allows me to pay complete attention to my client as he speaks, and it affords other members of the staff the opportunity to hear the facts firsthand from the client.

I have found it a good practice to excuse from the room, after the preliminary portion of the interview has been completed, any person whom the client has brought with him. This is especially true when dealing with juveniles and their parents, and with sex offenders and their spouses. The client must have complete freedom in expressing the facts of the case.

It is normally most difficult for the adolescent-juvenile client to tell me precisely what occurred while his parents are present. Often the statement he gives me is markedly different from the story he told his parents on the arrest. Similarly, the delicate situation involving the sex offense requires this type of isolation.

The necessity of obtaining a truthful account of the facts of the case becomes a most difficult task for the attorney. Seldom are we faced with a professional criminal, a person who knows the score, who is completely candid with counsel, and who knows that the well-informed attorney is his best defense to the charges. All too often we are faced with the novice who thinks that by convincing the attorney of his story, the attorney will be in a better position to argue his case to the jury. There are many techniques available which will help you have your client give you an accurate account of the facts of the case.

Fact-Finding Techniques

The client must be made to understand that his failure to give counsel every detail can only serve to seriously impair the presentation of his defense.

The best fact-finding technique has already been alluded to. That is the pump-priming technique. Put the client into the habit of telling you the truth by asking him unimportant questions. This is similar to the tactic the police use during their interrogation of a suspect. Get the person talking about anything, get him into a conversation, and then turn the conversation to the facts of the case. It is precisely the same technique that skilled trial attorneys use in cross-examination. The witness becomes more comfortable and lets his guard down.

Under certain circumstances the use of the polygraph, or the suggestion of its use, may be appropriate. I say the "suggestion" of its use because from experience I have found that the spectre of taking a polygraph test is enough to prompt the client to tell the truth.

I recall an experience I had with a client whose story seemed all-too-perfect. After hearing his story, I told the

client that not only could we be reasonably certain that he would be completely vindicated, but that he would have an action against the municipality for damages for false arrest. His eyes lit up at the possibility of making some extra money. I explained to him that I would submit him to my polygraph examiner and test out his story in every detail. Armed with his "favorable" results I would confront the prosecutor and demand that the charges be dismissed. The client's face showed his concern. "Just how accurate is that thing?" he asked. "It is infallible in the hands of a qualified examiner," was my response. It was at this point that his story began to fall apart.

Despite the fact that most courts bar the admissibility of polygraph tests, there is no reason why they cannot be used as an investigative tool of counsel. I have been most satisfied with the results of the use I make of the polygraph.

In one situation in particular, a polygraph can serve as a valuable weapon in the defense arsenal. Where I have determined that the client will cooperate with the authorities, I have his story completely checked out in advance on the polygraph. Frequently, once the client agrees to cooperate with the government, counsel is confronted with the prosecutor's accusation that the client is not telling all or is not being truthful. This favorite prosecutorial ploy can be short-circuited by the presentation of the polygraph examiner's reports.

Constitutional Rights

A third technique involves setting forth for the client the full panoply of constitutional rights available to him if the circumstances warrant. Of course, each of those rights are waived if not exercised. It is important for counsel to know all of the facts so as to be in a position to exercise the client's constitutional rights.

For example, you may say, "our constitutional system of justice requires, regardless of the guilt of the accused, that the charges against him be dismissed, if those charges resulted from an unconstitutional search of his property. I do not want to give up that important right if there exists in this case facts which require that it be raised."

After taking the client through most of his rights in this manner, he will usually be cooperative and open.

Finally, if the client persists in telling you a fantastic story rather than the actual facts of the case, he will usually be brought back to reality when he realizes that, should there be an adverse decision, he is likely to go to jail. The jailhouse key usually unlocks the door to his memory.

Once the importance of discovering the facts of the case has been impressed upon him, it is best to let him relate them to you uninterruptedly. However, once the client begins to "open-up," counsel must avoid at all costs any sign of reprobation or moral condemnation of his conduct. There is no need to cross-examine the client at this stage. Upon completion of his narration, you may want to explore certain areas by asking him specific questions. This narrative approach is a triple benefit. It puts the client at ease, it tells counsel what his client feels is most important, and it reveals the client's intelligence and ability to communicate verbally.

In essence, the interview becomes the foundation for your relationship with the client. Your actions must be carefully programmed to obtain the optimum results with the least embarrassment. You must be prepared to convince the client that you will champion his cause and give him specific ideas as to what steps you are prepared to take in his defense. Remind him that you will seek out his advice on all matters of consequence where time permits, but as legal advisor to the defense team your decision is controlling. The client must understand that you are not merely his "mouthpiece," ready to say what he wants you to say.

Autobiography

I normally conclude the interview by giving the client a homework assignment. It is a long term project which should bring the client up to the trial stage. I ask the client to write out for me, or if that is impossible, to dictate for me on tape (later to be transcribed) his autobiography. I suggest that it be done on looseleaf paper in chapter fashion, for example, early childhood, education, work experience, marriage, children, etc. In this way we can continually

supplement each chapter as new thoughts come to him. All he needs to do is to place the appropriate chapter heading on the paper; it then is filed in the trial notebook. I have him enlist the aid of his family and friends.

The importance of this project cannot be stressed too much. It makes all concerned part of the defense team. If a client is in custody, it gives him a meaningful way of participating in his defense. He does not feel left out.

The autobiography also serves me at the time of trial. It becomes the backbone of my opening to the jury. I am able to speak for my client and relate to the jury his essence, as well as the nature of our defense. I can better humanize the defendant. Should it become necessary for the client to face a judge for sentencing, the autobiography becomes the heart of the pre-sentence memorandum.

The overall strategy of the initial interview must be that in order to help the client you must know what his problem is. In determining the nature of the problem your best tool is a thorough understanding of the facts. Your job is to determine the scope of your client's liability. His job is to give you the tools with which to work.

CASE NOTES

SUPREME COURT DECISION

SEARCH WARRANTS - THIRD PARTIES

Ybarra v. Illinois, 48 LW 4023 (U.S. 1979).

Illinois police officers secured a state warrant to search a bar and the bartender for narcotics. Upon entering the bar, the bartender and all patrons were subjected to a search, based upon an Illinois statute which authorized police to detain and search all persons found on a premise to be searched. This statute was predicated on the theory that the police are authorized to protect themselves from possible attack or to prevent the disposal of anything described in the warrant. The defendant was one of the patrons searched. During an initial pat-down search "a cigarette package with objects in it" was felt in Ybarra's pocket. After moving on to search the other patrons, the police officer returned, frisked Ybarra again, reached into his pocket and removed the cigarette package he had felt earlier. Heroin was discovered in the package.

