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The Editors would like to welcome the JAG Corps Reserve Detachment Court-Martial Defense Teams to our list of regular readers. All Reserve Defense Teams will regularly receive THE ADVOCATE.

It is hoped that THE ADVOCATE will become a valuable part of your training by keeping you informed of current issues in military defense counsel practice.

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NOTIFICATION TO COUNSEL OF PRE-TRIAL AND POST-TRIAL INTERVIEWS OF ACCUSED

Defense counsel functions begin well prior to trial and continue well after findings and sentence are adjudged. Every accused is entitled to effective assistance of counsel both before and after trial. Government interviewers would, of course, prefer to interrogate suspects, accused, and those convicted without the presence of counsel, raising the possibility that an accused would waive his rights to counsel prior to trial and make a full admission; or after trial, admit the wrongdoing to which he had pleaded not guilty or make other damaging admissions. Recent decisions by the United States Court of Military Appeals have placed the burden of notice of interviews on the Government.

I

Pretrial Interviews

In United States v. McOmber, 24 USCMA 207, 51 CMR 452 (1976), the Court of Military Appeals held that:

"Once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code. To permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his counsel would utterly defeat the congressional purpose of assuring military defendants effective legal representation without expense." 24 USCMA 209, 15 CMR 454.

The test for prejudice applied by the Court is a constitutional one based on Sixth Amendment precepts, although the Court specifically declined to address the issue in constitutional terms. See United States v. Ward, 23 USCMA 572, 50 CMR 837 (1975); United States v. Moore, 24 USCMA 217, 51 CMR 574 (1976). Exclusion of any improperly obtained statement is now clearly the remedy.

Judge Cook, in concurring, indicated that the McOmber holding may produce a number of questions as to notice, objection to interviews by counsel, etc. The problems which Judge Cook envisioned may undoubtedly arise. An investigator must have notice of attorney representation. In McOmber and in United States v. Lowry, 25 USCMA 85, 54 CMR 85, M.J. (1976), the interviewer conducting the post-appointment questioning was the same individual who conducted the original questioning so there was no issue of notice. The situation may arise where in an investigator questions an accused shortly after appointment of counsel by the Staff Judge Advocate, or another investigator with no direct contact with an original investigator is involved. Knowledge of the appointment of counsel can be imputed to all military investigators in the command. Paragraph 4-9, AR 190-30, Military Police Investigations (7 November 1973), and Paragraph 3-11, AR 195-2, Criminal Investigation Activities (23 August 1974), require coordination with the command staff judge advocate to resolve all legal considerations regarding questioning of suspects and accused. Therefore, the military investigator should comply with regulatory requirements to inquire as to appointment of counsel prior to any attempted interview.

An independent investigator from outside the command poses greater problems for defense counsel. A civilian investigator does not have to comply with the requirements of military law in conducting an otherwise lawful interview and any evidence gained thereby may be used in courts-martial. United States v. Penn, 18 USCMA 194, 39 CMR 194 (1969); United States v. Holcomb, 18 USCMA 202, 39 CMR 202 (1969). Note: This issue is again being considered by the United States Court of Military Appeals in United States v. Hofbauer, No. 33,136. However, a civilian investigator with knowledge that counsel has been appointed should not question an accused without notice to counsel. See Michigan v. Mosley, 423 U.S. 96 (1975); Massiah v. United States, 377 U.S. 201 (1969). Evidence gained improperly under civilian standards is inadmissible at courts-martial. United States v. Jordan, 20 USCMA 614, 44 CMR 219 (1971); United States v. Jordan, 24 USCMA 156, 51 CMR 375 (1976). Although counsel should be aware of serious ethical considerations involved in representing a client when there is a possible offense of non-military jurisdiction, the great possibility of harmful evidence being used in courts-martial as a result of "independent" civilian questioning requires counsel to be on notice of such questioning. Imputing knowledge of the existence of appointed counsel upon non-command investigators requires some direct contact with Government related command personnel. An argument must be made that, upon such contact, the Government has a duty to inform the investigator of appointed counsel. As a matter of public policy, and to give real meaning and effect to Article 27, Uniform Code of Military

Justice, as envisioned in McOmber, such a duty would appear proper. This issue is currently pending before the Army Court of Military Review in United States v. McDonald, CM 435627.

The term investigator or interviewer should encompass anyone subject to the Code. Article 31, Uniform Code of Military Justice. The civilian investigator's requirements are imputed by contact with military personnel. The cooperative cell-mate should also be included, but it must be shown that he had arranged to obtain information for the Government prior to associating with the accused. Anyone in an accused's chain of command is also clearly included. Arguably, McOmber would extend Article 31 to require inquiry of an accused or suspect as to whether counsel has been appointed prior to questioning.

Proper advice to clients and adherence to that advice should preclude the incidence of unlawful pretrial interviews. Military law enforcement agencies should also follow their particular regulatory requirements. See Paragraph C-3, Appendix C, AR 190-30, supra, and Paragraph B-3, Appendix B, AR 195-2, supra. 1/ When an improper pretrial interview occurs, defense counsel must attempt to exclude the fruits thereof as a violation of the accused's right to counsel.

