

A Journal For Military Defense Counsel
THE ADVOCATE

**U.S. Army Defense
Appellate Division**

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THE ADVOCATE

Volume 10, Number 4

July-August 1978

CHIEF, DEFENSE APPELLATE DIVISION

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TRANSITION

MARON DEPARTS

The members of the Editorial Board wish to extend a sincere "well done" to Major Andrew W. Maron, who is leaving the Army for private practice with Short, Cressman & Cable in Seattle, Washington. During Andy's tenure as the Editor-in-Chief, The Advocate began meeting its advertised publication schedule and its format was thoroughly refined. Under his leadership, the "Side Bar," "On the Record" and "Sample Instructions" sections of The Advocate were started, the cover, masthead and interior format were polished, and new printing procedures were devised. His innovations, while making The Advocate more noteworthy professionally, resulted in a dramatic reduction in production cost. As a result, our circulation has more than trebled. Andy's personal attentiveness to the substantive quality of the content has resulted in many compliments from our readers and increased interest in writing for The Advocate. Andy has been instrumental in formulating and improving interaction among the members of the Editorial Board as well as between "the field" and The Advocate. His original contributions to this publication and to the Defense Appellate Division will be missed. We know a successful future as a civilian attorney awaits him.

* * * * *

ZOSCAK NEW EDITOR

The Advocate would like to announce the appointment of Captain John M. Zoscak to succeed Andy Maron as the new Editor-in-Chief. John is no stranger to the trial courtroom or to DAD. He divided his three year tour at Fort Hood as a trial counsel, Chief of Legal Assistance, and Chief of Defense Counsel before coming to Defense Appellate, where he has been an active attorney for the last two years. He has been a frequent contributor to The Advocate.

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THE ADVOCATE EXPANDS CIRCULATION

The Government Printing Office has requested that The Advocate furnish it with 1,275 copies of this issue (Vol. 10, No. 4) for distribution to many regional depository libraries.

These depository libraries will then be given an opportunity to receive The Advocate without charge and on a permanent basis. The Government Printing Office estimates that approximately 800 libraries will choose to do so, resulting in circulation of The Advocate to designated community, city and university libraries in almost every congressional district in the nation. This action will increase our circulation to 2,600 copies.

Beginning with this issue, The Advocate will also be sent to more than 80 MOBDES reserve officers assigned to the United States Army Legal Services Agency.

* * * * *

SJA'S DO RECEIVE THE ADVOCATE!

Defense counsel, who frequently suffer symptoms of paranoia, rarely have an opportunity to observe such symptoms in their government counterpart, the trial counsel. A recent record of trial received at DAD brought joy to the hearts and minds of the Editorial Board, most of whom are frustrated defense counsel who are used to feeling left out.

DC: . . . I believe [some unpublished cases] do support the defense position, at least that is what the latest addition of "The Advocate" tells me. I have not read the cases myself, so I cannot tell you what the holdings themselves say.

MJ: May I examine the portion of "The Advocate" that you refer to? . . .

* * *

MJ: . . . I'd like the trial counsel to read this particular portion at this time. I don't know if those "Advocates" are made available to trial counsel

ATC: I understand the "Advocate" is something that is purposely directed away from trial counsel, in the ordinary course of business anyway.

While we certainly provide more copies of The Advocate to defense counsel (we send each Army trial defense counsel a copy), an information copy of The Advocate is provided to each staff judge advocate. Presumably, he passes it on to the trial counsel. While The Advocate is written by and for defense counsel, it is not our intent to be an underground publication.

* * * * *

COMA RULES GUIDE AVAILABLE

Defense counsel and civilian subscribers who do military appeals may be interested in Eugene R. Fidell's new book, Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals. In addition to setting forth the COMA rules, the book provides explanatory comments and case annotations for each of the recent (July 1977) changes to the Court rules. The book is of particular value to defense counsel who are contemplating filing an extraordinary writ before COMA. Priced at \$4.50/copy, it may be obtained by writing to the Public Law Education Institute, Dupont Circle Building, Suite 610, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036, telephone (202) 296-7590.

* * * * *

ARTICLES, COMMENTS, IDEAS INVITED

Periodically we invite our subscribers to forward to us any comments, ideas, and suggestions, or written briefs, notes, and articles. Only by receiving input from trial defense counsel can we continue to provide effective communication between military defense counsel. Recently, we have received articles and comments from several JAGC officers and civilian attorneys located around the world. One inquiry prompted the examination of a developing area of the law - and the final result was an article (see Zoscak and Byler, "Recruiting Negligence: Another Challenge to the Enlistment Contract," 10 The Advocate 137 (1978)). Other letters have included sample instructions (see "Some Sample Instructions: Part 4," in this issue) or informed us of local court decisions which we have been able to pass to our subscribers in the "Case Notes" or "Side Bar" sections.

We thank those of our readers who have forwarded written material and comments to us; we actively and seriously solicit other attorneys to do so, as well.

ARTICLE 69 "APPEALS" - THE
LITTLE UNDERSTOOD REMEDY

Captain Jonathan D. Glidden, JAGC*

Public discussion of post-trial remedies in the military justice system tends to focus, naturally enough, on those "serious" cases for which review by the military appellate courts is provided under Articles 66 and 67, Uniform Code of Military Justice (UCMJ). The stakes in such cases are high; appellate review is, at least in part, automatic; the record of trial is generally subject to the scrutiny of appellate defense counsel; and the written decisions of the appellate tribunals are published. Accordingly, insufficient attention may, perhaps, be given to post-trial remedies available in cases which are not channeled into the "mainstream" of post-trial review. For example, pursuant to Article 69 an accused may apply to The Judge Advocate General of the Army (TJAG) for relief from any court-martial conviction which is final, but which has not been reviewed by a Court of Military Review. Despite the lack of attention publicly paid such cases, they may, for a variety of reasons, require a greater amount of attention and effort from the trial defense counsel with respect to post-trial processing than is true in other cases.

Cases of this type come to TJAG's attention through the initiative of the accused or some other appropriate person; they do not come before TJAG by automatic submission. The applicant may prepare an application for relief solely through his own efforts or he may rely upon the advice and assistance of counsel. Most often, the counsel assisting with the application is the trial defense counsel, whether military or civilian. On occasion, as where the accused has been transferred subsequent to trial, he may seek out new counsel through the local judge advocate office. Some applicants retain civilian counsel for the specific purpose of preparing the application.

* Captain Glidden is an Examiner in the Examination and New Trials Division, USALSA. He received an A.B. degree from Middlebury College and a J.D. degree from the University of California at Davis and graduated from the 64th Basic Class. The author has previously served as Senior Law Instructor, United States Army Military Police School, and as an appellate government counsel in GAD.