The U.S. Supreme Court, reversing the conviction, noted that the warrant authorizing the search described only the premises and the person of the bartender. At the time the warrant was issued, there was no probable cause to search Ybarra; indeed, there was no probable cause as to him at the time of execution of the warrant. Ybarra had made no gestures indicative of criminal behavior, had made no movements which might be an attempt to conceal contraband, and had said nothing suspicious to the police. In short, at the time of the search, the police knew nothing about Ybarra except that he was present in a place to be searched.

The Court held that the search of Ybarra and the seizure of the cigarette package violated Ybarra's constitutionally protected expectation of privacy, noting that a person's "mere propinquity to others independently suspected of criminal activity does not give rise to probable cause to search that person." The Supreme Court specifically rejected the State's contention that a search may be conducted where the person is on "compact" premises and the police have a "reasonable

belief" that he is connected with drug trafficking and "may be concealing or carrying away contraband."

FEDERAL COURT DECISIONS

EXPERT WITNESS - ADMISSIBILITY OF TESTIMONY

Ibn-Tamas v. United States, 48 LW 2340 (D.C. Cir. 1979).

The trial court excluded the testimony of a clinical psychologist who would have testified as a defense expert on the subject of "battered women," ruling that his testimony would invade the province of the jury. The defendant (wife) was charged with shooting her husband and claimed self-defense.

The D.C. Court of Appeals, reversing, noted that the witness would have provided a relevant insight, that the jury otherwise could not gain in evaluating the evidence, by specifically (1) informing the jury that there is an identifiable psychological class of women who may be characterized as "battered women," (2) informing the jury that the mentality and behavior of such women are at variance with the lay perception of how a normal person would react, and (3) providing a basis from which the jury could understand why Mrs. Ibn-Tamas perceived herself to be in imminent danger. The testimony, therefore, did not go to the ultimate question of guilt or innocence, but rather to the state of mind of the defendant and should have been permitted.

SENTENCING - PRETRIAL AGREEMENT

Frank v. Blackburn, 605 F.2d 910 (5th Cir. 1979).

Before trial (and again during a recess in the prosecutor's case) the trial defense counsel, government counsel, and trial judge met for a plea bargaining session. The trial judge personally announced that if the defendant pleaded guilty, he would be sentenced to 20 years. That offer was rejected and, after trial and conviction, the same judge sentenced the defendant to 33 years in prison.

In an appeal from a habeas corpus proceeding, the Fifth Circuit held, inter alia, that the judge erred in increasing the sentence above what he had earlier proposed. The Court

noted that the judge had presided at the preliminary examination and, in the in-chambers plea bargaining session, the government "systematically presented the factual merits of the case against the defendant to the judge, together with the pertinent history of the defendant (rap sheet)" The judge twice proposed a sentence of 20 years, which was twice rejected. The trial disclosed no new or more damaging facts about the defendant. The defendant "did not testify, so there was no false testimony or insolent demeanor to reflect against him. We [the Circuit Court] can find nothing in the record . . . which would bear on the decision to increase the sentence - other than Frank's refusal to plead guilty." The case was remanded for an adjustment in sentence.

Query - Does not the convening authority stand in shoes similar to those of the sentencing judge of this case when a pretrial agreement has been struck? After reviewing the report of an Article 32 investigation and a pretrial advice, and agreeing to an appropriate sentence; if the plea is found improvident, (absent additional unknown damaging evidence against the accused or false testimony by the accused) should not the convening authority be held to what he earlier agreed was an appropriate sentence?

LENGTHY DETENTION, ABSENT PROBABLE CAUSE, IS ILLEGAL

United States v. Perez-Esparza, 26 Crim. L. Rptr. 2204 (9th Cir. 1979).

Based upon a tip from a reliable informant that the defendant's car was being used to smuggle drugs into the U.S. from Mexico, Border Patrol Officers stopped the defendant's car and escorted the defendant to an interrogation area to await the arrival of DEA Agents. The agents arrived two and one-half hours later, advised the accused of his rights, and secured permission to search his car where drugs were found. Subsequently he was again advised of his rights and he confessed.

The Court of Appeals held that, while the informant's tip provided reasonable grounds upon which to base the investigative stop, it did not give probable cause to apprehend. While the informant was reliable, he failed to give any specific information of when, where, or how drugs were being smuggled. As such, the information failed to meet the second prong of the Aguilar-Spinelli test. The long detention was, therefore,

illegal. As there were no attenuating circumstances which would have purged the error, both the defendant's permission to search and his statement, while warned and apparently voluntary, were improperly secured and inadmissible. The Court was especially mindful of the fact that the Border Patrol Agents were experienced in drug smuggling cases and there was no reason why they could not have questioned Perez-Esparza themselves instead of waiting for the DEA Agents. See Dunaway v. New York, 25 Crim. L. Rptr. 3127 (U.S. 1979).

QUESTIONING OF DEFENDANT BY JUDGE - FIFTH AMENDMENT

United States v. Arthur, 25 Crim. L. Rptr. 2510 (4th Cir. 1979).

The Fourth Circuit Court of Appeals categorizes, as "serious error," a trial judge's inquiry of the defendant, on the merits, as to whether he had been advised of his Fifth Amendment rights prior to giving previous testimony. "The Fifth Amendment right of an accused not to incriminate himself includes the right not to take the stand at all; and this right was violated when the defendant was called as a witness by the Court and interrogated about the advice given him about his right not to testify" The question presented here concerned whether previous testimony would be admitted during the trial on the merits. Compare United States v. Mathews, 6 M.J. 357 (CMA 1979), wherein the Court of Military Appeals indicated that questioning a defendant during the sentencing portion of the trial was permissible.

DETECTIVE DOGS - REASONABLE CAUSE TO SEARCH

Doe v. Renfrow, 26 Crim. L. Rptr. 2006 (N.D. Ind. 1979).

In a non-criminal case in which a student sued school administrators for unwarranted searches of her pockets, clothing, and person, the District Court held that the alert of a marijuana dog provided reasonable cause [something less than probable cause] to search pockets and purses, but the alert was insufficient to allow a body search. The Court noted that the marijuana dog would alert because of the scent or odor of marijuana, not because of the actual presence of the substance. "There is always the possibility that one's clothing may have been inadvertently exposed to the pungent

order [sic] of the drug. . . . The alert of the dog alone does not provide the necessary reasonable cause to believe the student actually possesses the drug."

RIGHT TO COUNSEL - CONTINUED QUESTIONING

Thompson v. Wainright, 26 Crim. L. Rptr. 2038 (5th Cir. 1979).

After having been advised of his Miranda rights, Thompson indicated he would make a statement, but he wanted to tell his story to a lawyer first. The police officers questioning Thompson told him that his lawyer could not repeat Thompson's statement to them, and that the lawyer would probably tell Thompson to say nothing.

The Circuit Court reversed a denial of habeas corpus relief, holding that "the limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument . . . about whether having counsel would be in the suspect's best interest or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice would be to him if he were present."

