

THE ADVOCATE

A JOURNAL FOR
MILITARY DEFENSE COUNSEL

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PREPARATION OF WITNESSES FOR TRIAL

Regardless of the competence, care and thoroughness with which the trial defense counsel conducts his client's case, certain elements of the case will never appear in the record of trial. The demeanor and appearance of the witnesses are impossible to convey in a trial transcript. Nevertheless, when the case is close (or where the prosecution's witnesses are less than impressive), the proper preparation of witnesses for their appearance at trial can be vital to success. The following fundamentals should assist counsel by highlighting those factors which affect both defense and prosecution witnesses.

The Prosecution Witnesses

First, counsel should always try to "prepare" the prosecution's witnesses prior to trial. This is usually achieved by making thorough use of all discovery tools available. Through careful examination of every pretrial statement, memorandum, file note and transcript of testimony by a potential prosecution witness, a defense counsel will be able to "lock in" the prosecution's case, and prepare for effective cross-examination. Imaginative use of the Article 32 investigation and motion hearings at Article 39(a) sessions will also allow defense counsel to observe, question and limit the prosecution's witnesses. The personal interview of a prosecution witness (always in the presence of a third party) is a final method of "filling in the blanks" in order to prevent a witness from adding harmful details for the first time at trial. Use of all these techniques should enable the defense counsel not only to measure the substance of the prosecution's case, but also to "pre-test" the demeanor and appearance of each prosecution witness. This latter element can be a critical factor in counsel's selection and application of particular lines of attack in cross-examination. It is obvious that the glib prosecution witness has vulnerabilities very different from a cautious or reticent one. By examining each witness (and all of his previous statements) prior to trial, the defense counsel will be better prepared to exploit these vulnerabilities, while avoiding the personal and testimonial strengths of the prosecution's witnesses. CAVEAT: Do not reveal weaknesses or inconsistencies discovered in the witness' story by making the witness repeat those portions of his narrative over and over or by demonstrating obvious surprise or glee at the discrepancies revealed. Although the witness may not understand the reaction or remarks made, he may convey his observations to the trial counsel who in turn would recognize the problem and work to diminish its impact prior to the courtroom presentation of the witness' testimony.

The Defense Witnesses

Before any potential witness becomes a prospective witness for the defense, counsel must satisfy himself of the necessity, effectiveness and stability of the witness. Not every person with knowledge about a case can or should be a defense witness. If the defense can choose among several witnesses for a given piece of testimony or limit each of several witnesses to individual areas of testimony, then the decision as to which witnesses testify to what should be given consideration by counsel before trial.

When the defense counsel first interviews a witness (N.B.: where such an interview might be necessary for later use at trial, e.g. impeachment, a third party witness should be present), certain characteristics of the witness should be measured by examining counsel. First, does the witness have an ability to recall and convey whatever he knows forthrightly and effectively? Where the defense theory in an assault case is provocation, a witness who is unable to convincingly describe the manner in which the "victim" menaced the client is of little value despite his presence as an eyewitness. Does the witness tend to either underplay or overplay reality and/or expression? A witness who exaggerates is very vulnerable on cross-examination, as is a defense witness who, consciously or unconsciously, underplays a defendant's role in a particular event. Counsel should test each potential witness to discover such tendencies. Further, if time and/or distance are important, counsel should test a potential witness' ability to perceive, measure and convey these variables. If drawings or visual aids are to be used, can the witness translate his memory and testimony into a drawing or an exhibit? Can the witness physically cope with an exhibit or chart while he testifies before the fact-finders?

Are there any special strengths or weaknesses in a particular potential witness? Is the desired (and expected) trial testimony in conflict with any of this person's prior statements or testimony? If so, can the inconsistencies be resolved credibly? Does the witness have a reasonable pace and can he be relied on (or schooled) to avoid rambling beyond a question's scope?

Does the witness convey a credible appearance? In some cases a witness is being called for a negative purpose, in such cases of course, a negative answer as to credibility is the proper one. Would a potential witness be more effective as a primary witness or as a supporting witness? Can the witness be relied on to avoid verbal sparring matches with trial counsel? Is he likely to become an actor or to show overt leanings while on the stand?

Each of these questions touches on an area of concern for the defense counsel who must (or hopefully has the luxury to) choose among potential witnesses. Once a witness has been selected (or where there is a necessity and no choice), counsel should continue to prepare his witness, based upon his trial strategy, the witness' knowledge and counsel's earlier evaluations of the witness himself.

First, the witness must be made to understand the principles of the case and the scope of his utility within it. Counsel should try to prepare a witness with the objective of eliciting organized, yet spontaneous, testimony. The witness should, prior to testifying, examine all his prior statements, testimony and work-product. If a physical scene is important, counsel should take the witness to the site. If exhibits or aids are going to be used, counsel should show them to the witness prior to trial and allow the witness to work with them during the preparatory stages of the case, having marked identical copies, in the same manner as he will in court. Direct the witness to listen to questions, think and then answer in a crisp, clear voice directing his voice and gaze toward the fact-finder. Block a witness' tendency to act, to embellish or to slant his testimony toward one party.