In any event, consultation with a judge advocate before preparation of the application is encouraged. Paragraph 13-6b, AR 27-10. Judge advocates should therefore be familiar with Article 69 and procedures thereunder.

TJAG Authority

TJAG may grant relief on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused. He may vacate or modify the findings or sentence in whole or in part. Action upon applications for relief is not routine appellate review. The authority granted is for a form of extraordinary relief, and the burden of demonstrating error is therefore on the applicant.

TJAG designates attorneys to act as examiners with respect to cases brought to his attention. These attorneys comprise the Examination and New Trials Division, United States Army Judiciary, an element of the United States Army Legal Services Agency. An application for relief, together with the record of trial of the case in question, is reviewed by an examiner and the Chief of the Division. In each case, a memorandum of points and authorities is prepared for TJAG with a recommendation as to disposition of the application. The entire file is then forwarded to TJAG, who personally reviews each case. TJAG then either approves the Division's recommendation or directs such other action as he deems appropriate.

Although TJAG may exercise these powers sua sponte, he may also prescribe the manner and form of applications made pursuant to Article 69. Paragraph 110a, Manual for Courts-Martial, United States, 1969 (Revised edition). Accordingly, compliance with the provisions of Chapter 13, AR 27-10, is required as a predicate for action by TJAG.

Application Procedure

An application must be prepared on DA Form 3499 (Application for Relief from Court-Martial Findings and/or Sentence under the provisions of Title 10, United States Code, Section 869). Copies of the form are obtainable through normal supply channels. It must be executed on oath by the accused personally, subject to the exceptions set forth in Instruction 4, DA Form 3499. A judge advocate assisting the accused in such a matter should exercise care to ensure that the accused has signed the form

and that the signature is notarized. Improperly executed applications frequently arrive for consideration by TJAG. The result, as a minimum, is delay while a properly executed application is procured.

In many cases the accused makes application for relief while still at the installation where trial was held. A judge advocate assisting in such application should take care to heed the strictures of paragraph 13-5, AR 27-10, by forwarding the application through the office of the staff judge advocate. This requirement is more honored in the breach than in the observance. Applications are routinely mailed by applicants from the installation at which they were tried directly to the Examination and New Trials Division. While such procedure does not prevent an applicant from securing examination of his case, it results in substantial delay. Part of the purpose for requiring that applications be forwarded through the staff judge advocate in such cases is to ensure that the original record of trial is forwarded with the application. If the application is mailed directly, it is necessary to send for the record of trial. Several weeks of unnecessary delay may result.

Key Factor - Timeliness

Generally, the submission of an application for relief shortly after trial is more likely to be in the applicant's interest than submissions made after a substantial interval. One reason is that the records of trial in nearly all cases for which application for relief is made to TJAG are not verbatim. Since the burden of establishing an alleged impropriety is on the applicant, it is generally more difficult to secure relief where the lapse of time has left no documentation of the trial proceedings other than the accused's own assertion, on the one hand, and the "boilerplate" on the other. A timely application for relief gives the applicant the opportunity to utilize the assistance of his trial defense counsel, who is familiar with the events of trial, and to submit documentation dehors the record (affidavits, personnel records, local regulations, etc.) which may be necessary to a full and fair adjudication of his claim.

A second reason for applying in a timely fashion is that the time necessary for acting on the application may later come to be of practical importance. Time may not be of the essence for relief with respect to sentences of the type commonly imposed in cases examined under Article 69. On the other hand, the fact of conviction itself may become a crucial matter to the accused a year or two after trial when he finds to his dismay that promotion or re-enlistment is barred to him. At such times, he suddenly determines that an application for relief is

in his interest; hitherto unperceived substantive, procedural, and collateral errors may startlingly reveal themselves in all their glaring injustice. It may be important to the accused's career at that time that action on his application be completed by a particular date, yet such action may not be possible in the time available.

On the other side of the coin, counsel assisting in the preparation of an application for relief should also exercise caution lest the application be filed prematurely, i.e., before the case has become final pursuant to Articles 65(c) and 69, UCMJ. By the same token, counsel should not overlook, in considering courses of action available to his client, the authority of the supervisory general court-martial convening authority to take action on records forwarded to him for review pursuant to Article 65(c).

Assistance of Counsel

Effective assistance of counsel in the preparation of an application for relief may often require more than mere assistance in executing the DA Form 3499 and forwarding it. If counsel perceives no arguable basis for relief, he should so advise his client. (The client is, of course, free to file his application in any event.) If, on the other hand, the attorney perceives a viable issue, he should consider drafting a memorandum or brief for submission as an inclosure to the DA Form 3499 as well as obtaining and submitting supporting documentation. In many cases, such supporting material may provide the requisite substantiation to warrant relief. Counsel should ensure that affidavits presented with the application are properly executed; a great number of unsigned or unsworn statements are submitted in the apparent belief that a document headed by the word Affidavit becomes one by mere denomination.

In examining a record of trial for possible error cognizable under Article 69, counsel should bear in mind the four statutory grounds for relief; it should be specifically remembered that such grounds are more limited than those on which the Courts of Military Review and the United States Court of Military Appeals may act. Clemency is not a basis for relief; nor is "insufficiency of evidence" unless the evidence be insufficient as a matter of law. Accordingly, applications for relief based on the grounds of "fairness" or on a broadside allegation of insufficient evidence, such as the common contention that the evidence was insufficient in that Sergeant X, a key government witness, "lied" on

the witness stand, are unlikely to meet with success. Within the foregoing parameters, guidance as to viable issues may be gleaned from the published opinions of the military appellate courts.

Typical Applications

Typical of recent cases in which relief was granted are the following. SFC B was convicted of numerous offenses, many of which occurred during an enlistment previous to the term he was serving at the time of trial. Although Article 3(a), UCMJ, confers jurisdiction upon the military for some offenses committed during an expired enlistment where the individual has re-enlisted, several of SFC B's offenses were not of this type. Accordingly, TJAG set aside the findings of guilty as to those offenses for want of jurisdiction. In another case, PVI T was convicted of three specifications of assault and battery. At trial he indicated, for the first time, that he wanted civilian counsel; the circumstances were such that it did not appear that he was being dilatory. TJAG determined that the military judge erred in denying the accused's request for a continuance; the findings and sentence were set aside.

On the other hand, a number of recent applications have been viewed as falling well short of stating cognizable issues, let alone grounds for relief. Some contain such garbled language that it is impossible to perceive what error is being urged. A typical "far-fetched" argument was one in which it was urged that Private S was improperly convicted of uttering disrespectful words towards his superior commissioned officer solely because he (Private S) was looking away from the officer at the time the words were uttered. An argument of the "garbled" type is one which urged that the summary court officer erred in "considering written statements" without setting forth any explanation of the circumstances under which they were "considered."