COURT OF MILITARY REVIEW DECISION

MATERIAL WITNESS - ABATEMENT OF TRIAL

United States v. Falk, CM 438361 (ACMR 21 Dec. 1979)(unpub.)
(ADC: CPT Johnson).

The defendant, tried in Germany, was charged with and convicted of two sales of heroin. In a pretrial motion, he moved to abate the proceedings because a material defense witness had been separated from the Army and had returned to the U.S. The witness admitted to trial defense counsel that he was the seller of the charged drugs, not the defendant, but that he refused to return to Germany to testify. The trial judge denied the motion.

The Army Court of Review noted that there was testimony during the trial that the defendant and the witness looked remarkably similar (to the extent that their platoon sergeant of seven months had difficulty telling them apart), the identification of the defendant as the seller was solely by

the government's confidential informant, and that the defendant submitted a stipulation of expected testimony by the contested witness stating that he, not the defendant, was the seller of the drugs.

The Court held that the military judge had erred in not abating the proceedings. An accused may not be forced to present the testimony of a material witness by way of a stipulation or deposition. Such a requirement may deprive the accused of his Sixth Amendment right to compulsory process. See United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974); United States v. Boone, 49 CMR 709 (ACMR 1975).

The government has requested reconsideration of the decision, arguing that the appellant's failure to request the witness prior to the witness' discharge from the Army and return to the U.S. waived the appellant's right to the witness. The appellant is opposing this position.

STATE DECISIONS

CONFESSIONS - INDUCEMENT

Hillard v. State, 26 Crim. L. Rptr. 2140 (Md. 1979).

The Maryland Court of Appeals, citing neither the Maryland nor the United States Constitution, creates a new consideration for Maryland in testing the voluntariness of confessions. In this case, the defendant, with his attorney in attendance, was told by the police officer that he would "go to bat" for him with the prosecutor in return for a confession. The Court held that "if an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declarations will be considered to have been involuntarily made and therefore inadmissible." They also held that the presence of the defense counsel is not automatically determinative but is only one factor to be considered in judging voluntariness.

SEARCH AND SEIZURE - "OPEN FIELDS" DOCTRINE LIMITED

Burkholder v. Superior Court, 26 Crim. L. Rptr. 2025 (Cal. Super. Ct. 1979).

A California deputy sheriff initially viewed what appeared

to be marijuana under active cultivation while he was flying above the defendant's rural property. A second overflight a month later confirmed the initial impression. The deputy then proceeded (on the ground) to the appellant's rural property, and, without a search warrant, entered upon the defendant's land. In doing so, the deputy used a master key to unlock a fence gate across a rural access road, by-passed posted "No Trespassing" signs, and skirted a second locked gate. Upon passing these obstacles the deputy located the patch of cultivated marijuana and arrested the defendant, who happened to be present. The marijuana patch was located behind a hill and was not visible to anyone standing in a place where the public might lawfully be. The court below apparently upheld the warrantless search and seizure based upon the "open fields" doctrine.

The California Court of Appeals reversed. The Court held that the absolute limitation on the reach of the Fourth Amendment protection "under the 'open fields' doctrine of another era [citation omitted] is no longer viable." Under the totality of facts and circumstances, the defendant's expectation of privacy from ground intrusion was objectively reasonable. "To contemplate a contrary conclusion would itself lend credence to a specter of citadel-like fortifications in order to safeguard an otherwise reasonable expectation of privacy of the contemporary rural dweller, a refuge neither required nor compatible with established constitutional principles."

PLAIN VIEW

Howard v. State, 26 Crim. L. Rptr. 2079 (Tex. Crim. App. 1979).

The defendant was properly stopped one night for a minor traffic offense (failure to signal turn). As he was escorted from his car to the squad car by one of the officers, the other officer shined his flashlight into the defendant's car and saw an unlabeled, translucent, brown plastic "medicine jar" containing a large number of tablets. The officer reached in and seized the pill bottle. Subsequent analysis showed the tablets to be a controlled substance.

The Texas Court of Criminal Appeals held that the search and seizure was not incident to the apprehension as the appellant was no longer in proximity to the car; nor did

this qualify as a "plain view" search. There was nothing inherently suspicious about the bottle full of tablets. It was not until the officer had seized the bottle, opened it, and inspected the pills that he reasonably suspected that they were contraband. The contraband, as such, did not come into the officer's view until after he had seized the bottle and opened it. The Court held that the evidence was illegally seized.

VEHICLE INVENTORY - IMPOUNDMENT OF VEHICLE INVALID

Drinkard v. State, 25 Crim. L. Rptr. 2477 (Tenn. 1979).

The Tennessee Supreme Court held that, under both state and federal constitutions, the failure of police to offer a drunk driving arrestee the option of either leaving his car parked and locked or in another's custody renders the car's impoundment and subsequent inventory search invalid. Evidence found during the "inventory" should have been suppressed.

In response to the state's argument that a drunk driver is always incompetent to authorize alternatives to impoundment, the Court said that it is the degree of intoxication that is important. Here, the state made no showing that the driver was too drunk to entrust his car to his passenger.

"SIDE BAR"

or

Points to Ponder

1. CONDITIONAL GUILTY PLEAS REVISITED.

Recently it was suggested that defense counsel might consider negotiating pretrial agreements containing a condition that a plea of guilty specifically would not waive one or more issues on appeal (such as illegal search and seizure) which would normally be waived by such a plea (11 The Advocate 93). Such issues may also be preserved at the trial by a ruling to that effect by the military judge. Cf. United States v. Williams, 41 CMR 426 (ACMR 1969). Further, if the motion to suppress has been litigated and denied, and the matter is raised during the guilty plea inquiry, defense counsel should state that the accused desires to preserve the issue for appellate review.

The Federal circuits have divided on the permissibility of conditional guilty pleas. See cases collected at 26 Crim. L. Rptr. 3030. Commentators have recommended the procedure because it conserves prosecutorial and judicial resources and advances speedy trial objectives. No valid purpose is served by going through an entire trial simply to preserve a pretrial objection for later appellate review. ABA standards relating to the Administration of Criminal Justice §21-1.3(c) (2d ed. 1978); 1 Wright, Federal Practice and Procedure -- Criminal §175 (1969). The proposed amendments to the Federal Rules of Criminal Procedure would add Rule 11(a)(2) to read that the defendant may enter a conditional plea "with the approval of the court and the consent of the government." 26 Crim. L. Rptr. 3030.

Recently, the Second Circuit Court of Appeals in United States v. Dien, 26 Crim. L. Rptr. 2206 (2d Cir. 1979), considered an appeal of a denial of a suppression motion where the defendants pleaded guilty. The government had consented to the preservation of the appeal rights, so the search and seizure issue was fully litigated at the appellate level, resulting in a reversal of the conviction.