Prepare the witness for anticipated areas of cross-examination (but do not suggest answers or allow the witness to conclude that you are counselling him to be untruthful). Urge the witness to avoid arguing or fighting with opposing counsel (but remind the witness that, if counsel has asked for a yes/no answer when one is not possible, he should say so politely). School the witness to listen to opposing counsel's questions and think before answering (thereby allowing counsel time to frame objections). The witness should also be told to respond only to the trial counsel's question and not to volunteer information or detail. Warn the witness to be firm in his answers but to avoid unnecessarily absolute positions. Remind the witness that you, on re-direct examination, will give him an opportunity to explain any matters which have been touched upon in cross-examination. Also assure the witness that you, through objections, will protect the witness from embarrassing questions or badgering by opposing counsel.

Finally, show the witness the courtroom and show him where he and all the other participants in the case will be located in the courtroom when he testifies. While counsel may properly view the courtroom as familiar territory, the witness may consider a courtroom to be an imposing, if not terrifying, place. Counsel should be on guard to prevent a truthful and effective witness' testimony from being destroyed by fright or nervousness.

Appellate government counsel (and judges), when searching for reasons to sustain the sufficiency of the government's evidence, often refer to the fact-finder's ability to see the witnesses and test their credibility and demeanor. Defense counsel should recognize the value of these factors as essential elements in a trial strategy and include them in the preparation of each witness in every case.

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EDITORS' NOTE

THE ADVOCATE has, over the past eight months, made several changes in its operations. Not the least of these has been a much-improved schedule of publication. The Board of Editors has attempted to meet the bi-monthly publication objective while maintaining a high level of "product" in both qualitative and quantitative terms. In addition, THE ADVOCATE itself has received a face-lift in order to make it more readable. While all the major changes in the journal have been made, the Board will be making a few further adjustments. Therefore, at this point in our operation the Board wishes to solicit the comments, suggestions, criticisms and ideas of all those who read and use THE ADVOCATE. The Board has always welcomed manuscripts from trial defense counsel for consideration for publication. This particular solicitation, however, goes beyond that to a request for your thoughts on how THE ADVOCATE is assisting your performance of military justice duties. A formal letter is not necessary, just tell us what is on your mind. Write to:

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* * *

SUSPENSION POWER AND THE MILITARY JUDGE:
DOES HE OR DOESN'T HE?

Military law practitioners generally believe that the military judge has no authority, inherent or statutory, to suspend all or a portion of a sentence. However widespread and well-entrenched this belief now is, its validity is being tested in a Navy case pending before the United States Court of Military Appeals, United States v. Occhi, Docket No. 31,663, petition granted 12 March 1976. This article will explore the framework in which Occhi arose, the statutes and case law relevant to the issue, and the potential implications for military trial defense counsel.

Background Facts of United States v. Occhi

The precise issue granted by the Court in United States v. Occhi, supra, is as follows:

Whether the military judge had the power to suspend those portions of the sentence as he recommended be suspended by the convening authority, under the provisions of 18 U.S.C. 3651.

As the granted issue suggests, the military judge who sentenced Occhi had not attempted to adjudge a suspended sentence; he simply recommended that the convening authority take certain suspension actions. Also significant is the fact that the Navy appellate defense counsel who are representing Occhi did not raise the issue of whether the military judge had suspension power. Instead they had urged that the military judge's recommendation had impeached his sentence. The Court of Military Appeals itself specified the issue of whether the Probation Act, 18 U.S.C. Section 3651, empowered the military judge to sua sponte suspend portions of an adjudged sentence. Whether the fact that the granted issue was originated by the Court is of any great significance in predicting the ultimate disposition is questionable, but guarded optimism seems justified.

Two facts appear clear: (1) If the Court finds that military judges do have suspension authority, such authority will almost certainly be found to emanate from the Probation Act, 18 U.S.C.

Section 3651; and (2) If military judges are now found to have suspension authority, that authority will have to be found to have been pre-existing, but previously unperceived. Otherwise, the Court of Military Appeals will find itself in the position of judicially creating the power.

History and Analysis of The Probation Act

In Ex Parte United States, 242 U.S. 27 (1916), the Supreme Court of the United States held that no Federal court possessed the inherent power to suspend any sentence it adjudged, and that any power to suspend would have to be granted by statute. In 1925, at least partially in response to the Supreme Court's decision, the Congress passed a Probation Act (March 4, 1925, ch. 521, Section 1, 43 Stat. 1259). The act was made applicable to "the courts of the United States having original jurisdictions of criminal actions" 18 U.S.C. Section 724 (1928 ed.). In 1948, the above quoted language was changed to "any court having jurisdiction to try offenses against the United States", (June 25, 1948, ch. 645 Section 1, 62 Stat. 842, eff. Sept. 1, 1948), its present form.

The Reviser's Note indicates that the Congressional intent in making the referenced change was to make it clear that "the probation system is available for the rehabilitation of Federal offenders in the Territories and Possessions as well as in the continental United States."

The cited change is relevant for two reasons to the issue of whether military judges are included in the power granted by the Probation Act. Of prime significance is the fact that the present language is clearly broad enough to encompass military courts-martial. The second reason is that the above-stated rationale for the change in the language of the statute results in the application of the act to courts other than courts created under Article III of the United States Constitution, thus rendering impotent the argument that military courts are not included within the statute simply because they are not Article III courts.