COMA - The McPhail Doctrine

Much interest has been occasioned of late by the Court of Military Appeals' exploration of the outer boundaries of its jurisdiction. Among the decisions involving previously unrecognized powers of the court was McPhail v. United States, 1 MJ 457 (CMA 1976), in which jurisdiction was taken over a case which came within the scope of Article 69 and had in fact been acted upon by The Judge Advocate General of the Air Force pursuant to that Article. Judge Cook, writing for a unanimous court, opined that "as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction

to require compliance with applicable law from all courts and persons purporting to act under its authority." Id., 1 MJ at 463. Accordingly, having found that The Judge Advocate General of the Air Force had erred in finding that the court-martial had jurisdiction over the offense in McPhail, the Court of Military Appeals issued a writ directing that the findings and sentence be vacated.

In the wake of McPhail, a number of petitions for extraordinary relief were filed with the Court of Military Appeals with respect to actions by TJAG taken under Article 69. To date, all such applications have been denied or dismissed. See, e.g., Witzel v. Persons, Misc. Docket No. 78-1, ___ MJ ___ (CMA 8 June 1978) (petition dismissed; Judge Cook would dismiss for lack of jurisdiction); McGinty v. United States, 4 MJ 194 (CMA 1977) (petition denied; Judge Cook would dismiss); London v. Commanding General, 4 MJ 113 (CMA 1977) (petition denied); Napier v. Persons, 3 MJ 486 (CMA 1977) (petition denied). Although attempts to secure extraordinary relief with respect to Article 69 cases have proven fruitless, it is nevertheless clear that the potential for relief exists. The Court of Military Appeals takes the view that it has some jurisdiction over such cases; it is not clear, however, exactly what the nature of that jurisdiction might be. Clouding the question is the fact that Judge Cook, the author judge in McPhail, has now receded from his initial position. Stewart v. Stevens, Misc. Docket No. 77-134, 5 MJ 22 (CMA 8 June 1978). In his concurring opinion in Stewart, he expressly stated that he was "wrong" in McPhail.

The course of the Court of Military Appeals since McPhail leaves the question of jurisdiction over Article 69 cases open. It does appear that the majority of the court is prepared to grant relief in cases where jurisdictional error or a clear abuse of discretion has occurred. Beyond that, the scope of review is unclear.

Where relief is sought, however, the Court has generally denied petitions without prejudice in situations where a case was apparently cognizable under Article 69 and it was not shown in the petition that TJAG has denied relief. See, e.g., McGinty v. United States, supra. It seems clear that, as a general matter, exercise of the opportunity to make application for relief to TJAG will be a prerequisite to the exercise of jurisdiction by the Court of Military Appeals over cases cognizable by TJAG on application under Article 69.

A petition for extraordinary relief with respect to a conviction from which relief had been denied by TJAG was also filed recently with the Army Court of Military Review. Barnett v. Persons, Misc. Docket No. 1978/1 (ACMR 10 March 1978). The Barnett court opined that it has authority to provide extraordinary relief in a case over which it potentially will have appellate jurisdiction. The case sub judice in Barnett was held not to be in this category.

From final convictions by ordinary special courts-martial, the only avenue of appellate relief is that which petitioner has taken under Article 69, Uniform Code of Military Justice. There is no provision for a further appeal to this Court, and we are certain that if the Congress had intended this Court to review actions taken by The Judge Advocate General on Applications for Relief under Article 69, it would have so indicated

Id. Unlike the Court of Military Appeals, therefore, the Army Court of Military Review has taken the position that there is an absolute jurisdictional bar to its consideration of cases governed by Article 65(c). See also United States v. Williams, 5 MJ ____ (ACMR 28 June 1978).

Article 69 is a form of relief with which each judge advocate should familiarize himself, particularly in light of the emphasis which the Court of Military Appeals has recently placed upon the post-trial responsibilities of trial defense counsel in United States v. Palenius, 2 MJ 86 (CMA 1977). This article is only intended to provide general guidance to the judge advocate who may find himself called upon to assist an individual seeking relief from a court-martial conviction cognizable under Article 69. Further guidance is available in Chapter 13, AR 27-10, and through supervisory channels.

PSYCHIATRIC EXAMINATIONS AND ARTICLE 31:
A SOLUTION TO THE DEFENSE DILEMMA

Major Andrew W. Maron, JAGC*

From a review of the records of trial received in the Defense Appellate Division, and conversations with experienced military trial defense counsel, it is apparent that, although the defense of insanity is often considered, it is rarely raised. Perhaps one of the reasons for this situation is the existence of a serious flaw in the military's system for examining an accused's mental responsibility. That defect is that there is no clear prohibition against the in-court use of admissions made by the accused to a psychiatrist during an examination, regardless of whether the exam is requested by the defense or the government, or ordered by the court or the convening authority. The result, in the words of Judge Robert M. Duncan of the U.S. Court of Military Appeals, is that:

[a]n accused . . . faces a major choice between unsatisfactory alternatives. If he submits to the examination by the [psychiatric] board, . . . he risk[s] having statements made to the board . . . used at trial to determine his guilt[.]

United States v. Johnson, 22 USCMA 424, 429, 47 CMR 402, 407 (1973) (Duncan, J., concurring).

The Court of Military Appeals has recently considered the issue of insanity in the landmark case of United States v. Frederick, 3 MJ 230 (CMA 1977), but it has been several years since it focused on the problem of Article 31, UCMJ, and the psychiatrist. Nevertheless, despite the uncertain guidance in this area of the law, trial defense counsel can take affirmative steps to avoid problems for his or her client.

* Major Maron is assigned to DAD as an appellate defense attorney and Editor-in-Chief of The Advocate. He previously served four years in the infantry, attended law school on the excess leave program, and was a defense counsel and senior defense counsel at Fort Lewis, Washington. Major Maron has a B.S. from the U.S. Military Academy, a J.D. from the University of South Carolina, an LL.M. from the University of Virginia, and attended the Infantry Basic Course and the JAG Advanced Course.

Counsel may prepare a list of conditions that should govern the accused's psychiatric examination, and request that the government agree to them. If the government refuses to so agree, counsel should request that the military judge order that the conditions be imposed. These alternatives are not new. At least one CONUS installation regularly employs the first method, and COMA has specifically approved and commended use of the second. See United States v. Johnson, supra. Before discussing these conditions in detail, however, a brief review of pertinent case law is essential.