This technique can be very useful in those cases where there is one legal issue which could result in the defendant's acquittal, but the loss of that issue would surely result in a conviction. In such a case, an attempt to secure such an agreement is certainly preferable to litigating a waivable issue, failing to convince the trial court, then pleading guilty to the offense without such an agreement, thus precluding appellate review of the waived issue.

Some military judges refuse to entertain a pretrial motion to suppress when they know that a guilty plea will be entered, by ruling that the matter will be deferred until after the plea is entered, reasoning that the issue is to be raised, if at all, as an evidentiary matter during the prosecution's case-in-chief. This not-so-subtle way of denying an accused his right to litigate constitutional issues should meet with strong objections and an offer of proof by defense counsel, to preserve the denial as an appellate issue. In the absence of a contrary Manual provision, Article 36(a) of the Code "expresses a preference for federal procedure." United States v. Slubowski, 7 M.J. 461, 463 (CMA 1979).

Furthermore, the reasoning of the military cases which allow the military judge discretion to entertain suppression motions before or after the entry of a plea is based on the notion that "no legal or practical purpose can be served by reviewing the propriety of the search" where the accused has pleaded guilty. See United States v. Hamil, 15 USCMA 110, 35 CMR 82 (1964); United States v. Hartzell, 3 M.J. 549 (ACMR 1977); United States v. Mirabal, 48 CMR 803 (ACMR 1974). Such reasoning is inapposite where one has a conditional guilty plea agreement, the very purpose of which is to litigate and preserve the litigated issue. In such a case, it is a waste of judicial resources to litigate an entire trial where only one issue is to be preserved for appeal.

2. IMPERFECT SELF-DEFENSE.

The California Supreme Court has held that an honest, but unreasonable, belief in the need to defend oneself against imminent peril to life or great bodily injury will reduce homicide from murder to manslaughter. People v. Flannel,

26 Crim. L. Rptr. 2245 (Cal. 1979). Fundamental to this holding was the Court's belief that a person who carefully weighs a course of action and then chooses to kill is aware of his societal duty to act within the law. When, despite such awareness, he commits an act likely to cause serious injury or death, he has exhibited a wanton disregard for human life constituting malice aforethought.

If an accused, however, had an honest belief in his need to defend himself, that belief would be inconsistent with malice aforethought. No matter how mistaken the accused's belief, he cannot simultaneously entertain both malice and a genuine belief that he must repel an imminent peril of bodily injury. The Court further stated that the concept of the affirmative defense of self-defense is two-pronged. It is, first, the honest belief of imminent peril that negates malice in a case of complete self-defense. Once the honest belief has negated malice, a determination of the reasonableness of that belief goes to the justification for the homicide itself. The Court declared the two-prong approach to be the common law rule, citing Perkins on Criminal Law (2d ed. 1969). If only the prong of honest belief is established by an accused, the defense of self-defense is not perfected; but the element of malice has been negated, thereby reducing the degree of culpability from that of murder to manslaughter. See Tedrow, Digest - Annotated and Digested Opinions, U.S. Court of Military Appeals 458 (1966).

The military courts have repeatedly rejected the concept of imperfect self-defense. See United States v. Mathis, 17 USCMA 205, 38 CMR 3 (1967); United States v. Maxie, 9 USCMA 156, 25 CMR 418 (1958); United States v. Black, 3 USCMA 57, 11 CMR 57 (1953); United States v. Calley, 46 CMR 1131 (ACMR 1973). Interestingly, the military courts' rejection appears to rest, not with established legal principles as applied to the definition of malice, but rather upon policy considerations announced in a 1953 USCMA decision and an argument that the "adoption of any theory of 'imperfect self-defense' unnecessarily confuses the legal situation presented by an otherwise clear statement of facts" United States v. Black, supra at 61, 11 CMR at 61. While the need to avoid complex legal issues may have been required in the days of untrained law officers and court members' use of the Manual, it is without support in a first rate system of criminal justice.

See also Tedrow, supra at 458, criticizing the Court of Military Appeals' decisions in this area for failing to recognize that lack of malice reduces murder to manslaughter.

The policy objection apparently refers to a determination that society should not reduce the criminal liability of one who kills another in an honest, but unreasonable, belief. United States v. Maxie, supra. The military courts have not been willing to sanction this "honest but stupid" theory of diminished criminality. The other basis for the military courts' rejection of the theory of imperfect self-defense is their perception of difficulty in determining the honesty of an accused's subjective belief without the benefit of an objective standard of reasonableness. Arguably, such a determination would be no more difficult to make than other abstract determinations, such as on intent and credibility, which the finder of fact is routinely required to make. Objective factors such as the past relationship between the accused and the victim; the reputation of the victim for violent acts (and the accused's knowledge of that reputation); and the education, experience, and intelligence level of the accused are some of the factors traditionally recognized as a means of determining the authenticity of the accused's purported belief. These factors are similarly available as a means to measure the accused's subjective belief of a need to defend himself. Acceptance of the concept by another civilian jurisdiction provides a basis from which to litigate the issue anew in the military courts. This can best be accomplished by requesting a tailored instruction in an appropriate case.

While not using the common law term "malice aforethought," Article 118, UCMJ, substitutes the particular acts from which malice could be implied. See United States v. McDonald, 4 USCMA 130, 15 CMR 130 (1954). The theory of imperfect self-defense is that it negates the element of malice in murder, and malice is an element to be proven by the prosecution. Unless the finder of fact is convinced beyond a reasonable doubt that the accused did not have an honest belief that he was in peril of death or imminent bodily harm, they cannot be convinced beyond a reasonable doubt that he acted with the requisite malice in the commission of the murder. This doctrine is consistent with the interpretation of Article 118 by USCMA in United States v. Vaughn, 23 USCMA 343, 49 CMR 747 (1975).

3. WHEN THE SUSPECT'S REQUEST FOR COUNSEL GOES UNHEEDED AND HE IS SUBSEQUENTLY INTERVIEWED.

The Army Court of Military Review sees an important difference in dealing with the voluntariness of an accused's counselless pretrial statement, given subsequent to his request for counsel, as depending on whether the accused subjectively believed that follow-up requests for counsel would go unheeded. In United States v. Johnson, CM 437934 (ACMR 27 Sept. 1979) (unpub.), the Court found no error in admitting a statement of an accused who initially requested counsel, then was twice interviewed seven hours and nearly one month thereafter by other CID agents who were unaware of the request. The Court distinguished United States v. McClellan, 1 M.J. 575 (ACMR 1975), involving nearly identical circumstances, in that the accused in McClellan testified at trial that he did not re-request counsel at subsequent interviews because his previous requests were left unanswered and to request counsel again would "do him no good." With the Court applying such a distinction, counsel should ascertain, in each case, why the accused did not re-request counsel at a subsequent interrogation, and, if he gives the reason accepted in McClellan, allow him to provide that reason at trial. See, e.g., United States v. Martinez, 6 M.J. 627 (ACMR 1978).