Previous Military Cases on Suspension Power

All military cases to this point which have addressed the issue have held that courts-martial and/or military judges are not imbued with suspension powers. In United States v. Simmons, 2 USCMA 105, 6 CMR 105 (1952), the United States Court of Military Appeals held that the various service boards of review were not

empowered to suspend a punitive discharge. The rationale employed by the Court in Simmons, supra, was basically two-pronged: (1) Inasmuch as no court possesses inherent suspension power (citing Ex Parte United States, supra), there must be a legislative grant of the power if it exists. As there was no such express grant, the Board of Review did not possess the power to suspend a punitive discharge. (2) Historically, the power to suspend sentences had been vested "in those reviewing authorities which had the power to order execution of a sentence." Since a board of review had no power to order a sentence into execution, it could not possess suspension power.^{1/}

The Simmons rationale was applied to courts-martial in United States v. Marshall, 2 USCMA 342, 8 CMR 142 (1953). The Marshall court did not, however, consider the applicability of the Probation Act to military courts. Over the years, the military appellate courts have consistently followed the Simmons-Marshall holding and have never, before Occhi, considered the applicability of the Probation Act to courts-martial and/or military judges. By the time United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973), was decided, the "dogma" had become so entrenched that Judge Duncan, in his concurring/dissenting opinion, no longer even felt compelled to cite any authority for his footnoted comment that:

Military judges have no power to suspend sentences whether adjudged by them or by a court-martial with members. United States v. Lallande, supra, at 177.

There is one reported Army case in which the military judge purportedly suspended a bad conduct discharge acting, as he stated, "pursuant to the provisions of Title 18, United States Code, Section 3651." United States v. Pierce, 43 CMR 609 (ACMR 1970). Unfortunately, before the Court of Military Review, the applicability

^{1/} It is worthy of note that the precise issue in United States v. Simmons, supra, i.e. whether the intermediate military appellate tribunals can suspend a sentence, has recently been certified to the Court of Military Appeals by The Judge Advocate General of the Navy. United States v. Silvernail, No. 32,530, certified 14 June 1976. In Silvernail, the Navy Court of Military Review, in a bold and well-reasoned opinion, held that Article 66 authorized Courts of Military Review to affirm only a suspended sentence as a matter of sentence appropriateness. In so holding, the Court distinguished Simmons. As Judge Fulton stated in his concurring opinion: "Time has sapped the vitality of Simmons." Should the Court of Military Appeals uphold the Navy Court's action, the impact on the sentence appropriateness function of the Courts of Military Review will obviously be of great magnitude.

of the Probation Act to the military judge was not urged by appellate defense counsel. As the Court noted:

Neither party contends that the military judge had legal authority to suspend the imposition or execution of sentence by virtue of the provisions of 18 USC Section 3651. Rightly so, of course. That statute is clearly inapplicable to courts-martial, including one consisting of a military judge sitting without members. We reiterate what we said recently in United States v. Bowman, 42 CMR 825 (ACMR 1970),

"...Those tribunals are not a portion of the Judiciary of the United States. They are part of the Executive, rather than the Judicial, branch of our Government. United States v. Nelson, 2 CMR (AF) 841 (AFBR 1949); United States v. Castro, 28 CMR 760 (AFBR 1959), and cases cited therein. The observation of Colonel Winthrop, in his classic work on military law is worthy of note:

'None of the statutes governing the jurisdiction or procedure of the "courts of the United States" have any application to [a court-martial].'

What everyone involved in Pierce ignored was that the quotation from Winthrop was wholly irrelevant to the question of the applicability of the Probation Act to courts-martial. Winthrop specifically refers to those statutes concerning "courts of the United States" which is a term of art, and which clearly does not include military courts. The Probation Act, however, was, by its amended terms, made applicable to "any court having jurisdiction to try offenses against the United States...", not to "courts of the United States." The difference may be crucial in the Occhi case.

Status of Military Judges in Modern Framework of Military Justice

Another factor which bears on the issue of the applicability of the Probation Act to military judges (but which is somewhat beyond the scope of this article), is the steadily increasing stature of the military judge since his elevation to that status in 1968. An excellent article on this subject is Stevenson, "The

Inherent Authority of the Military Judge," 17 AF L Rey. 1(1975). It should simply be noted that recognition of suspension authority in military judges is consistent with the expressed general intent of Congress in creating such judges. As Senior Judge Ferguson observed in his concurring opinion in Courtney v. Williams, et.al., 24 USCMA 87, 51 CMR 260 (1976):

The legislative history...convincing me that it was the intent of the Congress in changing the title of the "law officer" of the 1950 Code to "military judge" and in effecting the significant substantive changes in the Code regarding the powers and responsibilities of the military judge, that the holders of that office have all of the prestige and authority of other federal trial judges wherever practicable. Id. at 264.