Babbidge and Its Progeny

The leading case in the field of psychiatric testimony is United States v. Babbidge, 18 USCMA 327, 40 CMR 39 (1969). There, after the defense announced that it was prepared to present witnesses to substantiate an insanity defense, the government requested that the law officer order the accused to participate in an examination by a government psychiatrist. The law officer granted this motion. Following the examination, the results of the medical board were introduced into evidence to rebut the insanity defense. No incriminating statements elicited during the exam were admitted into evidence which tended to prove the accused guilty of the charged offenses. On appeal, the Court of Military Appeals affirmed, holding as proper the law officer's actions in ordering the accused to undergo a government psychiatric examination. The Court stated that:

[w]hen the accused opened his mind to a psychiatrist in an attempt to prove temporary insanity, his mind was opened for a sanity examination by the government. His action constituted a qualified waiver of his right to silence under Article 31.

Id., at 332, 40 CMR at 44.

Of immediate importance to our consideration of Article 31 is Judge Darden's lengthy dictatory discussion. There, the Court appeared to limit the use of evidence received by the government in a psychiatric examination by prohibiting the use of it against the accused on the issue of guilt or innocence. The Court quoted with approval the U.S. Fourth Circuit case of United States v. Albright, 388 F.2d 719 (4th Cir. 1968):

. . . the purpose of the examination is not to determine whether a defendant did or did not do the criminal acts charged, but whether he possessed the requisite mental capacity to be criminally responsible therefor, if other proof establishes that he did do them.

United States v. Babbidge, supra at 331, 40 CMR at 43.

Babbidge quickly spawned a number of other decisions by the Court of Military Appeals. In United States v. Wilson, 18 USCMA 400, 40 CMR 112 (1969), the Court held that a government psychiatrist could testify concerning an accused's mental conditions in order to rebut testimony by a defense psychiatrist without having to establish that the accused was advised of his Article 31 rights. See also United States v. Schell, 18 USCMA 410, 40 CMR 122 (1969) and United States v. Ross, 19 USCMA 51, 41 CMR 51 (1969). On the contrary, in United States v. White, 19 USCMA 338, 41 CMR 338 (1970), the Court held impermissible the impeachment of an accused by statements made during a psychiatric examination without a showing that the accused was properly advised of Article 31, UCMJ.

While the holding in White and the language from Babbidge appear to offer comfort to trial defense counsel, it is important to remember that military psychiatrists are required^{1/} to satisfy themselves that the accused-examinee understands his Article 31 rights. See United States v. Johnson, supra and Paragraph 4-4f, Army Technical Manual 8-240, Psychiatry in Military Law (1968).^{2/} Thus, if a psychiatrist properly advises an accused of Article 31, and the accused makes an admission to the examiner, it appears that the government may reveal that statement at trial to prove the charged offenses.

1. It has been the author's experience that most psychiatrists are uncomfortable with the requirement to advise an accused-examinee of Article 31. As a consequence, many psychiatrists do not comply with this directive. Frequently, this failure is with the concurrence of the trial counsel or the convening authority. See e.g. United States v. Johnson, supra at 425, 47 CMR at 403.

2. The same manual serves both the Department of the Air Force (AFM 160-42) and the Department of the Navy (NAVMED P-1505). The manual is presently undergoing revision in the Office of The Surgeon General, SGPC, Department of the Air Force, however no substantial change to Paragraph 4-4f is planned.

The situation was last confronted in detail by the Court of Military Appeals in United States v. Johnson, supra, a case which involved an accused's contention that he be permitted to retain a civilian psychiatrist at government expense to assist in his defense. Of significance to our discussion of Article 31 are the actions by the military judge in the case. After appropriate pretrial motions, the military judge entered an order directing that the accused be examined psychiatrically, and that certain conditions be imposed on the proceedings to protect his rights. These conditions were:

- 1) No information secured during the examination was to be publicized in advance of presentation in court.
- 2) No information secured during the examination was to be disclosed to the trial counsel.
- 3) The completed psychiatric report was to be submitted to the court, and no information contained therein was to be released without court approval.

Commending the military judge for this protective order, the Court found it unnecessary to rule on the situation in which the government attempts to admit into evidence a statement made by the accused during the examination.

Nevertheless, the case is important for the discussion that occurs in the concurring opinion of Judge Duncan who criticized what he called "the antagonistic choices, under existing law, that one accused of crime faces in the event that he seeks to raise the issue of mental capacity prior to or at trial." Id., at 429, 47 CMR 407. He pointed out that such a situation does not exist in the federal civilian system because of the statutory protection provided by 18 U.S.C. §4244 (1970). There, Congress provided that:

No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilty in any criminal proceeding.

Id., at 429-30, 47 CMR at 407-8. Therefore, Judge Duncan would have held that "in order to comport with due process of law no statement made during such an examination shall be admitted in evidence against the accused concerning his guilt." Id., at 430, 47 CMR 408.

Unfortunately for military accused, that conclusion is not the law. Equally unfortunate for military defense counsel is the fact that no definitive law on this subject exists. Thus, without any specific statutory or decisional authority, counsel must rely on the dicta from Babbidge, which states that the objective of psychiatric examination is to determine mental competence and not to determine guilt or innocence. But, as pointed out by Judge Duncan, this statement falls far short of a prohibition on the use of incriminating statements voiced during a psychiatric examination.

Protecting the Rights of the Examinee

There appear to be four methods that protections for the accused-examinee can be promulgated. Congress, of course, may amend the Uniform Code of Military Justice to include a provision similar to 18 U.S.C. §4244. Alternatively, the President may revise the Manual for Courts-Martial, United States, 1969 (Revised edition) to either prohibit the use of statements made by an accused from being admitted in evidence on the issue of guilt, or to provide for a physician-patient privilege.^{3/} Further, the Court of Military Appeals could decide, as suggested by Judge Duncan in Johnson, that military due process of law prohibits the use of any statement made during a medical or psychiatric examination as evidence on the issue of guilt. Finally, prior to the client submitting to a psychiatric examination, trial defense counsel may request that the government agree to conditions which preclude the in-court use of any statements made by the accused on the issue of guilt. If the government fails to agree, trial defense counsel should seek an order from the court imposing such conditions.

3. See Paragraph 151c(2), MCM, 1969, and Paragraph 151c(2), Dep't of Army Pam 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition) (1970) for a discussion of the physician-patient privilege and the reasons that 18 U.S.C. §4244 was not incorporated in the MCM, 1969. See also United States ex rel Edney v. Smith, 425 F.Supp. 1038 (E.D.N.Y. 1976) and Buncey v. State, 353 So.2d 640 (Fla. App. 1977) for the impact of the attorney-client privilege on defense psychiatric witnesses.