II

Post-Trial

After conviction, Government interviewers may seek to question an accused for purposes of further investigations or for purposes of the Staff Judge Advocate's review in compliance with Article 61, Uniform Code of Military Justice. In all cases, the appointed defense counsel should be notified and the client should have the benefit of counsel. United States v. Palenius, 25 USCMA 222, 54 CMR 549, ___ M.J. ___ (1977). Citing Swenson v. Bosler, 306 U.S. 258 (1967) and Arsenault v. Massachusetts, 393 U.S. 5 (1968) in Palenius, the Court of Military Appeals recognized the Sixth Amendment right to counsel as applicable to all critical stages of the criminal proceedings.

1/ Military investigators are required to make all arrangements for interviews with suspects and accused through appointed counsel.

Post-trial interviews are not only of benefit to the Government. The Courts have maintained that the accused may also benefit in clemency action from the convening authority. United States v. Coulter, 3 USCMA 657, 14 CMR 75 (1953); United States v. Boheman, 39 CMR 301 (ABR 1968). Although there is no Code or Manual provision requiring post-trial interviews, such interviews have been recognized as within the custom and tradition of the military associated with the convening authority's clemency and review functions. United States v. Clisson, 5 USCMA 277, 17 CMR 277 (1954); United States v. Coulter, *supra*; United States v. Boheman, *supra*; United States v. Canady, 24 CMR 709 (ACMR 1964). The "vitality" of post-trial interviews as they are presently conducted has been questioned by the Court of Military Appeals and is currently pending decision. See United States v. Lanzer, 3 M.J. 60 at note 6 (CMA 1977); United States v. Salazar, Docket No. 33,292 (pet. granted 3 January 1977); United States v. Kelly, Docket No. 33,545 (Pet. granted 31 March 1977).

Because there is no Code provision providing for the interview, staff judge advocates may decide to dispense with a worrisome procedure, particularly if they are precluded from gaining any further benefit by conducting interviews without the presence of counsel. ^{2/} In such jurisdictions, and in proper cases, a documented request for an interview with the convening authority or his agent should be considered for the purpose of seeking clemency. It is arguable that the custom and tradition of such an interview entitles a convicted service member to its benefits. For purposes of a clemency interview or any other confrontation with Government representatives, the appointed defense counsel should be present with accused. This necessarily implies no substitution of counsel without proper release of that counsel and acceptance by the accused of substituted counsel. The issue of immediate transfer of convicted service members after trial, but prior to any possible clemency action, is currently pending before the Court of Military Appeals. United States v. Vick, Docket No. 34,241 (Pet. granted 6 July 1977). To the extent such practice is still recognized Army procedure, defense counsel should document a protest of transfer of accused prior to action by the convening authority. The occasion may arise when a convicted service member is afforded an option to be transferred to a

^{2/} For informational purposes, see Wzorek, "Utilizing the Post-Trial Interview to the Accused's Advantage," The Advocate, Vol. 8, No. 5, p. 17 (1976).

confinement facility removing him from counsel and convening authority. Acceptance of such an option after advice of counsel would probably waive any error otherwise raised by a transfer prior to action.

Presence of counsel at post-trial interviews would, beyond precluding needless and harmful admissions by accused, serve to benefit the client. The possibility is one which counsel have a positive duty to investigate and utilize. United States v. Palenius, supra; Paragraph 48(k), Manual for Courts-Martial; ABA Standards, The Defense Function, §82 (1971). In light of the Court of Military Appeals' activist position vis-a-vis effective representation, counsel would be well advised to consider all post-trial functions for the benefit of accused.

As the Salazar and Kelly cases are still pending decision, the responsibility for seeking out interviews, insuring assistance of counsel at interviews, and documenting non-notification in event of derogatory results is squarely on defense counsel. In this regard, it should be noted that, while an accused may make a knowing and intelligent waiver of counsel assistance, Faretta v. California, 422 U.S. 806 (1975), documenting such a waiver is a government burden. In event of a violation of the client's right to counsel after trial, several items should be brought to the attention of the convening authority and the appellate courts. Your client may not have been given warnings under Article 31, Uniform Code of Military Justice, much less asked if appointed counsel is available. Interviews may be scheduled at times or locations rendering counsel presence impossible due to duties imposed directly or indirectly by the Staff Judge Advocate. 3/ In the event harmful information is communicated to the convening authority, a rebuttal should be attempted and a demand for clemency as requested or review by another convening authority should be made. 4/ Without a positive showing of clemency, the possible taint of exposure to

3/ Defense counsel's trial docket is to an extent controlled by the SJA in that detail of counsel is normally a duty of that office.

4/ Counsel are to be afforded the opportunity for rebuttal of matters in the review and failure to take advantage of that opportunity will normally be considered a waiver of defect, United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975). However, inclusion of improper matter gleaned in a post-trial interview can not be effectively rebutted; in essence, the cat is out of the bag.

improper matter in the staff judge advocate's review can not be overcome. The identity of any covert interviewer should also be disclosed to preclude the use of trial counsel, which is an improper practice. United States v. Clisson, supra; United States v. Nees, 18 USCMA 29, 39 CMR 29 (1968).

Conclusion

The right to effective assistance of counsel extends well before, and well after, the actual trial and that right is based on the Sixth Amendment as well as the Code. Pursuant to that right, accused should never be interviewed by Government agents or representatives without benefit of counsel's presence. A violation of pretrial counsel rights requires exclusion of any information derived from the interview. Post-trial violations should require a positive indication of correction or an impartial review and action. The recent decisions of the Court of Military Appeals place the requirements of effective representation on the defense counsel to be aware of, and challenge any violation of, the accused's right to counsel.