Defense and Government Positions in United States v. Occhi

The appellant's brief in United States v. Occhi makes the following major arguments:

- (1) The language of the Probation Act is clear and unambiguous on its face, and is certainly broad enough to encompass military courts-martial; the inquiry therefore need not proceed beyond the face of the statute.
- (2) Although Article 71 and 74 of the Code do not list military judges among those eight individuals who are empowered to suspend sentences, neither do those Articles, or their legislative history, proscribe the exercise of such power by military judges. There is no need to give to the military judge in the Uniform Code that authority which he already possesses by virtue of the Probation Act whereas those individuals who are enumerated in the Code clearly would not otherwise be so empowered.
- (3) The recognition of the applicability of the Probation Act to courts-martial is consistent with the legislative intent of Congress in creating military judges, and with the increasing trend towards upgrading the stature of military judges to the desired level of parity with Federal district judges.

The thrust of the government's arguments in reply are as follows:

- (1) No court has inherent suspension power absent statutory grant.
- (2) While the language of the Probation Act might be sufficiently broad to encompass courts-martial, in fact, the Act is not applicable to military courts. This is evidenced by the location of the Act in Title 18 of the United States Code which "is generally recognized" to "apply to criminal trials in the federal district courts, and not to criminal trials held in the military service." (Government Brief at 2).
- (3) The 1948 Amendment to the Probation Act was solely for the stated purpose of broadening the statute to encompass the territorial Federal criminal courts and was not intended to include military courts-martial.
- (4) The failure of the Congress in the Uniform Code or elsewhere to specifically delineate military judges as among those empowered to suspend sentences is strongly indicative of an intent to exclude them from the exercise of that power.
- (5) The unique needs and demands of the military justice system make the supervision of a probation system such as that envisioned in the Probation Act unworkable in the military.

Implications for Practice

If the decision of the Court of Military Appeals in United States v. Occhi is favorable, the resulting impact on defense practice before courts-martial is obvious. Implications for trial practice pending the decision might be less obvious and, therefore, merit discussion. As noted at the outset, if the Court finds suspension power to exist in military judges, they almost assuredly will find that it has existed for some time without being recognized or exercised. Therefore, trial defense counsel should be especially covetous of "recommendations for suspension" by military judges since those "recommendations"

might well be held to be suspensions per se whether or not the convening authority follows the recommendation. Certainly the number of cases now pending before the Court in which petitions for review have been granted on the Occhi issue would indicate the value of such recommendations by military judges.^{2/}

Obviously, it would be an ideal situation if a military judge could be persuaded to actually exercise his authority under the Probation Act, such as the military judge in United States v. Pierce, supra, did (albeit to no avail on appeal). In light of the granted issue in Occhi, another judge, now sitting, might be willing to take the same initiative. Another alternative, practicable with particular judges, is to get a statement from him on the record of trial, or by affidavit post-trial (hopefully prior to action), that if he were empowered to suspend his adjudged sentence, or portions thereof, he would, in fact, have done so. Perhaps none of these alternatives will work in every situation or location, but it should at least be clear that the "recommendation" of the military judge is now to be given much more attention than might have been the case pre-Occhi.

* * *

STIPULATIONS

"Stipulations of fact ... intended to avoid delay, trouble, or expense in the trial are well-recognized and accepted substitutes for other competent sources of proof or the direct testimony of witnesses." United States v. Cambridge, 3 USCMA 377, 12 CMR 133 (1953). Eliminating the need for one party to put witnesses on the stand or to introduce documentary evidence to prove a fact which is uncontested by the other party not only has the obvious advantages noted by the Court in Cambridge, supra, but also allows the parties to quickly address those contested issues upon which the determination of the guilt or innocence of the accused will rest. However, while stipulations of fact can be used by the trial defense counsel to his client's advantage, he must constantly guard against the possibility that he has stipulated to more than he desires. What is intended to be a stipulation to a simple fact, easily proven by the prosecution, all too often goes beyond the one fact, knowingly conceded, to embrace other

^{2/} To date, there have been in excess of fifty grants of review. In all of them that have been examined, nothing more substantial than a "recommendation" for suspension was made by the military judge.

facts which can be, and are intended to be, contested. Therefore, care in the drafting of a stipulation of fact is of the utmost importance. It must be remembered that the accused can never be forced to enter into a stipulation and an unfavorable stipulation should not be entered into.

In United States v. Cambridge, supra, the United States Court of Military Appeals makes clear that an accused is bound by a stipulation entered into by his counsel even though the accused did not personally and expressly join in it. The Court stated the proposition that, "Ordinarily, statements made by defense counsel will bind the accused as effectively as though the accused himself had made them." Id. at 382, 12 CMR at 138. While the military judge should insure that the accused joins in the stipulation, it is clear that the primary responsibility for its contents rests with the defense counsel. In view of this, the accused should always be shown a copy of the stipulation well before trial or at least as soon as it is drafted.

In United States v. Robinson, CM 433995 (7 April 1976), an unpublished opinion, the Army Court of Military Review set aside a conviction for bigamy, upon finding that the military judge relied upon a stipulation of fact in determining the providency of the pleas without inquiry of the accused concerning the accused's knowledge of his right not to stipulate. Citing United States v. Cambridge, supra, the Court held that further inquiry concerning the conditions surrounding the stipulation was necessary to insure a provident plea. Thus, defense counsel should always explain to the accused what it means to stipulate, i.e. that he is admitting that the particular fact is true and agrees to its consideration by the finder of fact and/or sentencing authority. A discussion of its use and impact should follow, for the accused must be made aware that he is bound by the stipulation. All too often at the appellate level the accused complains that he did not realize that the stipulation was going to be used, for example, in the providency inquiry, or that if he had truly realized what the stipulation really said he would never have agreed to its submission to the court. The extra time and effort to educate and prepare the accused is well-spent if, for no other reason, it minimizes the chances of improvident pleas and later claims of inadequate assistance of counsel.