This latter action is the most promising immediate relief available to the unsettled problem of Article 31 and the psychiatric examination. If trial defense counsel chooses to take this step, he should consider proceeding in the following manner. When counsel requests a neuropsychiatric examination of the accused in order to determine the accused's mental competence, the psychiatric board should be directed to answer the following questions:

- 1) Was the accused at the time of the alleged offense suffering from a mental disease or defect?
- 2) If the accused did suffer from a mental disease or defect, did such a disease or defect result in a lack of substantial capacity on the part of the accused, concerning the particular act charged, to either:
 - a) appreciate the criminality of his conduct, or
 - b) conform his conduct to the requirements of the law?
- 3) Does the accused possess sufficient mental capacity to understand the nature of the proceedings against him and to intelligently conduct or cooperate in his defense?
- 4) Does the accused have any other emotional or personality disorders?

United States v. Frederick, supra.

Once the diagnostic questions are posed, the psychiatric request should contain the conditions or limitations on the examination. These conditions are:

- 1) Only the answers to the four diagnostic questions will be provided to the court and the trial counsel. No other information whatsoever will be furnished to the trial counsel without court order.

- 2) No information secured during the examination or board proceeding will be publicized in advance of presentation in court or termination of the trial.
- 3) No report of the examination will be related to anyone outside of technical medical channels without the expressed consent of the accused.
- 4) No statement or disclosure made by the accused during any examination shall be admitted in evidence in court against the accused concerning his guilt.

The advantage of these limitations to an accused is apparent - he can participate in a neuropsychiatric examination free from fear that the words he uses and the statements he makes will come back to haunt him in court. On the other hand, the advantage to the government of such an agreement, although not quite so clear, is equally as convincing. The government's prime concern is, or ought to be, to insure that the accused undergoes a complete examination, unimpeded by any procedural problems. The government's interest, at the stage in the proceeding when an accused's mental status is in doubt, should only be the examinee's mental competence; it should not be concerned with gathering further evidence against the accused. As the military judge stated in United States v. Johnson, supra at 426, 47 CMR 404:

. . . the government is really only concerned with the three questions [regarding sanity]. If you [the government] want a confession you can send the man to the CID right now. We only want an examination to determine his responsibility and capacity

As Judge Duncan explained in Johnson, prohibiting use of statements made during an examination on the issue of guilt will eliminate "the antagonistic choices . . . that one accused of crime faces in the event he seeks to raise the issue of mental capacity." Id., at 429, 47 CMR at 407. Such a rule of law will promote "a fair trial . . . [for] both parties." Id., at 430, 47 CMR at 408.

The government should also be reminded that the conditions are not unusual or overly restrictive. The limitations do not prohibit the government from contesting the issue of the accused's mental competence. They only restrict the prosecutor's right to use statements made during the psychiatric examinations from being introduced in evidence on the issue of guilt or innocence. In fact, such a limitation is presently the law in the federal civilian criminal system. 18 U.S.C. §4244 (1970). Further, the language of Babbidge appears to indicate that this is the law in the military courts as well. United States v. Babbidge, supra at 331, 40 CMR at 43. Thus, listing the conditions is not an uncalled-for extension of rights to an accused - it merely clearly defines the conditions for and limitations on psychiatric examinations before any ambiguities can arise.

Conclusion

The law regarding the admissibility of statements made by an accused to a psychiatrist remains uncertain. Several methods are available to remedy this situation. Either a statutory amendment to the Uniform Code of Military Justice, a presidential change to the Manual for Courts-Martial, or a decision by the U.S. Court of Military Appeals could provide protections to the accused-examinee. Because it appears remote that any of these actions will occur in the near future, trial defense counsel should take steps now to clarify the ambiguity.

Counsel can request the government to agree, or the court to order, several conditions and limitations on the use of information gained from the accused during a psychiatric interview. These limitations are specifically designed to insure an accurate psychiatric examination, yet prohibit the government from admitting into evidence at trial any statement made by the accused on the issue of guilt or innocence. Such a set of conditions provides all parties with exactly what is desired by all - an accurate and complete examination into the mental capacity of the accused, and a fair trial.

THE FEDERAL RULES OF EVIDENCE:
RELEVANCY AND ITS LIMITS

Captain Allan T. Downen, JAGC*

On 1 July 1975, the Federal Rules of Evidence became effective in almost all federal courts of the United States. Fed. R. Evid. 1101(a). Although not specifically discussed in the Rules, there is ample authority to conclude that many of the rules are applicable to military courts-martial. This conclusion stems from an examination of the Uniform Code of Military Justice,^{1/} the Manual for Courts-Martial, United States, 1969 (Revised edition)^{2/} and United States v. Weaver, 1 MJ 111 (CMA 1975). In Weaver, the Court explained that ". . . federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment." Id., at 117. Thus, there is significant support for trial defense counsel to request that a military judge adopt a favorable federal rule of evidence when the Manual is silent or not clearly dispositive of an evidentiary issue.

Obviously, an examination of all the Federal Rules of Evidence is beyond the scope of this article. However, Rules 403 and 410, which may be of substantial use to practicing military defense counsel, will be discussed. Rule 403 is a codification of the common law power of the trial judge to exclude unfairly prejudicial evidence, while Rule 410 excludes certain pretrial admissions. These rules appear to touch on areas of military criminal law not fully pre-empted by the MCM, 1969. As such they may be of assistance to trial defense counsel.

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1. Article 36, requires that courts-martial procedures prescribed by the President shall "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." [Hereinafter cited as UCMJ].

2. Paragraph 137 provides that federal and common law rules which are not otherwise prescribed in the Manual are applicable to courts-martial. [Hereinafter cited as MCM, 1969].

ARTICLE IV

Rules 403 and 410 are located in Article IV, which is entitled "Relevancy and Its Limits." This section deals with a potpourri of aspects of relevancy, ranging from the definition of "relevancy" (Rule 401) to the admissibility of evidence of liability insurance (Rule 411). Despite the all inclusive nature of Article IV, there is a clear definition of and philosophy for the relevancy section of the Rules. Relevant evidence is defined as: ". . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

In application of this definition, Rule 402 prescribes that all relevant evidence is admissible,^{3/} and, therefore, evidence which is not relevant is not admissible. The remainder of Article IV places limitations on this very broad rule of admissibility. The overall goal of the relevancy section might be summed up in the Advisory Committee's comment:

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence.^{4/}

The Rules in Article IV attempt to assist the judicial system in answering that question.

RULE 403

Rule 403 provides a general guideline for excluding otherwise relevant evidence in the following language:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Emphasis added).

3. Except as otherwise provided by the Constitution, statute, other Federal Rules of Evidence, or rules prescribed by the Supreme Court.

4. Advisory Committee Note accompanying each Rule approved by the Supreme Court on November 20, 1972.

This exclusionary rule is similar to, yet broader than paragraph 137, MCM, 1969, which provides that evidence is not relevant when it is too remote to have any appreciable probative value in regard to a fact in issue. Thus, Rule 403 may be used as a "catch-all" objection to the admission of evidence if the defense counsel cannot point to any other specific ground or if the military judge has ruled against counsel on another asserted objection.