AUTHOR'S NOTE:

In a letter to all staff judge advocates, dated 22 August 1977, The Judge Advocate General sked that "as a matter of policy" the use of post-trial interviews be discontinued. TJAG noted that defense counsel now have the opportunity to submit matters relating to clemency and rehabilitative potential under both case law and the Code. United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975); Article 38(c), UCMJ. Notwithstanding these post-trial opportunities for formal communications with the convening authority, defense counsel should consider whether a face-to-face personal interview would inure to the accused's ultimate benefit. In the event counsel and the accused determine a post-trial interview would be desirable, counsel should specifically request the staff judge advocate to arrange such an interview. If the SJA denies this request, either because he believes that TJAG's letter is directive in nature or for other reasons, defense counsel should insure that any objection is clearly reflected in the Goode response.

RANDOM GATE SEARCHES

Introduction

This article will delve into the controversial area of search and seizure as it relates to random gate searches. Specifically, it will answer the following questions - under what circumstances is a random gate search permissible; what difference does it make if the post is "open" or "closed"; what is the permissible scope of such a search; and what effect, if any, does a lawful custodial arrest have on that scope? Based on the law presented to answer those questions, a possible method of analysis will be suggested to be employed by field defense counsel when faced with the need to effectively argue for the suppression of evidence seized during an "impermissibly broad" random gate search.

Random vs. Probable Cause Search

The Fourth Amendment guarantees to individuals the right to be free from unreasonable searches and seizures. This is achieved through the requirement that a valid search must be carried out pursuant to probable cause. The Supreme Court has defined probable cause to search as "whether the affiant has reasonable grounds at the time of his affidavit and the issuance of the [search] warrant for the belief that the law was being violated in the premises to be searched..." Dumbra v. United States, 268 U.S. 435, 441 (1925). When such probable cause does in fact exist, an impartial official may issue a search warrant "particularly describing the place to be searched and the persons or things to be seized." United States v. Chadwick, 45 LW 4797 (June 21, 1977). The purpose of such a warrant is clearly to limit the scope of the search to the specific areas and objects which are relevant to the "circumstances which rendered it permissible." Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring). The same limitation on the scope of a search applies to the military. However, when dealing with random gate searches the probable cause requirement with regard to each individual car is abrogated.

At present, military commanders may authorize gate searches of randomly selected departing and entering vehicles during a limited period of time for a specified purpose. United States v. Sanchez, 50 CMR 450 (AFCMR 1975) (departing vehicles); United States v. Blade, 49 CMR 646 (AFCMR 1974) (entering vehicles).

That purpose must be to safeguard the installation, its resources and the government property thereon from theft, damage or intrusion. See United States v. Blade, supra; United States v. Chase, 24 USCMA 95, 51 CMR 268 (AFCMR 1976). However, a random gate search may not be a general exploratory search conducted for the sole purpose of discovering evidence of criminal activity, involving personal rather than government property, on the part of an accused or other individuals. United States v. Blade, supra; United States v. Rabinowitz, 339 U.S. 56 (1960); Go-Bart Importing Company v. United States, 282 U.S. 344 (1931); Barger v. New York, 338 U.S. 41 (1967); Chimel v. California, 395 U.S. 752 (1969). Clearly, both the United States Court of Military Appeals and the Supreme Court have recognized the need to limit the purpose of random searches.

Limiting The Scope

Once it has been established that the purpose of the search is valid the most important factor involved in warrantless searches and seizures comes into play - the scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. Warden v. Hayden, supra. Essential to the task of limiting a search's scope is the character of the post, the nature of the object being searched and the "reasonable expectation of privacy" attaching to that object.

Closed vs Open Posts

It is important to understand from the outset that searches in a "closed" post (i.e. posted reservation) differ significantly from searches in an "open" post. Existing case law makes it clear that the permissible nature of the infringement on Fourth Amendment guarantees is conditioned on the character of the base. In United States v. Vaughn, 475 F.2d 1262 (10th Cir. 1973) the Court was concerned with a search at a closed military installation which had the standard sign posted at the entrance to the base which read:

"Warning. U.S. Air Force Base. It is unlawful to enter this area without permission of the commander ...while in this installation all personnel and the property under their control are subject to search."

The Court held that once within the area where security was imposed, a search conducted without probable cause and without consent will be proper. In addition, it stated that the submission to search could be imposed as a valid condition to obtaining access to the base. However, once a determination has been made to deny an individual entry to the base, any search conducted thereafter must meet Fourth Amendment standards. Similarly, United States v. Grisby, 335 F.2d 652 (4th Cir. 1964), in the context of a closed base, held that the military police may search an automobile entering the base so long as the policeman acts in accordance with military law, or the laws of war. Thus, under Vaughn and Grisby given a closed base and the particular need for security, discipline, order or certain exigent circumstances, civilians and, by logical inference, military personnel as well, are subject to warrantless search, absent consent and/or probable cause.