One of the most heavily litigated areas in regard to stipulations of fact concerns the issue of whether the stipulation in question is tantamount to a confession to all the elements of

the offense, even though the accused has pled not guilty. Paragraph 154b(1) of the Manual for Courts-Martial, United States, 1969 (Revised edition), states: ". . . If an accused has pleaded not guilty and the plea still stands, a stipulation which practically amounts to a confession should not be received in evidence." A petition for review in an Air Force case involving this very issue was recently granted by the United States Court of Military Appeals. See United States v. Hurlburt, No. 31,435, petition granted 1 June 1976. In previous cases, the decisions have turned on whether the stipulation actually admitted all the elements. For example, the Court of Military Appeals has held that a stipulation of fact was not the equivalent of a confession because the element of intent necessary to a desertion charge was lacking from the stipulation. United States v. Wilson, 20 USCMA 71, 42 CMR 263 (1970). The Army Court of Review has held that a stipulation was erroneously received into evidence at a court-martial for larceny because it indicated that the accused took a checkbook with the intent to deprive the owner of it at least temporarily; and, although he had given no thought to what he would do with it in the future, he later took one check from the book to present for payment and then decided not to return the book to the owner. United States v. Greene, 43 CMR 737 (ACMR 1971). In another case, the Air Force Court of Review held that, although the stipulation practically amounted to a confession, its admission was not error where the military judge pointed out the inconsistency with the plea of not guilty and defense counsel responded that the accused did not wish to dispute the evidence, but rather entered the plea of not guilty solely for the purpose of preserving for appellate review adverse rulings on certain preliminary motions, whereupon the judge then conducted a Care inquiry. United States v. Rempe, 49 CMR 367 (AFCMR 1974).

While the issue of whether the stipulation practically amounts to a confession in contradiction to one's plea of not guilty is a readily apparent one, and hopefully had been considered by defense counsel when dealing with a stipulation of fact, a more subtle problem is the possibility of stipulating to more than one intended. Although potentially as detrimental to an accused, this problem is not as apparent and thus the defense counsel must be most vigilant to guard against it. A couple of examples will serve to illustrate the problem.

Fairly common is the chain of custody in drug cases where there is no question as to the procedures followed or as to the chemist's findings. All too often in stipulating to chain of custody defense counsel inadvertently also stipulate to

knowing and conscious possession or ownership of the substance seized and/or the location where they are discovered when, in fact, defense counsel intended to contest one or more of the above factors. Consider, for example, a situation where a controlled substance was found in a coat in the accused's locker, and the stipulation provides that the substance found in the accused's coat in his locker was controlled when defense counsel intended to contest ownership of the coat. A small but exceedingly important slip! If the decision is made not to contest the chain of custody or the laboratory findings, field defense counsel should limit the stipulation to a statement that the substance offered in court was seized by A, properly receipted for by B, the evidence custodian who in turn properly transmitted the item(s) to the laboratory where they were tested and then returned with the accompanying lab report in the regular course of business.

A recent case at the appellate level illustrates the problem concerning the inclusion of uncharged misconduct in the stipulation. This particular case involved an accused who went AWOL to avoid trial by a BCD special court-martial for alleged drug offenses. Upon his return some ten months later, he was merely charged with the AWOL, presumably because the delay resulted in the loss of the real evidence or documents necessary to perfect the government's case on the drug offenses. Having decided to plead guilty, the accused entered into a stipulation of fact as required by the pre-trial agreement. This stipulation of fact, to be introduced after findings, as initially drafted by the trial counsel noted that the accused went AWOL the day before his trial for drug offenses and then proceeded to enumerate all the dangerous drugs involved. The accused's defense counsel promptly had all reference to dangerous drugs eliminated, but trial counsel insisted upon the inclusion of a provision pointing out that the accused was scheduled to be tried by a BCD special court-martial the day after he went AWOL. Although the military judge was not informed that the accused was involved, he certainly was put on notice that the accused was facing serious charges when he went AWOL. While the propriety of this particular stipulation of fact and the pressure placed upon the defense counsel is still to be resolved on the appellate level, it is an example of a case when trial defense counsel (albeit, in this particular case, against his wishes) stipulated to more than the mere fact that the accused went AWOL.

The problems faced by the defense counsel in the immediately preceding example emphasize a point which should always be kept in mind: the defense counsel should always attempt to draft the stipulation of fact! A stipulation of fact drafted by the defense counsel will ideally include only those facts to which he is willing to stipulate, cast in the most favorable light possible.