A clear example of the use of Rule 403 occurred in United States v. Weaver, supra. There, the Court of Military Appeals found that paragraph 153b(2)(b), MCM, 1969, set no time limit on the admissibility of state court convictions for impeachment purposes. The Court explained that the then-proposed Rule 403 of the Federal Rules of Evidence provided a trial judge with the discretion to exclude such a conviction if its probative value was outweighed by the danger of unfair prejudice, and the Court made such a rule applicable to the military. Weaver, therefore, established the military rule^{5/} that any conviction less than 10 years old could be challenged by an accused on the basis that the prejudicial effect of the impeaching offense outweighed any probative value regarding the issue of credibility.^{6/}

In another recent case, United States v. Bessette, 4 MJ 736 (NCMR 1978) the Navy Court of Review relied on Rule 403 to uphold a trial judge's decision to exclude a statement concerning a remote point of the appellant's defense. The Court held that, although the evidence was relevant, it was "remote, confusing, misleading, and cumulative." Id., at 740.

Defense counsel may make the same type of argument in presenting an in limine^{7/} motion. Neither the MCM, 1969, nor the Federal Rules of Evidence specifically discusses motions in limine, however, their use may be buttressed by an application

5. Effective after 1 July 1975.

6. The Court also relied on Rule 609 in establishing that any conviction more than 10 years old is not admissible unless the probative value substantially outweighs the prejudicial effect.

7. A motion in limine is "a procedural device which requests a pretrial order enjoining opposing counsel from using certain prejudicial evidence in front of the jury at a later trial." Siano, "Motions in Limine," Army Lawyer, January 1976, at 17.

of Rule 403. No military case has considered in limine motions in light of the Federal Rules of Evidence. However, one federal district court granted a motion in limine basing its decision on Rule 403. United States v. Jackson, 405 F.Supp. 938 (E.D.N.Y. 1975). This action followed defense counsel's argument that full disclosure of certain circumstances surrounding the capture of the accused would suggest to the jury that the accused had participated in a nationwide crime spree and would bring a number of unrelated crimes to the jury's attention. The government sought introduction of this proof of flight to corroborate the identity of the accused. The court ruled that the evidence would not be admitted at trial, providing the defendant would stipulate as to the circumstances of his flight without reference to the unrelated crimes. This action kept the unfairly prejudicial circumstances from the attention of the jury, yet permitted the government to use otherwise relevant evidence.

Although Rule 403 might seem to suggest that this evidence should have been completely excluded, the trial judge also must consider Rule 102 which mandates that the rules shall be construed "to the end that the truth may be ascertained and proceedings justly determined." Thus, in seeking to apply Rule 403, counsel should be ready to demonstrate that the evidence sought to be excluded is unfairly prejudicial. As the court opined in Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977), ". . . 'unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'."

RULE 410

Federal Rule of Evidence 410 may, on occasion, be invoked by trial defense counsel in the recurrent situation in which the accused has made a pretrial confession or admission. Rule 410 provides that:

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer . . . (Emphasis added).

Military courts have generally excluded from evidence any admissions made by an accused during the providency inquiry or stipulations of fact used in the providency hearing if the plea of guilty is withdrawn.^{8/} However, one federal court has taken a further step and excluded evidence of incriminating statements made by an accused to police officials when seeking an agreement that his wife would not be prosecuted. In United States v. Ross, 493 F.2d 771 (5th Cir. 1974), the Fifth Circuit Court of Appeals held that a government narcotic agent could not testify as to his discussion with the accused when the accused stated "If I take the blame is there a chance you will let my wife go?" The court excluded the statement, citing Santobello v. New York, 404 U.S. 257 (1971), because it concluded that few defendants would engage in plea bargaining if remarks uttered during the course of unsuccessful bargaining were admissible in a later trial as evidence of guilt. Although Ross was announced prior to the effective date of the Federal Rules of Evidence, the same decision has been obtained under Rule 410. In United States v. Herman, 544 F.2d 791 (5th Cir. 1977), the Fifth Circuit Court of Appeals noted that Rule 410 codified Ross^{9/} and expounded an expansive view of the protections of Rule 410 in the following language: "Statements are inadmissible if made at any point during a discussion in which the defendant seeks to obtain concessions from the government in return for a plea." Id., at 797.^{10/}

In cases in which an accused makes a statement to police officials during an apparent plea bargaining attempt or request for leniency, Rule 410 may prevent the prosecution from using that statement. The fact that police agents normally do not make "deals" does not seem dispositive, for an accused cannot be expected to know the extent of an officer's authority, nor is

8. See United States v. Barben, 14 USCMA 198, 33 CMR 410 (1963) and discussion in Imwinkelried, "The New Federal Rules of Evidence - Part IV," Army Lawyer, July 1973, at 12.

9. United States v. Ross, 493 F.2d 771, 796 (5th Cir. 1974).

10. But see United States v. Robertson, 560 F.2d 647 (5th Cir. 1977) (en banc) which refused to exclude inculpatory statements of a defendant pursuant to an agreement made with the government to be lenient with his wife. The Court held that Rule 410 did not bar this evidence because it did not involve a negotiation concerning the accused's own plea. Saltzburg and Redden in the Federal Rules of Evidence Manual (2d Ed. Supp. 1978) suggest that an alternative basis for the decision could be that the bargain was completed when the government promised to be lenient with the wife and the defendant agreed to make a statement.

there any requirement in the Rule that the statement be made during discussions with a person specifically authorized to make a binding agreement.^{11/} The fact that an accused is not represented by counsel also does not preclude him from attempting to bargain since he is entitled to represent himself.^{12/}

If a trial defense counsel is aware of the possible applicability of Rule 410 to his case before trial, he may litigate the issue at an Article 39a session. If not, counsel should be alert to the testimony of police agents for hints that plea bargain negotiations have taken place. Most significant about the use of Rule 410 is that it may operate to keep an accused's statements from being admitted into evidence without regard to the traditional attacks on the admissibility of confessions, i.e., lack of Article 31 rights, involuntariness, coercion, etc.

Conclusion

It is clear now that the Federal Rules of Evidence are applicable to courts-martial when the MCM, 1969 is silent or ambiguous.^{13/} In fact, military appellate courts have begun to apply this doctrine with ever-increasing frequency.^{14/} Rules 403 and 410 are two examples of applications of the Federal Rules which may be helpful to trial defense counsel. Other Rules in Article IV, such as those dealing with character evidence and evidence of habit or routine, also bear comparison with MCM, 1969, provisions. Indeed, a full reading and study of the Federal Rules of Evidence may offer a multitude of possible applications to military courts-martial. Such an examination by counsel may yield benefits for current clients, as well as prepare him or her for possible future changes in military evidentiary law.