4. THE CONVICTED CO-ACCUSED AS A PROSECUTION WITNESS.

A recent Court of Military Review decision labeled the prosecutor's use of an immunized co-accused in his cohort's trial as misconduct, United States v. Fuentes, CM 437786, ___ M.J. ___ (ACMR 9 Jan. 1980), where the testimony of such a witness was a "presentation of known false evidence . . . incompatible with the rudimentary demands of justice"

The victim, Private Upshaw, was stabbed in the back four times while lying unconscious on the latrine floor of the barracks. At the trial of Private Cyr, Upshaw testified that a Private Fuentes attacked him with a knife, and that in the ensuing struggle, Cyr joined in by hitting and choking him until he passed out.

Private Cyr took the stand in his own behalf and testified that he intervened in the fight when it appeared that Upshaw had gained control of the knife and was about to cut Fuentes' throat. Cyr further testified that he poked Upshaw with a mop and pushed him and Fuentes to the floor, where Fuentes regained control of the knife and stabbed Upshaw. Cyr denied he ever choked anyone.

The government position, as argued, was that Cyr's testimony was "improbable, contradictory, and . . . fabricated." Cyr was convicted of the assault on Upshaw.

The same trial counsel, 3 days later, prosecuted Fuentes. He did not call the victim Upshaw, but instead used the immunized Cyr, who testified substantially as he had in his own trial, as the primary government witness. Thus the government used as its key witness an individual whose testimony, just 3 days earlier, had been characterized by the trial counsel as false. Apparently the trial defense counsel for Fuentes was unaware of the change in the government's position. The governmental deception was not raised at Fuentes' trial and was only discovered by CMR's review of the Cyr record of trial.

The Court of Military Review concluded that trial counsel's action amounted to prosecutorial misconduct, labeling it a "deliberate deception." They found that he presented evidence which "constituted a corruption of the truth seeking process."

Trial defense counsel are in a position to squelch this practice, and to assist in the appeal of the case by alerting the Defense Appellate Division when this tactic is utilized. Defense counsel should examine the record of trial of the co-accused if available, discuss the prosecution's case with counsel for the co-accused, or better yet attend the co-accused's trial. Then if the government employs tactics similar to those used in Fuentes, point the problem out to the trial court and move to strike the offending matter. If necessary, counsel should make comments in the reply to the post-trial review, or submit an Article 38(c) brief, and attach a relevant extract from the co-accused's trial. Additionally, a letter alerting Defense Appellate would be of assistance if the co-accused's case is not subject to automatic appellate review.

Counsel for any co-accused may be able to turn this to his client's advantage. It is not just the subsequently tried co-accused who may assert the government's inconsistent position to his advantage, e.g., the first co-accused tried may now argue that the government has abandoned its prior theory of his guilt and adopted his version of the facts as set forth by the government in subsequent trials. Trial defense counsel should submit this to the convening authority, and if no success is met there, call it to the attention of appellate counsel.

5. COURT-MARTIAL STATISTICS (reprint from TDS newsletter).

The following statistical data is provided solely for your information. It is not an attempt to persuade counsel that one forum is better than another. Each court-martial jurisdiction is an entity unto itself, as local counsel well know.

The FY 1979 U.S. Army Trial Judiciary report reveals that 5772 courts-martial, including 77 summary courts, were tried by military judges. Approximately twenty-three percent (1321) were general courts-martial and twenty-eight percent (1622) were BCD special courts-martial.

Over one-half of the GCMs (708) were tried by military judge alone. Sixty-three percent of these cases were guilty pleas. In 550, or approximately 78% of the cases, the military judge awarded a punitive discharge.

In general courts tried with members, 36% of which involved guilty pleas, the accused was sentenced to a punitive discharge in 317 (about 52%) of the cases.

Sixty percent of all BCD special courts-martial were tried before military judge alone. Of these, 532 (or about 55%) were guilty pleas. A discharge was given by the judge in 524 (approximately 54%) of all the cases.

By comparison, 649 BCD SPCMs, 208 of which were guilty pleas, were tried before members. The accused received a discharge in 30% of the cases.

Special courts-martial statistics reveal that 1947 cases, 949 (49%) of which were guilty pleas, were tried before military judge alone. Court members were requested in 789 cases (29%), 184 (23%) of which involved guilty pleas.

USCMA WATCH

GRANTED ISSUES

EQUAL PROTECTION - OFFICERS

The Equal Protection Clause prohibits selective enforcement of the laws when based on unjustifiable standards or arbitrary classifications. The Court of Military Appeals, in United States v. Means, pet. granted, No. 38,154, 8 M.J. ____ (CMA 4 Jan. 1980), will examine the conviction of an Air Force lieutenant whose case, the defense contends, was referred to a general court-martial solely because of his officer status. LT Means was convicted of possessing .02 grams of amphetamines and 10.08 grams of marijuana. He was sentenced to a dismissal and partial forfeitures. The Article 32 investigating officer recommended trial by special court-martial. Statistical summaries, produced by the defense, showed enlisted servicemen in the same command would have received a SPCM or nonjudicial punishment for similar offenses involving the same quantity of drugs. While referral to a GCM does not empower the government to predetermine the ultimate sanction against an accused, cf. United States v. Batchelder, 99 S.Ct. 2198 (1979), it may have a significant effect on the severity of the punishment imposed. CMA will have the opportunity to address the Equal Protection doctrine's impact on the apparently disparate processing of officer cases.

BURDEN OF PROOF - COCAINE

In another Air Force case, CMA has agreed to review the proof necessary to sustain a cocaine conviction under the "disorder or neglect" clause of Article 134. United States v. Ettleson, pet. granted, 8 M.J. 179 (CMA 1979). The accused was charged with transfer of a habit-forming narcotic drug, cocaine, as a disorder prejudicial to good order and discipline in the military. At trial, the defense counsel requested an expert witness who would testify that cocaine was not a habit-forming narcotic drug. The military judge denied the request, stating that Congressional classification of cocaine as a habit-forming narcotic drug foreclosed the issue. Had the accused been charged with violating the U.S. Code under

the non-capital crime or offense clause of Article 134, the military judge's ruling would have been correct. However, the ruling removed the issue of the habit-forming, narcotic nature of cocaine from the fact-finders, as well as eliminating the government's burden of proof on the element.