The inclusion of uncharged misconduct will be minimized. If trial counsel objects to the wording or desires the inclusion of further facts, prepare another draft. Negotiate from your strength, i.e. your draft, not from his. It is apparent that all too often the defense counsel and his client are presented at the eleventh hour before trial or at trial with a stipulation drafted by trial counsel sometimes containing every bit of damaging but irrelevant remarks from a pretrial statement. The defense counsel is then forced to seek changes under severe time constraints. Although defense counsel could ask for a recess in order to negotiate or, of course, to refuse to stipulate at all, such a situation is obviously not conducive to a stipulation of fact favorable to the defense. By drafting the stipulation himself, the defense counsel can turn the tables. He can force the trial counsel to either get his witnesses or to enter into the stipulation as drafted by the defense counsel.

Stipulations of fact are useful to save time and expense. They can also be used to prevent the disclosure of detrimental information, e.g., the extent of injury in a particularly savage assault. Stipulations can, and ought to be, utilized, but only if they are in the best interests of the accused. A stipulation of fact carefully drafted by the defense counsel and then presented to the trial counsel is strongly recommended as the means most certain to serve, not impair, the accused's interests.

* * *

MINIMIZING THE EFFECTS OF ARTICLE 58(a)

As every defense counsel knows, Article 58(a) of the Uniform Code of Military Justice requires automatic reduction to E-1 for any enlisted member convicted by court-martial and sentenced to a punitive discharge, any period of confinement, or any hard labor without confinement. This is so even though the accused may have been explicitly sentenced to an intermediate reduction by the sentencing authority or to no reduction at all. The reduction is also automatic even if one or all of the triggering elements are suspended by the convening authority. The reduction becomes effective at the time the convening authority approves the sentence. Understandably, this sudden loss of rank can have far-reaching effects on those lucky few who manage to get their sentences suspended, especially if the subject individual is an NCO at the time of trial. The anxiety and burden of serving

in a new unit with a suspended sentence is not made any easier by going to the unit as an E-1.

However, reduction by operation of law need not be the inevitable result of every court-martial sentence including one of the above elements. Article 58(a) requires such reduction "[u]nless otherwise provided in regulations to be prescribed by the Secretary concerned." The Army has such a regulation. Paragraph 7-64a(4)(b), Change 53 to AR 600-200, dated 30 April 1975, provides as follows:

Exception. An individual whose sentence to punitive discharge, confinement, or hard labor without confinement is approved may be probationally retained in the grade held by him at the time of sentence or in any intermediate grade if the convening or higher authority taking action on the case suspends execution of the above specified elements of the sentence and provides in his action that the individual shall serve in that grade during the period of suspension, and thereafter, unless the suspension is vacated prior to termination of the period of suspension.

It is therefore possible for a convicted enlisted member to retain his rank (or at least some of it) and the dignity that goes with it during the period of suspension. However, counsel should be aware of the fact that, unlike the provisions of Article 58(a), there is nothing automatic about the exception. It must be expressly directed by the convening authority at the time he takes his action. A form for this type of action can be found in Appendix 14 of the Manual for Courts-Martial, United States, 1969 (Revised edition). See Form No. 51 at A14-7 in the Manual. Enterprising counsel might even wish to draft such a form for the convening authority's signature for use when submitting the response to the staff judge advocate's review.

Counsel should not presume that the staff judge advocate will go out of his way to make the convening authority aware of this very useful clemency tool. The staff judge advocate may be unaware of it, or worse yet, he may conclude that it is the responsibility of the defense counsel to make such a recommendation to the convening authority in a petition for clemency or in the defense response to the staff judge advocate's review. The Army Court of Military Review has consistently held that the staff judge advocate has a responsibility to inform the convening

authority of his options in this regard. See United States v. Matarazzo, 48 CMR 700 (ACMR 1974); United States v. Parker, 44 CMR 330 (ACMR 1971); and United States v. Ray, 42 CMR 583 (ACMR 1970). Unfortunately, corrective action at the appellate level often takes months, and occasionally, even years. If relief from automatic reduction is to be forthcoming at all, it should be sought before the accused is reduced in rank. In United States v. Parker, supra, at 332-333, the Court of Military Review made the following observations:

In a case such as this, where the provisions of Article 58a, supra, would automatically operate to reduce an accused to Private E-1, and it is the recommendation of the staff judge advocate that the sentence be suspended and the accused restored to duty, it is incumbent upon him to advise the convening authority, in his post-trial review, of his powers under AR 600-200, supra, to retain the accused in the present or any intermediate grade; and also, of the accused's attendant automatic reduction to Private E-1 if he fails to provide specifically to the contrary in his action. . . . Of course, such advice should always be accompanied by the recommendation of the staff judge advocate as to whether the accused should be reduced to Private E-1, retained in present grade, or in some intermediate grade.

• In a footnote to that passage, the Court added:

Clemency actions which allow retention in present or intermediate grades are an oft-ignored power of the convening authority. Staff judge advocates should make their respective convening authorities well aware of the pertinent provisions of AR 600-200, and Appendix 14d, MCM. . .

In guilty plea cases involving pretrial agreements, a provision suspending the triggering elements of Article 58(a) should also include an agreement to direct that the accused serve his suspension in his present or some designated intermediate grade. In not guilty cases which yield a recommendation for suspension from the sentencing authority, the defense counsel should seek the concurrence of the staff judge

advocate and make sure that the power to retain the accused in grade during the period of suspension is brought to the convening authority's attention.