11. United States v. Herman, 544 F.2d 791 (5th Cir. 1977); United States v. Smith, 525 F.2d 1017 (10th Cir. 1975).

12. United States v. Smith, supra, citing Faretta v. California, 422 U.S. 806 (1975).

13. Imwinkelried, "The New Federal Rules of Evidence - Part IV," Army Lawyer, July 1973, at 11.

14. United States v. O'Berry, 3 MJ 334, 336 n.3 (CMA 1977); United States v. Johnson, 3 MJ 143, 146 n.3 (CMA 1977); United States v. Fields, 3 MJ 27, 28 n.2, 30 nn.5 & 6, 31 n.8 (CMA 1977) (Fletcher, C.J., concurring); United States v. Houston, 4 MJ 729, 731 n.2 (AFCMR 1978); United States v. Davis, 2 MJ 1005, 1010 n.6 (ACMR 1976); United States v. Dawkins, 2 MJ 898 (ACMR 1976).

THE DEFENSE STRUCTURES IN THE ARMED FORCES

At trial defense counsel are aware, the Army is presently conducting a test of a separate defense counsel structure within the Training and Doctrine Command.* As the Army experiments with the new Trial Defense Service, an introduction to the structures for providing defense services in the other armed forces might be interesting and informative. Therefore, brief descriptions of the defense services in the Air Force, Navy, Marine Corps, and Coast Guard are provided below.

Air Force

On 1 January 1974, the Secretary of the Air Force directed the implementation of a plan to remove all defense counsel from local command authority and place them under the authority of The Judge Advocate General. An initial test of the concept was conducted in the northeastern states and, on 1 July 1974, the program was extended worldwide.

The separate defense structure is under the supervision of the Chief, Defense Services Division in the Office of The Judge Advocate General, Washington, D.C. This officer (a Colonel) supervises both the trial defense structure and the appellate defense division. The Air Force has divided the world into seven judicial circuits for the administration of military justice. The defense function of each circuit is supervised by a Chief Circuit Defense Counsel. This officer (usually a Lieutenant Colonel) is responsible for the proper functioning and administration of all defense services within the circuit. He is the direct supervisor of the trial defense counsel, who are located at Area Defense Counsel offices. Additionally, each circuit has a circuit defense counsel who is responsible for representation at the more serious Article 32 investigations and general courts-martial, as determined by the Chief Circuit Defense Counsel.

Area Defense Counsel offices have been established at all major Air Force installations throughout the world. Each is manned by one or more defense attorneys and an administrative assistant. Each office is physically separated from the offices of the staff judge advocate and other command functions. All personnel in the defense program are rated by other officers within the defense structure; neither the staff judge advocate

* See "Separate Defense Structure to be Tested," 10 The Advocate 65 (1978).

nor the convening authority are involved in the rating scheme. Area defense counsel are drawn from a variety of previous assignments, normally serve two year tours as ADCs, and are reassigned to another installation after completing their service as a trial defense counsel.

Area Defense Counsel offices provide airmen the full spectrum of defense services. In case of unavailability of the ADC, back-up assistance is provided by lawyers of the base legal office.

Navy

In 1973 the Navy Legal Service was established as a separate command within the Navy with The Judge Advocate General designated as the commanding officer. At that time, the previously existing law center offices, which were under the command and control of the convening authorities, were generally changed to become Naval Legal Services Offices (NLSOs), under the command and control of the Navy JAG Corps.

Whereas, formally the director of a law center was also the staff judge advocate to the general court-martial convening authority, the creation of the NLSOs separated the staff judge advocate function from the counsel who provide trial and defense services. The officers assigned to the staff judge advocate's office retained responsibility for statutory SJA military justice duties and other services to the immediate commander. The other officers were assigned to the NLSOs, and are responsible for prosecution, defense, legal assistance, and claims. Each NLSO, and any satellite or "branch office" of each, are under the control of an OIC. In the criminal law area, this JAG attorney is responsible for the proper and efficient functioning of the military justice system.

Typically, defense and trial counsel serve relatively short periods of time in military justice duties before rotating to other billets. Where the office is large enough to require several attorneys in each section (or "wing"), the senior JAG of that section in terms of time-in-service exercises the leadership responsibility. This senior defense (or trial) counsel has input in the preparation of the fitness report (OER), but it is the OIC of the NLSO, as the reporting senior, who signs all fitness reports. The OIC, then, reports directly to The Judge Advocate General of the Navy.

Marine Corps

The organization of Marine legal offices vary widely from base to base, as they are related to the size and mission of the installation served and the desires of the staff judge advocate. Generally, however, at large bases legal work is performed in a law center which is under the control of the SJA, who reports to the officer exercising general court-martial authority. Either he or his appointee, the Director of the Law Center, is in charge of the functioning of the military justice system. Often times, a senior defense counsel exercises some degree of delegated control over subordinate defense counsel to include evaluation recommendations of the SJA. Any rotation of duties among attorneys is contingent upon the needs of the law center and performance of counsel. At small installations, Marine lawyers are supervised and rated by the SJA. Currently, the Marine Corps is evaluating pilot programs with a view towards possible modifications in the trial and defense counsel organizations.

Coast Guard

Each of the twelve Coast Guard districts is served by a legal office headed by the District Legal Officer, normally a Captain or Commander, who performs the staff judge advocate function. He is responsible for all legal services within the district and, depending on the volume and diversity of service required, may designate program areas for which law specialists working for him will be responsible. Assignments are only temporary so that each law specialist will have the opportunity to gain experience in as many of the diverse areas of Coast Guard legal activity as possible.

The small number of general and special courts-martial tried annually in the Coast Guard has not warranted the assignment of specific trial and defense counsel as a continuing duty. When a court-martial is convened, law specialists are assigned from those available within the district legal office to perform trial duties. When requested by an accused, an out-of-district law specialist, if available, will be assigned as defense counsel. Frequently, law specialists also serve as Summary Court-Martial officers.

McOMBER AND PREVENTIVE LAW

Recently a panel of the United States Army Court of Military Review, in United States v. Roy, 4 MJ 840 (ACMR 1978), affirmed a rape conviction by distinguishing and, thus, severely limiting the Court of Military Appeals decision in United States v. McOmber, 1 MJ 380 (CMA 1976). If upheld by COMA, Roy will have a serious impact on the right of an accused to be represented by counsel during questioning. In the meantime, the case provides an excellent example of how using a little preventive law can protect the legal rights of an accused.

The Court of Military Appeals in McOmber 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.

Id., at 383.