In short, in the military context, the courts have demonstrated a willingness to preserve the longstanding and well-recognized duty of a base commander to maintain security, order and discipline within his command and over the installation. In order to fulfill this duty the military commander may order random gate searches of both military and civilian individuals, which may, in fact, infringe on certain Fourth Amendment guarantees. However, the more the public or national interest is involved, as in the case of a closed, top-security installation, the more likely the judiciary will be to uphold the validity of the search. Basically, the resolution of the issue must hinge on the reasonableness of the method or means employed by the official authorizing the search and seizure. If a less intrusive means to achieve the required end is not available in a given situation the court will most likely uphold the validity of the search or seizure involved.

The "Reasonable Expectation of Privacy"

In Carroll v. United States, 267 U.S. 132 (1925), the court first noted the distinction between:

"A search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality

or jurisdiction in which the warrant must be sought." *Id.* at 153 (Emphasis added)

Since Carroll, virtually every case addressing the issue of automobile search and seizure has accepted the automobile-house dichotomy and, in so doing, upheld warrantless automobile searches. See e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971). Along with this consistency of opinion, a rationale, most clearly enunciated in Katz v. United States, 389 U.S. 347 (1967) as the "reasonable expectation of privacy" doctrine, has developed. According to the doctrine, it is assumed that one's expectation of privacy is less in the passenger compartment and exterior of an automobile than in a home, simply because of the "public" nature of a car. In other words, unlike a house, an automobile has little capacity for escaping public scrutiny since it travels public thoroughfares where both its occupants and contents are in plain view. Cardwell v. Lewis, 417 U.S. 583, 590 (1974). Nonetheless, the unrestrained search of an automobile could constitute a serious invasion of an individual's privacy. South Dakota v. Opperman, 428 U.S. 364, 379 (1976). For, as the Court stated in United States v. Chadwick, *supra*, the individual's privacy interest centers on the contents of the car, rather than on the car itself. It is for this reason that the courts have consistently recognized that the justification needed to search the private areas of an automobile is no less than that needed to search a home or office. Opperman, *supra* at 388. For example, in People v. Counterman, 556 P.2d 481 (1976) the Court struck down the validity of a search of a closed knapsack found in the backseat of the defendant's car; in Mozetti v. Superior Court, 484 P.2d 84 (1971), the Court held that the search of a closed suitcase incident to an inventory procedure was unreasonable; and in United States v. Lawson, 487 F.2d 468 (8th Cir. 1973), a gun seized from a locked trunk during a routine police inventory was held to be inadmissible at trial. See also, Wimberly v. Superior Court, 547 P.2d 417 (1976), Mestas v. Superior Court, 498 P.2d 977 (1972) and People v. Superior Court, 118 Cal. Rptr. 586 (1974), all three of which held that "a separate and distinct intrusion of a defendant's privacy occurred when the trunk was unlocked and opened. Such a search constituted an intrusion into the area of the car in which the defendant probably had the greatest reasonable expectation of privacy." 118 Cal. Rptr. at 588, fn. 5. In addition, one Court even went so far as to hold that the insertion of the key into the door of a car to see if it fit constituted the beginning of a search which, absent probable cause or exigent circumstances, was unlawful. United States v. Portillo-Reyes, 429 F.2d 844, 845 (9th Cir. 1975).

Despite the weight of evidence presented by these cases, Carroll, supra and Chambers, supra, two oft-cited Supreme Court cases, would appear to refute them entirely. In both cases, the Court upheld warrantless searches based on probable cause where exigent circumstances existed. In so doing, neither Court distinguished between, or recognized a greater privacy interest in, the different compartments of an automobile. Significantly, in both cases the probable cause upon which the search was based applied to the vehicles as a whole and was not focused solely on the passenger compartments. Specifically, in Carroll, the defendants were bootleggers who generally transported contraband in the vehicle and so it was proper to search the entire car. Similarly, in Chambers, the police officers, after having had the defendant's car under close surveillance, stopped the car and arrested the defendants for robbery and in so doing had reasonable cause to believe that the entire car contained weapons and the fruits of a recent crime. Both cases are thus clearly distinguishable indicating that any attempt to say that an unlimited detailed search of one's car is not a substantial invasion of privacy is a matter of semantics rather than one of careful legal analysis. It is imperative to note at this point, though, that if the search which does take place is in fact lawful, both civilian and military law hold that articles relating to an offense different from that which justified the search can be seized. Manual for Courts-Martial, United States, 1969 (Revised edition), Paragraph 152; Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Morrison, 10 USCMA 525, 28 CMR 91 (1959). Note, that, as in the case of the plain view doctrine, there must be a proper prior justification before such an unrelated seizure will be upheld. Absent a lawful search, no seizure, related or unrelated, will be upheld. State v. Washington, 480 P.2d 174 (1971). Rather, the Court will consider such a seizure to be an invasion of the individual's "reasonable expectation of privacy."

The Question Of Consent

Up to this point, emphasis has been placed on the fact that a lawful search requires either a warrant issued pursuant to probable cause or a warrantless search justified by exigent circumstances and probable cause. However, there is one other situation in which a search will be upheld - a search of property, without a warrant and probable cause, but with proper consent, voluntarily and intelligently given, is valid under the Fourth Amendment in both military and civilian law. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Castro, 23 USCMA 166, 48 CMR 782 (1974). Because the Fourth Amendment requires consent not be coerced by explicit or implicit means, the emphasis in a consent search is on the freedom and

voluntariness of the consent. It would certainly lessen the frequency of dispute if law enforcement officers made crystal clear to persons whose premises are to be searched that, unless they have free and knowing consent to enter into and search the premises, they cannot do so. United States v. Justice, 13 USCMA 31, 32 CMR 31 (1962) citing United States v. Whitacre, 12 USCMA 345, 30 CMR 345 (1961). However, such specificity is rarely encountered. Thus, in determining whether there was consent to a search, each case must be decided upon its own facts. United States v. Justice, *supra*. It used to be that anything resembling consent was acceptable. Of late, however, the presumption is against consent, the result being that the alleged consent will be considered a mere gesture of acquiescence or submission to a show of authority unless it is shown that the accused consented in clearly "unambiguous" words. United States v. Kinane, 24 USCMA 120, 51 CMR 310 (1976).