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ARTICLE 134 VS ARTICLE 92--RESOLVED OR NOT?

On 2 July 1976, the United States Court of Military Appeals rendered its decision in the case of United States v. Courtney on the question of whether prosecution of drug offenses in the military under Article 134 as opposed to Article 92 of the Uniform Code of Military Justice constituted a denial of due process and equal protection. The majority opinion written by Chief Judge Fletcher concluded that the present system is characterized by "an utter lack of guidance", and that regardless of which Codal provision was utilized, the drug offense was "intrinsically the same".

[T]he difference in penalty consequences is generated not from the accused's illegal act but rather solely from the accuser's unbridled discretion to charge the offense either under Article 92 or Article 134. (Ms. op. 5)

Applying these two findings to the test enunciated in Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court concluded that:

[I]t is the utter lack of guidance coupled with the existence of two statutes which because of the table of maximum penalties punish virtually identical conduct in different ways that violates the Fifth Amendment." (Ms. op 6)

It is, of course, the position of THE ADVOCATE that the rationale and holding of Courtney is applicable to all cases, and that, therefore, sentence relief should be accorded to all cases in which the action has been taken. Government appellate has argued that Courtney is limited to its facts, and filed a petition for modification and reconsideration to the United States Court of Military Appeals in the case of United States

v. Jackson, which was reversed by order on the same day as Courtney. This petition was denied on 26 July 1976; however, the government and, at least certain members of the Army Court of Military Review, are persisting in the view that Courtney is a limited case. Until more definitive guidelines are set forth in the "follow-up" cases, a question still remains as to whether the defense must litigate this matter at trial, as was done in Courtney, in order to preserve the error. With this question remaining, and in order to maximize relief for clients whose cases have yet to be tried, the following procedures are suggested for use as applicable.

When negotiating a pretrial agreement, attempt to "lock" the convening authority into the punishment set forth for a violation of Article 92, rather than Article 134. If such is not possible, make clear on the record that the quantum portion of the agreement is based on a maximum imposable sentence determined under that portion of the table of maximum punishments for a violation of Article 134, and your position that, in light of Courtney, this was erroneous.

If, as is occurring at some installations, pursuant to advice or directives from the staff judge advocate or convening authority, only Article 134 is being utilized, counsel must also be prepared to make his record. If these directives have been put in writing, they should be included as appellate exhibits. Depending upon the commander, either live testimony or stipulations should also be presented to demonstrate the particular policy being utilized and any aspects of an additional issue of command influence existing beyond the pure "134 vs 92" issue.

At trial in a contested case, counsel should move for a new pretrial advice and, if possible or useful, a new Article 32 investigation on the basis that the primary reason for the case being referred to a general court was the fact that the maximum imposable sentence was improperly determined, and that the figure used was so inflated as to cause referral of the case to a higher court than that which was called for on the basis of the actual act in question. This motion is obviously more likely to be favorably received in cases involving use or possession of small amounts of marijuana or "soft" drugs which are often referred to BCD or straight special courts.

At the trial, whether the case be contested or not, move to have the judge rule that the maximum imposable sentence is limited to that set forth for a violation of Article 92,

and if sentence is to be imposed by court members, request that the judge instruct them to that effect. If he refuses, have him set forth, on the record, his specific reasons for his ruling and/or failure to instruct.

It was hoped that the United States Court of Military Appeals in Jackson would eliminate any remaining confusion on the question of the necessity for the defense to litigate this matter, but the denial of the government petition without opinion has apparently failed to resolve the confusion in the government's mind. In the interim, litigating the matter and preserving the record is imperative, and, even should litigation not be made mandatory, it is highly desired in terms of achieving meaningful relief in the given case. Assuming litigation of the issue will ultimately be deemed a prerequisite, then such action is imperative. Even should this not be required, the litigation will serve the dual purpose of enhancing the chance for meaningful sentence relief on appeal and alerting the United States Court of Military Appeals to the fact that the mandate of Courtney is being ignored.

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EDITOR'S NOTE

The Court of Military Appeals is now publishing a daily journal of proceedings, including listings of current granted issues, which may be quite helpful to trial defense counsel. Distribution to the field is currently limited, except in the Air Force. COMA is now consulting with the Army and expects dissemination of the daily journal to every SJA office in the near future. It is also contemplated that the first six months of the journal will be cumulated and published along with the regular advance sheets.

The Clerk of Court at COMA wants to assure the widest distribution of these COMA publications. If, in the near future, field defense counsel find that they are not receiving slip opinions or the journal via existing distribution, they are urged to contact THE ADVOCATE so that this information can be conveyed to COMA.

RECENT OPINIONS OF INTEREST

FEDERAL CASES

ARREST-WARRANTLESS

United States v. Santana, ___ U.S. ___ (June 24, 1976).

The Court held that the vestibule of one's own house is a public place and a warrantless arrest based upon probable cause does not violate the Fourth Amendment. Justice Rehnquist stated that there is no expectation of privacy in an area of one's own house which is exposed to public view.

IMPEACHMENT

Doyle v. Ohio, ___ U.S. ___ (June 17, 1976).