INDIVIDUAL DEFENSE COUNSEL REQUESTS

Three cases are now pending before the Court on the problems associated with requests for individual defense counsel. In United States v. Kelly, cert. filed, 7 M.J. 140 (CMA 1979), the Coast Guard practice of "assigning" but not "detailing" a counsel to assist an accused with preliminary matters will be examined. After being assisted by one attorney and establishing an attorney-client relationship with this person, CWO Kelly requested another counsel as IDC. The convening authority granted the request and detailed the requested attorney on the convening order. At issue is whether, under Articles 27 and 38(b), the accused is entitled to two military counsel, or whether detailing a single military counsel is sufficient when that counsel is selected and made available before any other counsel is formally detailed. Intertwined with this fundamental issue are the problems associated with severing an existing attorney-client relationship, and the dictates of United States v. Jackson, 5 M.J. 223 (CMA 1978), regarding the availability of counsel at all "critical" stages of the court-martial process.

In United States v. Ettleson, supra, the Court is confronted once again with the proper reasons for denying an IDC request. The requested counsel was initially determined to be unavailable because of a pending PCS. On appeal, the Wing Commander granted the accused's request. Shortly thereafter, however, the Commander reversed his decision of availability and denied the request because of a briefing the individually requested counsel had to give one day before the next scheduled session of trial. When trial resumed, the IDC request was renewed before the military judge. Detailed counsel argued that the reason for the IDC's denial (the briefing) was no longer valid, and that the accused had abandoned attempts to secure an alternate IDC after his initial choice was granted by the Wing Commander. This motion was denied and the trial proceeded with the detailed defense counsel.

The third case, United States v. Redding, cert. filed, No. 38,437, 8 M.J.____ (CMA 9 Jan. 1980), is before CMA as a certification from The Judge Advocate General of the Navy. It concerns the authority of the Navy Court of Military Review to grant extraordinary relief when the Court concludes that the military judge used an erroneous standard of law in his ruling on a request for individually requested counsel.

SUMMARY DISPOSITION

NON-RETROACTIVITY OF EZELL

CMA recently affirmed United States v. Johnson, No. 35, 167, 8 M.J.____ (CMA 23 Jan. 1980) (summary disposition), holding that United States v. Ezell, 6 M.J. 307 (CMA 1979), applies only to searches conducted after April 9, 1979, the date of that opinion. In light of previous decisions testing the neutrality of search-authorizing officials by Ezell standards, albeit the searches were conducted prior to Ezell, e.g., United States v. Wenzel, 7 M.J. 95 (CMA 1979); United States v. Franklin, 7 M.J. 371 (CMA 1979) (summary disposition); United States v. Albright, 7 M.J. 473 (CMA 1979) (summary disposition), the decision is surprising. The Army Court of Military Review has reacted quickly to Johnson. In at least one case, United States v. Duhart, CM 438375 (ACMR 31 Dec. 1979) (unpub.), the decision of the Court, which dismissed several specifications in light of Ezell, has been withdrawn and reconsideration ordered. The Defense Appellate Division may request reconsideration of Johnson.

Note: The Johnson case has no impact on Ezell type searches conducted after 9 April 1979.

REPORTED ARGUMENTS

IMMUNITY - DISQUALIFICATION OF CONVENING AUTHORITY

In United States v. Lochausen, pet. granted, 4 M.J. 354 (CMA 1978), argued 15 January 1980, the Court will decide whether a successor convening authority is disqualified because one of his company commanders told a witness that he would not be prosecuted as a reward for his cooperation. The judges' questions focused on the convening authority's responsibilities under Article 64 for reading the record of trial and reviewing the findings and sentence. Chief Judge Fletcher

expressed his difficulty with the rule that a convening authority is disqualified for granting immunity. He noted the truth-determining processes of the court-martial, e.g., cross-examination, and the role a grant of immunity might play in the convening authority's review of a trial. With the Chief Judge's stated displeasure of over-emphasis given any one witness' testimony, see United States v. Leyva, 8 M.J. 74 (CMA 1979); United States v. Lee, 6 M.J. 96 (CMA 1978), and the diminishing importance of the convening authority in post-trial review matters, cf. United States v. Cansdale, 7 M.J. 143 (CMA 1979), the holding of United States v. Sierra-Albino, 23 USCMA 63, 48 CMR 534 (1974), that a convening authority is disqualified to act when he becomes aware of a subordinate's grant of clemency (or immunity) to a witness, may be modified.

SERVICE-CONNECTION - JURISDICTION

Two cases, United States v. Trottier, 4 M.J. 916 (AFCMR 1978), pet. granted, 5 M.J. 218 (CMA 1978), and United States v. Norman, pet. granted, 5 M.J. 251 (CMA 1978), both argued 16 January 1980, present CMA with the opportunity to further define the meaning of the requirements of Relford v. Commandant, 401 U.S. 355 (1971), which establish court-martial jurisdiction. Both cases involve off-post drug sales with on-post contacts prior to some of the sales, and assertions by the buyer-informant that further on-post distribution of the illicit substances was intended. Questions from the bench indicated that under an offense-by-offense analysis, court-martial jurisdiction may exist over a sale offense where later use or distribution on post is evidenced, but not over the possession of the drug at the time of sale.

STANDING

United States v. Cordero, pet. granted, 7 M.J. 249 (CMA 1979), argued 17 January 1980, involves the admissibility of evidence seized from an automobile in which the accused was a passenger. The military judge denied the defense motion to suppress the marijuana at trial, ruling that SP4 Cordero lacked standing to contest the search and seizure. In an unpublished opinion, ACMR held that the accused had standing, but nevertheless upheld the search and seizure, citing United States v. Holler, 43 CMR 461 (ACMR 1970). Although none of the occupants owned the vehicle, the owner had given them permission to use it. Questions by both judges centered on the effect Rakas v. Illinois, 439 U.S. 128 (1978), has upon

United States v. Jones, 362 U.S. 257 (1960), and on prior military cases involving standing in general, and the effect of footnote 4 in Rakas on automatic standing in particular.

HEARSAY, UNCHARGED MISCONDUCT, INSTRUCTIONS, INFERRING GUILT

United States v. Pastor, pet. granted, 4 M.J. 159 (CMA 1977), argued 15 January 1980, presents the Court with a variety of issues stemming from the accused's conviction of sodomy and indecent assault upon his nine year old stepdaughter. After a defense motion to suppress alleged fresh complaints by the prosecutrix to her mother and a failure of the military judge to specifically rule thereon, Mrs. Pastor was permitted to testify to numerous conversations with her daughter about the alleged incidents. On rebuttal, she was permitted to testify that her son had told her that he had seen the accused with the prosecutrix. Two defense motions for a mistrial were denied. During argument, the government stressed the statements were admitted to explain how Mrs. Pastor became aware of the her husband's acts, and not as fresh complaints or for the truth of the matter asserted. Alternatively, the government postulated that if admitted for the truth contained therein, the victim's statements were spontaneous exclamations. On this point, the facts were not developed at trial to show the length of time between the accused's acts and the complaint (or spontaneous exclamation). Although the military judge gave a cautionary instruction to disregard Mrs. Pastor's hearsay testimony concerning what her son had told her, the record reflects that the jury made no response to it, leaving it unclear as to whether they understood and agreed to abide by this crucial instruction.