In United States v. Jordan, 23 USCMA 525, 50 CMR 664 (1975), the Court held the reply of "Yes, I can't really stop you" to a request for permission to search was not free and voluntary. Relying on the fact that the defendant was in custody at the time the consent was given, the Court held it to be simply the product of the defendant's belief that he was powerless to prevent the search. See also, Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Wallace, 160 F.Supp. 859 (D.C. 1958), cited with approval in United States v. Alaniz, 9 USCMA 533, 26 CMR 313 (1958). Even in the absence of a custodial arrest at the time the consent is given, the Courts have invalidated various consents on the grounds of the implicit coercive nature of the confrontation. See, e.g., United States v. Chase, *supra*; Graham v. State, 184 P.2d 984 (1947); United States v. Marquette, 271 F. 120 (N.D. Cal. 1920). As noted previously, a valid consent must also be intelligently made. Obviously, the requirement of an "intelligent" consent implies that the subject of the search must be aware of his rights, for an intelligent consent can only embrace the waiver of a "known right." Johnson v. Zerbst, 304 U.S. 458 (1938); United States ex rel Mancini v. Rundle, 337 F.2d 268 (3rd Cir. 1964). Certainly, one cannot intelligently surrender that which he does not know he has. United States v. Blalock, 255 F.Supp. 268 (1966). Thus, arguably, the searching officer must advise the accused of the fact that he need not consent to the search. Failure to do so is clearly grounds for the suppression of evidence seized. If, however, a person consents to a search after receiving adequate Miranda/Article 31 warnings, specific warnings of Fourth Amendment rights may not be necessary to validate the search. United States v. Noa, 443 F.2d 144 (9th Cir. 1971); See also, United States v. Isani, 10 USCMA 519, 28 CMR 85 (1959) which held that in a consent search, the accused, at least impliedly, concedes that evidence obtained as a result of the search is admissible even though

he was not advised of his Article 31 rights. In short, law enforcement officials can avoid the requirement that consent be intelligently made if such consent is given after receipt of Miranda/Article 31 warnings. While clearly a disheartening fact from a defense point of view, it is one that must be kept in mind.

In an attempt to totally avoid the issue of whether consent was given voluntarily and intelligently, some have tried to analogize the consent implied in administrative regulatory inspections with gate searches and shakedown inspections. A close examination will reveal, however, that such an analogy cannot be made. In United States v. Roberts, 25 USCMA 39, 54 CMR 39 (1976), in its brief the government placed great weight in the cases of Camara v. Municipal Court, 387 U.S. 523 (1976), and Almeida Sanchez v. United States, 413 U.S. 266 (1973). The argument set forth by the government was that shakedown inspections - generally unannounced examinations of the persons and property found within a certain area - are analogous to Camara-type administrative regulatory inspections. In rejecting this argument, Judge Perry clearly stated that the majority did not believe that a person in the military implicitly consents to a search of his or her personal living quarters, lockers and belongings for evidence of a crime in the same sense that, for example, a gun merchant or liquor dealer implicitly consents to an inspection of his records and certain areas of his business establishment. When a businessman chooses to engage in a highly regulated business he does so with the knowledge that what he does will be subject to effective inspection. The same cannot be said of the military member in a gate search setting. The military member has no way of knowing the guard's purpose or the limits of his authority. Similarly, the guard has no definite knowledge that the car searched is properly within the scope of his authorized scrutiny. In short, neither has within his grasp the specificity which both the Supreme Court and the Fourth Amendment demand.

The Necessity For Advance Judicial Approval

The argument is often made that the specificity demanded by the Fourth Amendment is not important in the military where the law is based on military necessity. Military necessity assumes a military society apart from the civilian world where, due to the special nature and importance of the military function, activity by the government may be legitimized if such activity is

for the purpose of furthering "vital" military needs." The phrase "vital military needs" has never been defined and probably never can be defined with any degree of exactness sufficient to pass constitutional scrutiny. Even so, a person in the military is still a "person" as defined by the Constitution and subject to the rights thereunder. In short "vital military needs" are no excuse for infringing on the Constitutional rights of individual servicemen through warrantless random gate searches lacking in specifically defined purpose and scope. Achieving such specificity might not be as difficult or impossible as some might contend if the suggestion made by the Supreme Court in Almeida-Sanchez v. United States, 413 U.S. 266 (1972) is adopted. In that case, the Court held that the search of the accused's automobile made without probable cause or consent by a roving border patrol violated accused's right to be free from unreasonable searches and seizures. While recognizing the right and need of the border patrol to conduct such searches, the Court stated that there is nothing to suggest that it would not be feasible for the border patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time. This is especially true since the roving searches are planned in advance or carried out according to a predetermined schedule. The use of an area warrant procedure would surely not "frustrate the governmental purpose behind the search." 413 U.S. at 283. This same argument could easily be made in the military setting regarding random gate searches which are instituted to solve a criminal problem which has developed on base. See, e.g., United States v. Unrue, 22 USCMA 466, 47 CMR 556 (1973); United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973). Clearly, like the random border search, the random gate search is planned in advance and advance judicial approval could be obtained. Admittedly, such a procedure might entail some inconvenience but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement. See, e.g., United States v. U.S. District Court, 407 U.S. 297, 321 (1971). Following this procedure would undoubtedly result in searches based on sufficiently particular prior authorization.