The Fourteenth Amendment Due Process Clause forbids the prosecution from using the accused's silence post Miranda warnings for impeachment purposes. This is because every post arrest silence is "insolubly ambiguous" and also because Miranda warnings carry the implicit assurance that silence will not be penalized.

DISCOVERY

United States v. Agurs, ___ U.S. ___ (June 24, 1976).

The defense moved for a new trial after discovering a murder victim's prior criminal record which the defense felt could have materially aided its self-defense theory at trial.

A prosecutor needn't divulge all exculpatory matter, whether there is a general Brady request or no request at all. The following standard of materiality was set down by the Court: "...if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Therefore, the entire record must be examined to determine if the omission is material.

SEARCH AND SEIZURE

South Dakota v. Opperman, ___ U.S. ___ (July 6, 1976).

The Court upheld a warrantless inventory search of an auto after it had been impounded for multiple parking violations.

Such routine inventories are reasonable under the Fourth Amendment; the expectation of privacy in one's auto is held to be significantly less than that in one's home or office.

DOUBLE JEOPARDY-MISTRIAL

United States v. Kessler, 19 Cr. L. 2165 (C.A. 5, 5/3/76).

The Government intentionally used an exhibit it knew to be false to establish a weapons smuggling conspiracy. The prosecution knew that the weapon had no known nexus with the alleged conspiracy. The defendant was forced to move for a mistrial. Such prosecutorial overreaching triggers an exception to the general rule that a defendant cannot invoke a double jeopardy bar when he is the one who seeks the mistrial.

SEARCH AND SEIZURE

United States v. Kim, 19 Cr. L. 2281 (D.C. Hawaii, 6/9/76).

Governmental use of a telescope and binoculars to peer into a suspect's residence constitutes a search within the meaning of the Fourth Amendment. The protections inherent in the Fourth Amendment must grow along with technological advances in society.

COMA OPINIONS

ARTICLES 134 AND 92

United States v. Courtney, 30,864, 2 July 1976.

Relying on the rationale of Skinner v. Oklahoma, 316 U.S. 535 (1942), COMA held that whether drug offenses are charged under Article 134 or 92 of the Code, the penalty consequences should conform to those set out under Article 92, otherwise a Fifth Amendment violation occurs. The more severe penalty consequences arising under Article 134 are generated by the "accuser's unbridled discretion" rather than varying "degrees of evil". After testing for prejudice, a reassessment of the sentence was mandated.

COMA also advises, by footnote, that similar equal protection issues are raised in cases charged under Article 92 where the accused is subjected to a more serious penalty than

that imposable for the same misconduct under Article 134 (when an offense charged under the "crimes and offenses not capital" clause of Article 134 requires resort to the D.C. Code or the U.S. Code as appropriate.

See also, NOTE, supra at page 18.

HAIRCUTS

United States v. Young, 30,103, 2 July 1976.

Young was charged with failure to obey an order "to get his hair cut". The Court voided Young's conviction because the commander used "an impermissible criterion". While the commander had specified that the bulk of the hair could not exceed 2 inches, the regulation merely stated that the length could not be excessive, or interfere with the wearing of headgear. Hairstyles are to be judged solely by the criteria set down in the regulations.

While reversing on this narrow ground, the Court rejected any equal protection argument and the proposition that hair length should not be regulated at all, citing Kelley v. Johnson, ___ U.S. ___, 96 S. Ct. 1440 (1976).

Chief Judge Fletcher dissented in part, arguing that the ultimate offense was a failure to obey the regulation and there was sufficient evidence to show that this standard had been violated.

CMR DECISIONS

DEFENSE COUNSEL REBUTTAL TO SJA REVIEW

United States v. Myhrberg, 11830, 16 July 1976.

In an en banc decision, CMR made it clear that waiver will be invoked for any error in a post-trial review which is not rebutted by trial defense counsel, unless the application of the waiver doctrine "would result in a manifest miscarriage of justice".

ARREST-DWELLING HOUSE

United States v. Jamison and Trimiew, 11291, 21 June 1976.

Forced to justify a seizure based upon a search incident to arrest theory, the Government faces severe restrictions where the arrest can only be made by entering a dwelling house. Held: "absent exigent circumstances, appropriate authorization by a responsible commander based upon probable cause must be obtained before a private dwelling may be entered to make an arrest even though the person entering possesses authority to arrest and has probable cause to do so." Although dismissing here, the Court did not decide the application to barracks entries or searches.

IMPEACHMENT

United States v. Scooby, 11873, 21 July 1976.

The military judge permitted the trial counsel to impeach the accused with a prior conviction which was still pending appellate review. Though the SJA warned the convening authority to ignore this evidence and recommended a reduced sentence, the only adequate remedy was held to be a rehearing, due to the effect this information had on the accused's credibility as weighed against that of the accusers.

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* NEXT ISSUE *

* The Post Trial Interview - a look at the tactical and ethical considerations affecting this often pro forma trial level proceeding. *

* "Bruton" Revisited - The Court of Military Appeals has taken a renewed interest in Bruton-type issues. A review of the area will include the pending cases. *

* Attacking the Commander's Authority to Order a Search - A new look at the standards of neutrality and detachment and the unit CO. Suggested lines of attack are also offered. *

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