Evidence was also adduced at trial concerning the accused's acts of masturbation, drinking, and permitting his minor stepchildren to read Playboy and Penthouse magazines. Relying on the Air Force Board of Review decisions of United States v. Dotson, 34 CMR 894 (AFBR 1964); United States v. Jones, 28 CMR 796 (AFBR 1959); and United States V. Rhodes, 24 CMR 776 (AFBR 1957), the defense argued this evidence was irrelevant and prejudicial. Although none of the evidence constituted criminal misconduct, the defense contended an instruction on uncharged misconduct was required, especially in

light of the trial counsel's emphasis on the accused's auto-eroticism.

Most of the bench's questioning dealt with the issue of inferring guilt from the accused's actions when the Article 32 investigating officer read the elements of the charges to him at the stockade in the absence of detailed counsel. Specialist Pastor was initially charged with rape as well as the crimes of which he was convicted. When the Article 32 officer read him the formal charges, Pastor was confused as to their exact nature, and asked that the elements of each be delineated. The Article 32 officer complied, beginning with the sodomy charge. After finishing with the elements of the rape offense, the accused remarked, "Well, there wasn't any penetration." At trial, the rape charge was amended to attempted rape. Despite defense objections, the Article 32 officer was permitted to testify to the accused's statement. This evidence was used to deny a requested defense instruction that the victim's testimony was uncorroborated (the military judge held that the blurted statement corroborated the victim's testimony as to the attempted rape). The statement also formed the basis of the trial counsel's argument that Specialist Pastor's silence, when read the elements of the other offenses, was indicative of guilt as to those offenses. As pointed out in one of the Chief Judge's questions, the crux of the issue is whether the government can use the statements of an accused to a neutral and detached official (the Article 32 officer) in the absence of counsel, but after receiving Article 31 warnings. The record was not sufficiently developed to answer the judges' questions as to why detailed defense counsel was absent from this Article 32 session. While the decision may lead to new law concerning the role of the Article 32 investigating officer and effective assistance of counsel, one lesson is already clear. Defense counsel should alert their clients to the dangers of discussing pending charges with anyone other than counsel.

WAIVER

One of the earliest realizations of the neophyte trial defense counsel is that at times even his greatest efforts will not save some of his clients from conviction. Given the fact of conviction, counsel as well as the accused puts his faith in the appellate process and hopes vindication can be had from above. However, counsel so positioned must remember that no matter how attractive or promising issues were at the trial level, only those issues preserved for appeal will be of use to an accused. Because of this, counsel must be familiar with the concept of waiver and have a feel for what issues are waived by lack of objection, consent, or guilty pleas. This update on the area of waiver is supplied to assist counsel as a handy guide and quick index of the field.

It must be noted that, assuming approval by the President, the new military rules of evidence will dramatically change this area of the law. These changes will be the subject of analysis in a future special edition of The Advocate.

I. The following matters are never waived:

Jurisdiction.	Paras. 68 <u>b</u> , 215 <u>a</u> , <u>MCM</u> , 1969.
Trial counsel previously acted for the defense.	<u>United States v. Fowler</u> , 6 M.J. 501 (AFCMR 1978).
Failure to state an offense.	<u>United States v. Fleig</u> , 16 USCMA 444, 37 CMR 64 (1966).
Substitution of military judge after arraignment (or members after assembly).	<u>United States v. Smith</u> , 3 M.J. 490 (CMA 1975); para. 39 <u>e</u> , <u>MCM</u> , 1969.
Incorporation by reference of preliminary instructions.	<u>United States v. Waggoner</u> , 6 M.J. 77 (CMA 1978).
Hearsay.	<u>United States v. Porter</u> , 7 M.J. 32 (CMA 1979); <u>United States v. Neutze</u> , 7 M.J. 30 (CMA 1979); para. 139 <u>a</u> , <u>MCM</u> , 1969.

Admission of hearsay statement of witness, not meeting requirements of para. 153a, MCM, 1969.

United States v. Self,
5 M.J. 551 (AFCMR 1978).

Insanity.

United States v. Frederick,
3 M.J. 230 (CMA 1977);
paras. 120-24, MCM, 1969.

Improper questions by the military judge or court members.

United States v. Smith,
6 USCMA 521, 20 CMR 237
(1955); United States v. Parker,
34 CMR 601 (ABR 1964).

Improper trial counsel argument prejudicial to the accused's substantial rights.

United States v. Knickerbocker,
2 M.J. 128 (CMA 1977); United States v. Albrecht,
4 M.J. 573 (ACMR 1977).

Improper previous conviction.

United States v. Morales,
1 M.J. 87 (CMA 1975); United States v. Perkins,
48 CMR 975 (ACMR 1974).

Instructions on material issues.

United States v. Sawyer,
4 M.J. 64 (CMR 1977);
United States v. Jones,
3 M.J. 279 (CMA 1977);
United States v. Thompson,
3 M.J. 168 (CMA 1977);
United States v. Grunden,
2 M.J. 116 (CMA 1977);
United States v. Graves,
1 M.J. 50 (CMA 1975).

Substantial overstatement of maximum sentence.

United States v. Harden,
1 M.J. 258 (CMA 1976).

Failure of military judge to take corrective action concerning inattentive court member.

Compare United States v. Groce,
3 M.J. 369 (CMA 1977),
with United States v. Robertson,
7 M.J. 507
(ACMR 1979).

Staff judge advocate/
convening authority disquali-
fication to review.

United States v. Quan,
4 M.J. 244 (CMA 1978).

II. The following matters are not waived unless specifically consented to:

Trial within Article 35
waiting period (knowing
waiver).

United States v. Oliphant,
50 CMR 29 (NCOMR 1974).

Former jeopardy.

Paras. 68d, 215b, MCM, 1969.

Statute of limitations.

Paras. 68c, 215d, MCM, 1969.

Presence of second detailed
counsel at trial.

United States v. Otterbeck,
50 CMR 7 (NCOMR 1974).

Erroneous detail of counsel.

United States v. Wilson,
2 M.J. 683 (AFCMR 1976).

Absence of significant number
of members, without excusal
by convening authority.

United States v. Colon,
6 M.J. 73 (CMA 1978);
United States v. Allen,
5 USCMA 626, 18 CMR 250 (1955).

Voluntariness of a confession/
admission* (See also Category
IV).

United States v. Frederick,
3 M.J. 230 (CMA 1977);
United States v. Graves,
1 M.J. 50 (CMA 1975);
United States v. Rivers,
7 M.J. 992 (ACMR 1979);
United States v. Hartzell,
3 M.J. 549 (ACMR 1977).

Article 15, illegible waiver
provisions, admitted on
sentence.