Scope Of Searches Subsequent To Arrest

Frequently, a gate search turns up only the tip of the iceberg, but nonetheless, enough is found to justify an arrest. Probable cause to arrest exists when the police have "reasonably trustworthy information" that a crime was or is being committed and that the arrestee committed or is committing the crime. Beck v. Ohio, 397 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 88, 102 (1959); UCMJ, Article 7b; United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959). The effect of such a lawful arrest is to broaden the permissible scope of any subsequent search. Specifically, incident to a lawful custodial arrest a police officer may conduct a full body search,

United States v. Robinson, 414 U.S. 218 (1973); United States v. Brashears, 21 USCMA 552, 45 CMR 326 (1972), as well as a search of the area from which the arrestee "might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969); Cupp v. Murphy, 412 U.S. 291 (1973), United States v. Chadwick, 45 L.W. 4797 (June 21, 1977). However, as was the case with probable cause and consent searches, there are limitations on such searches and once these limits are exceeded the search is no longer valid as one incident to arrest. Thus, if, for example, the arresting officer does not conduct a body search but instead immediately proceeds to search the automobile, a strong argument can be made that he has waived the right to a body search. Consequently, any search of the automobile which then takes place must be limited to the area "from which he might gain possession of a weapon or destructible evidence." Chimel, supra. A problem arises in trying to specifically define that area which is within immediate reach. Nonetheless, three tests have developed:

1. Linear distance test - apply a radius test measuring from the point where the person was situated at the time he was apprehended.
2. Subjective test - allow the police officer to search any place from which he believes that the arrestee may grab a weapon or destructible evidence.
3. Objective - subjective evaluation test - allow the police officer to search any place from which he subjectively believes the individual may grab a weapon or destructible evidence, provided that belief is reasonable.

From a defense point of view, actively striving to limit the scope of a permissible search, the first two tests may be readily discarded in that both allow for too broad a scope. The third test, however, could be employed quite favorably by defense counsel. For example, using the linear distance test the Court of Military Review upheld a vehicle search conducted after the defendant was ordered to dismount and directed to the rear of the vehicle. While nothing was within grabbing distance the area searched did fall within the ambit of where the defendant was situated at the time he was apprehended United States v. Warfield, 44 CMR 759 (1971). On the other hand, employing the objective-subjective evaluation test to a similar fact situation, the Court in United States v. Pullen, 41 CMR 698 (ACMR 1976) struck down a vehicle search conducted after the accused had dismounted since at that point he did not have ready physical access to the car and so could not have destroyed any evidence of a crime. See also, People v. Floyd, 260 N.E. 2d 815 (Ill. 1970) and

United States v. Lewis, 50 CMR 585 (ACMR 1975); People v. Gregg, 117 Cal. Rptr. 495 (1975) and People v. Koehn, 102 Cal. Rptr. 102 (1972), all of which held that a search of an accused's car after his arrest and after he has been removed from the vehicle and handcuffed is not a valid search incident to arrest because nothing is within grabbing distance once an individual is handcuffed. Taken together, the foregoing cases indicate that the Courts are willing to draw a line based on the circumstances of each case as to the area within the arrestee's immediate reach which will be subject to lawful search incident to arrest.

In sum,

"A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. That intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search..." 414 U.S. at 235.

However, once law enforcement officers have exclusive control over "personal property not immediately associated with the person of the arrestee" and "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident to the arrest." United States v. Chadwick, 45 L.W. at 4801.

Conclusion

In light of the foregoing material, field defense counsel would be best advised when faced with a random gate search issue to apply the following analysis:

1. Was the incident involved tryly a random gate or stop search?
 - a. Was it for a valid purpose?
 - b. Were the automobiles being searched on a random basis or was the accused targeted by the authorities? If the latter is the case, did they have probable cause to stop and search his vehicle?

2. Was the scope of the search sufficiently limited?
 - a. Where did the search occur - on a closed or open post?
 - b. Did the police officer unlawfully pry into those areas in which the accused has a reasonable expectation of privacy?
3. Did the accused consent to the search? If so,
 - a. Was his consent given voluntarily and unambiguously?
 - b. Was he made aware of his right to refuse to consent?
 - c. Was he given his Miranda/Article 31 warnings prior to the search?
4. Was any attempt made to obtain prior judicial approval in order to insure specificity of scope and purpose? If not, why not?
5. Was the search incident to a lawful custodial arrest?
 - a. Was a full body search conducted?
 - b. Was the search limited to the area within the arrestee's immediate control? If so, what test was used to define that area?
 - c. Did the search in any way exceed the bounds of a lawful search incident to arrest?

If defense counsel systematically answer these questions, they will more likely than not find one or more grounds on which to base an argument for the suppression of evidence seized as the result of an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution.

RECENT OPINIONS OF INTEREST

COMA OPINIONS

FRESH COMPLAINT

United States v. Thompson, 3 M.J. 168 (CMA 1977).

The appellant was charged with taking indecent liberties with two girls aged six and seven. Each child's mother testified as to what her daughter told her. The judge instructed the court that this constituted evidence of fresh complaint. The mothers' testimony was held not to be evidence of fresh complaint, because the daughters did not discuss the appellant's conduct or complain of a sexual offense. The statements were not made under circumstances of trustworthiness, i.e., shock, outrage, agony or resentment. Finally, because the judge has the primary responsibility to properly instruct the court, the defense counsel's failure to object to the instruction did not waive the error.

TRIAL IN ABSENTIA

United States v. Peebles, 3 M.J. 177 (CMA 1977)

Trial in absentia after arraignment is permissible in the military if it is shown that the accused's absence was both unauthorized and voluntary. Here, the absence could not be inferred to have been voluntary since there was not actual notice of the trial date to the accused. Notice to the defense counsel was not sufficient, absent specific authority given to him by the accused to waive the presence of the accused. The failure of the accused to notify anyone of a new address did not estop his claim since he was never told to notify the authorities of a change in his address.

The Court dismissed the charge due to the protracted nature of the proceedings (over seven years).

INSANITY TEST

United States v. Frederick, 3 M.J. 230 (CMA 1977).

The insanity test of the American Law Institute (AL 1) was adopted by the United States Court of Military Appeals. The test provides:

(1) A person is not responsible for for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

JURISDICTION OVER THE OFFENSE

United States v. Henry, 3 M.J. 190 (CMA 1977)
(Memorandum Opinion and Order).

The Court of Military Appeals upheld jurisdiction where a serviceman, charged with forgery, altered the amount on his pay-check. While off duty, he presented the check to a civilian bank in a nearby community. The Court held that "the violation of military property - two pay checks - and the resultant expense and inconvenience directly incurred by the military to correct their status vis-a-vis the civilian bank which cashed the checks was so great in this particular instance that this factor alone is sufficient here to justify jurisdiction in the military courts."

SPEEDY TRIAL

United States v. Cole, 3 M.J. 220 (CMA 18 July 1977).

In this case, the government was held accountable for pre-trial delays under Burton even though the accused requested a delay to acquire a civilian defense counsel at an Article 39a session. The government counsel, on the record, stated that he was not prepared to proceed with trial until the date requested by the defense counsel in his motion for a continuance. However, the Court held that the Government had met its heavy burden of proof where the investigation was complex, there was an unusual amount of scientific evidence and the witnesses had been dispersed throughout the world before the crime was detected. The fact that the charged offense was serious, (murder and sodomy) was not, by itself, sufficient cause for delay.

ADEQUACY OF REPRESENTATION

United States v. Rivas, 3 M.J. 282 (CMA 1977)

In Rivas, the Court in effect has adopted a tougher standard regarding adequacy of counsel cases. In this case, the chief government witness refused to answer the trial defense counsel's questions in cross-examination. The trial defense counsel did not move to strike the witness's direct examination as a violation of the accused's Sixth Amendment right to confront an adverse witness. The Court found that there was no tactical reason to fail to do so. The Court concluded that "where, . . . , defense counsel remains silent where there is no realistic strategic or tactical decision to make but to speak up - then the accused has been denied "the exercise of the customary skill and knowledge which normally prevails . . . ' within the range of competency demanded of attorneys in criminal case."

ADMINISTRATIVE DISCHARGE IMPOSED BY COURT MEMBERS

United States v. Jones, 3 M.J. 348 (CMA 1977)

In this case, the court members imposed an undesirable discharge as part of its sentence. The Court held that it was error for the military judge to permit the court members to increase the severity of the previously announced sentence by imposing a BCD.

TRIAL COUNSEL'S ADVISE TO ARTICLE 32 OFFICER

United States v. Payne, 3 M.J. 354 (CMA 1977)

In Payne, the investigating officer consulted the trial counsel over the facts and evidence available to him. The Court held the Article 32 investigation to be defective as the Article 32 Officer who is required to be neutral and detached had communicated with a prosecutor even though he had been assigned an impartial legal advisor, the Deputy Staff Judge Advocate. The Court concluded that the defective Article 32 was not prejudicial per se, but required a presumption of prejudice. However, the government, by clear and convincing evidence, rebutted this presumption at trial. The Court warned that future violations may cause the court to adopt a per se rule.

INATTENTIVE COURT-MEMBERS

United States v. Groce, 3 M.J. 369 (CMA 1977).

An inattentive court-member (possibly sleeping) was cause for reversing a conviction where the lack of attentiveness occurred during a vital stage of the proceeding - the military judge's instructions on findings.

United States v. Brown, 3 M.J. 368 (CMA 1977)

Decided along w/Groce, in this case, a court member stated that although he was not totally asleep, he was "a little lethargic," "fighting sleep;" "heavily eyelidded . . . trying to pay attention to what the military judge was saying."

CMR OPINIONS

STANDARD OF PROOF ON JURISDICTIONAL MOTIONS

United States v. Spicer, 3 M.J. 639 (NCMR 1977).