United States v. Mathews,
6 M.J. 357 (CMA 1979).

Substitution of defense
counsel for Goode review.

United States v. Annis,
5 M.J. 351 (CMA 1978).

*May also be waived by introduction of the confession into
evidence by the defense. United States v. Frederick, 3 M.J.
230 (CMA 1977).

III. The following matters are waived by failure to object (if raised, they will survive a plea of guilty):

Failure to appoint defense counsel upon request during pretrial confinement.

United States v. Jackson,
5 M.J. 223 (CMA 1978).

Denial of request for individual military counsel.

United States v. Quinones,
1 M.J. 64 (CMA 1975); United States v. Mitchell, 15 USCMA 516, 36 CMR 14 (1965).

Challenge of military judge for cause.

United States v. Wisman,
19 USCMA 554, 42 CMR 156 (1970);
United States v. Haynes,
44 CMR 487 (ACMR 1971).

Known disqualification of military judge.

United States v. Griffin,
8 M.J. 66 (CMA 1979);
United States v. Airhart,
23 USCMA 124, 48 CMR 685
(1974).

Amendment of specifications.

United States v. Rodman,
19 USCMA 102, 41 CMR 102
(1969); United States v. Clark,
49 CMR 192 (NCOMR 1974).

Trial on unsworn charges.

United States v. Taylor,
15 USCMA 565, 36 CMR 63 (1965);
United States v. May, 1 USCMA
174, 2 CMR 80 (1952).

Speedy trial.

United States v. Sloan, 22
USCMA 587, 48 CMR 211 (1974);
paras. 68i, 215e, MCM, 1969.

Right to a public trial (closing of court during brief periods of testimony).

United States v. Moses, 4 M.J.
847 (ACMR 1978). But See
United States v. Grunden,
2 M.J. 116 (CMA 1977).

Improper trial counsel argument, not amounting to flagrant abuse of discretion.

United States v. Wood, 18 USCMA 291, 40 CMR 3 (1969); United States v. Doctor, 7 USCMA 126, 21 CMR 252 (1956); United States v. Cain, 5 M.J. 845 (ACMR 1978).

Inadmissible matter introduced by government on sentence (generally).

United States v. Peace, 49 CMR 172 (ACMR 1972).

Prior punishment.

United States v. Florczak, 49 CMR 786 (ACMR 1975); paras. 68g, 215c, MCM, 1969.

Multiplicity.

United States v. Sweney, 48 CMR 476 (ACMR 1974); United States v. Buchholtz, 47 CMR 177 (ACMR 1973).

Failure to hold para. 67f, MCM, 1969, hearing on reconsideration of military judge's ruling.

United States v. Marcott, 7 M.J. 971 (ACMR 1979).

Errors in the post-trial review.

United States v. Morrison, 3 M.J. 408 (CMA 1977); United States v. Barnes, 3 M.J. 406 (CMA 1977).

IV. The following matters are waived by a failure to object and, even if raised, they are waived by a plea of guilty:

Article 32 defects.

United States v. Lopez, 20 USCMA 76, 42 CMR 268 (1970); United States v. Pounds, 50 CMR 441 (AFCMR 1975).

Defects in the pretrial advice.

United States v. Heaney, 9 USCMA 6, 25 CMR 268 (1958); United States v. Henry, 50 CMR 685 (AFCMR 1975); United States v. Eason, 49 CMR 844 (NCOMR 1974).

Minor defects in specifications.

United States v. Crawford,
44 CMR 342 (ACMR 1971);
para. 68, MCM, 1969.

Search and seizure, and other evidentiary motions.*

United States v. Dusenberry,
23 USCMA 287, 49 CMR 536
(1975); United States v. Walters,
22 USCMA 516, 48 CMR 1 (1973); United States v. Blakney,
2 M.J. 1135 (CGCMR 1976). Cf. United States v. Ezell,
6 M.J. 307 (CMA 1979).

Best evidence rule.

United States v. Deller,
3 USCMA 409, 12 CMR 165 (1953);
United States v. Royal, 2 M.J.
591 (NCRM 1976).

"Lawfulness" of arrest, custody, apprehension, and confinement under Article 95

United States v. Wilson,
6 M.J. 214 (CMA 1979).

Voluntariness of a confession (see also Category II).

United States v. Frederick,
3 M.J. 230 (CMA 1977);
United States v. Graves,
1 M.J. 50 (CMA 1975);
United States v. Hartzell,
3 M.J. 549 (ACMR 1977);
United States v. Otero,
50 CMR 888 (CGCMR 1975).

V. The following matters are not waived by a failure to object but will not survive a plea of guilty.

Pretrial exercise of right to counsel and remain silent.

United States v. Ross,
7 M.J. 174 (CMA 1979).

Disqualification of commander to authorize a search and seizure (where Fourth Amendment issue otherwise raised).

United States v. Ezell,
6 M.J. 307 (CMA 1979).

* But in cases of manifest miscarriage of justice, or deprivation of an accused's right to a fair trial, see United States v. Karo, 46 CMR 633 (ACMR 1972).

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

(During Voir Dire of Court Members).

MEMBER: I have a B.A. degree ... and a year and a half of law school at the University of Florida.

TC: I'm just curious. Did you get sick of law school?

MEMBER: Yes.

TC: So did I.

* * * * *

(Accused testifying in extenuation and mitigation).

ACC: I don't even know where my wife and child is, let alone how the marriage is going.

* * * * *

(Cross examination of defense witness in extenuation and mitigation).

TC: OK. What kind of things does your platoon do?

WIT: Well, we don't do too much, basically, but the only time we do anything is when we go to the field, sir.

TC: Well, when you do do something...? (Laughter). Is [the accused] especially a good worker during those times when you don't do anything?

WIT: Yes, sir. (Laughter).

* * * * *

(Guilty plea inquiry).

MJ: At some point did you leave 23d AG?

ACC: Yes sir, I did.

MJ: When was that?

ACC: I left there around March of 78, I believe, sir.

MJ: And what was your reasons for living ... excuse me, for leaving?

* * * * *

MJ: You are a bright individual, is not that correct?

ACC: That was two years ago ... I definitely killed a lot of brain cells since I've been in the Army.

* * * * *

(Government witness responds to defense counsel's cross-examination).

WIT: That was the situation, yes. Got me ... okay ... well, I ... well, the way I said it that way, right ... okay, I see ... what I seen right ... right ... it may not understand ah ... like you said, right, ah ... okay.

* * * * *

(Assault victim testifies that the accused threatened to kill her and then rape her and ...).

VICTIM: I'm not into necrophilia especially when I'm the victim.

* * * * *

DC: The defense has no objection to Prosecution Exhibit 2, except that in parts it's not very legible.

MJ: Let me take a look; if it's too illegible, we'll have to do something because they get offended in Washington if they can't read everything.