The accused was convicted of unauthorized absence in violation of Article 86, UCMJ. At trial, he claimed that the court lacked in personam jurisdiction because of recruiter misconduct, and he testified that his recruiters supplied him with questions and answers to prepare him for an armed forces entrance examination. The recruiters denied rendering such assistance and the Navy Court of Military Review found beyond a reasonable doubt that no recruiter misconduct occurred.

The case is significant because of the standard of proof held to be applicable. The Court reasoned that the Government must prove jurisdiction beyond a reasonable doubt, rather than by the usual standard of preponderance of the evidence, because the accused's status as a member of the military becomes, in effect, an element of the offense when absence or desertion is charged. The element that the accused is required to be with his unit or at his place of duty is lacking if the accused is not a member of the military on active duty. Likewise, whenever the accused's military status is subsumed under an element of a charged offense the high standard of proof beyond a reasonable doubt is applicable on any jurisdictional issue raised. See Paragraph 57(b), Manual for Courts-Martial, United States, 1969 (Revised edition). Presumably, these offenses include the general articles and all military offenses, especially Article 92, UCMJ.

AVAILABILITY OF INDIVIDUAL COUNSEL

United States v. Smith, ___ M.J. ___ (ACMR 26 July 1977).

Because the trial defense counsel has the burden of proving the error of a denial of individually requested counsel, the Army Court of Military Review held that it was error for the military judge to preclude the defense from presenting evidence that the counsel was reasonably available. It was not sufficient justification for the judge's denial that there were prior prima facie valid reasons for a finding of unavailability.

RECENT GRANTS OF REVIEW OF INTEREST

INFORMANTS - IMPUTED KNOWLEDGE

United States v. Williams, Docket No. 34,159
(Petition granted June 14, 1977).

Whether the evidence is insufficient in law to sustain the conviction of larceny by trick because the government informant who arranged the sale of the counterfeit drugs to the undercover agent knew the nature of the substance and this knowledge is imputable to the government.

DRUGS - DENIAL OF CONFRONTATION

United States v. Santiago-Rivera,
Docket No. 34,242 (Petition granted July 5, 1977).

Whether, consistent with the Sixth Amendment, the government can meet its burden of proof in a narcotics case, absent the testimony of a chemist, or a stipulation by the parties, as to the identity of the drug as a controlled substance.

POST CONVICTION TRANSFER

United States v. Vick, Docket No. 34,241
(Petition granted July 6, 1977).

Does the removal of a prisoner, following conviction, from the trial situs to the Disciplinary Barracks, deny the appellant effective assistance of counsel under United States v. Palenius, 25 USCMA 222, 54 CMR 549, ___ MJ ___ (1976) and effectively deny him his immediate right to an authenticated record of trial under United States v. Cruz-Rijos, 24 USCMA 271, 51 CMR 723, ___ MJ ___ (1976).

SEARCH AND SEIZURE -
AUTHORITY TO ORDER SAME IN EUROPE

United States v. Irby, Docket No. 34,087
(Petition granted July 7, 1977).

A sub-community commander, pursuant to USAREUR Regulation 10-20, 25 June 1975 is responsible for a geographic area in the Federal Republic of Germany which is a part of a larger community commanded by a community commander. The question here is whether the sub-community commander was empowered to authorize a search of appellant's person in his unit billets.

The defense pointed three errors in the assertion of search authority. First, the regulation's limited grant of search authority is directed only to community commanders and there was no delegation here. Second, the USAREUR Regulation only permits searches of areas, not persons. Finally, unit billets are excluded from the community commander's search authority.

EXTRAORDINARY WRITS OF INTEREST

INVOLUNTARY RELEASE OF RESERVE OFFICER FROM
ACTIVE DUTY FOLLOWING SENTENCE TO DISMISSAL

Second Lieutenant Robert H. Hughes v. Major General William B. Steele, Convening Authority, Misc. Docket No. 77-101.

Petitioner was convicted by general court-martial and sentenced to be dismissed from military service. The sentence was approved by the convening authority. Petitioner was thereafter involuntarily released from active duty under the provisions of paragraph 3-71a, AR 635-100 dated 12 May 1976. This provision permits a reserve officer to be relieved from active duty pending appellate review whereas a regular officer or warrant officer may not be relieved from active duty pending appellate review under paragraph 12-1, change 12 to AR 635-120, dated 12 May 1976. Relying on a recent preliminary injunction granted against the Army in Trueblood v. Alexander, Civil Action No. W-77-CA-26 (W.D. Tex., 17 March 1977) (unpublished), the petitioner asked the Court of Military Appeals for Extraordinary Relief in the Nature of a Writ of Mandamus on the following issue:

WHETHER INVOLUNTARY SEPARATION OF THE PETITIONER
A RESERVE OFFICER CONVICTED BY GENERAL COURT-
MARTIAL AND SENTENCED TO A DISMISSAL, UNDER THE
PROVISIONS OF ARMY REGULATION 635-100 PENDING
COMPLETION OF APPELLATE REVIEW OF HIS CONVICTION,
DENIES HIM EQUAL PROTECTION AND DUE PROCESS OF
LAW IN THAT NEITHER REGULAR OFFICER OR ENLISTED
PERSONNEL MAY BE INVOLUNTARILY SEPARATED UNDER
SIMILAR CIRCUMSTANCES.

A similar issue is also pending in Fitts, et al v. Alexander,
Complaint Action No. 77-2089 (D.Kan) filed 19 April 1977.