The holding in McOmber was quickly extended by the Court in United States v. Lowry, 2 MJ 55 (CMA 1976). There the Court concluded that such a requirement applies even when the questioning is related to separate offenses from those on which the attorney is representing the accused, as long as the separate offenses occurred in the same general area and within the same general period of time.

Despite the specific holding of these cases, the Army Court of Military Review decision in Roy severely distinguished the McOmber Doctrine. In Roy, a CID agent took a statement from an accused after a proper rights advisement. Nine days later he took another statement from the accused, again after advising him of his rights. The agent did not ask the accused if he had counsel, nor did the accused volunteer that he had been assigned and consulted with counsel two days previously. At the time the agent questioned the accused the second time, the agent did not know the accused had counsel, but he knew that an Article 32 investigation was scheduled

for the next day. He also knew that an accused usually had counsel at that investigation. Faced with these facts, the United States Army Court of Military Review held that, "absent a showing of bad faith or an attempt to circumvent the holding of McOmber and Lowry, we decline to extend those cases to an investigator who probably should but does not in fact know that an accused has counsel." (Emphasis added). Id., at 841.

Whether the decision in the Roy case will be adopted by the Court of Military Appeals is yet to be seen. Nevertheless, prudent trial defense counsel can take action in an attempt to prevent it from having an impact on their clients.

The first line of defense to this problem is, of course, to advise all clients, in the bluntest terms, not to make any statements or discuss the case with anyone outside of the presence of counsel. Beyond that step, the trial defense counsel can notify the appropriate military law enforcement agencies (i.e., CID, MPI, PMO) of his or her representation of the client. This action is specifically designed to prevent criminal investigators from interviewing clients without first informing counsel. Of course, in many cases, the trial defense counsel will not know the actual agent who is investigating the accused; a letter of notification of representation should, then, be sent to the heads of the local law enforcement agencies phrased in a manner which amounts to notice to all investigators within the particular agency. While it is true that, even after such notification, agents might still plead the same facts as Roy (i.e., "should have known he had a lawyer, but didn't"), the burden on the government to show good faith would be much greater.

The following is a proposed letter which could be used by trial defense counsel for notifying investigative agencies of representation. Defense sections may desire to adopt this letter as a standard form for their own defense practice.

The McOmber holding has been, and continues to be, one with far-reaching consequences. Surely, the Court of Military Appeals will continue to be called upon to explain its meaning, as it has done recently in United States v. Turner, 5 MJ 148 (CMA 1978).*

* EDITOR'S NOTE. The editors are examining Turner and its impact on McOmber, and intend to present future material in The Advocate about this subject.

Whatever the final outcome of the conflict, trial defense counsel can take a small step now in an attempt to prevent future problems for his client.

Captain David L. Holmes, JAGC
Defense Appellate Division

APPENDIX

Commander
Fort Blank, Field Office
USACIDC

Dear Sir:

This is to serve notice upon you and all those within your command that, as of this date, I have undertaken to represent _____ as (his)(her) attorney during the current criminal investigation of _____.

In accordance with United States v. McOmber, 1 M.J. 380 (CMA 1976), it is required that I be personally informed before any criminal investigator interviews my client. If you or any of your agents or employees find it necessary to question my client, or assist any other law enforcement agency in conducting any questioning, I ask that I be contacted prior to doing so.

I may be contacted pertaining to this matter at _____ during duty hours.

Sincerely,

Captain, JAGC

WAIVER

The appellate courts are constantly beset with claims by government counsel that errors have been waived by the defense. There are, of course, occasions when trial defense counsel will consciously waive motions and objections in order to obtain some tactical or strategic advantage. When this is done, defense counsel should consider noting and explaining their decision on or in the record. The trap to be avoided, however, is the inadvertent waiver of errors which might otherwise prove to be grounds for relief on appeal.

As a reminder, we are publishing below a reorganized list of issues, and how they are waived, that has appeared earlier in The Advocate (Vol. 7, No. 1) and has been distributed in the FDS Seminar books. The following list is organized in categories according to how the error is waived. It should be noted that regardless of category, appellate courts have held that waiver is inapplicable if there has been a violation of military due process or a manifest injustice. The following is intended only as a guide and a starting point to aid trial defense counsel in determining what must be done to protect the record and preserve issues for appeal.

I. The following matters are never waived:

Failure to state an offense	US v. Fleig, 37 CMR 64
Hearsay	Par 139a, MCM
Improper previous conviction	US v. Morales, 50 CMR 647 US v. Perkins, 48 CMR 975
Improper TC argument (if prejudicial to substantial rights of the accused)	US v. Knickerbocker, 2 MJ 128
Insanity	Par 120 et. seq., MCM US v. Frederick, 3 MJ 230
Instructions	US v. Grunden, 2 MJ 116 US v. Thompson, 3 MJ 168 US v. Jones, 3 MJ 279

Jurisdiction	Par 68d, MCM Par 215a, MCM
Substitution of MJ after arraignment (or members after assembly)	Par 39e, MCM US v. Smith, 50 CMR 774

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

Former jeopardy	Par 68d, MCM
Statute of Limitations	Par 68c, MCM
Voluntariness of a confession* (see also category IV)	US v. Frederick, 3 MJ 230 US v. Graves, 50 CMR 393 US v. Hartzell, 3 MJ 549

*May also be waived by introduction of the confession into evidence by the defense.

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

Amendment of specs	US v. Redman, 41 CMR 102 US v. Clark, 49 CMR 192
Denial of request for IDC	US v. Mitchell, 36 CMR 14 US v. Quinones, 50 CMR 476
Errors in post-trial review	US v. Barnes, 3 MJ 406 US v. Morrison, 3 MJ 408
MJ challenge for cause	US v. Wisman, 42 CMR 156 US v. Haynes, 47 CMR 48
Multiplicity	US v. Bucholz, 47 CMR 179
Prior punishment	Par 68g, MCM Par 215c, MCM US v. Florczak, 49 CMR 786

SOME SAMPLE INSTRUCTIONS: PART 4

Editor's Note: As our regular readers have no doubt noticed, we have been running a series of sample instructions in the past three issues of The Advocate. These instructions were obtained from the Field Defense Services Office (now U.S. Army Trial Defense Service), which had prepared them for their 1978 seminars. The publication of these sample instructions has prompted some trial defense counsel to forward to us instructions that they had used or attempted to use in the past. In this issue, we reproduce three of them. They are:

Illegal Pretrial Confinement
Law of Principals
Immunized Accomplice Testimony

The editors wish to thank Mr. Donald A. Timm, Esq., Seoul, Korea, and Captain John C. Zimmermann, Fort Hood, Texas, for these contributions.

Illegal Pretrial Confinement

Gentlemen, I have determined as a matter of law that the accused was subjected to illegal pretrial confinement from _____ to _____. During this period, (he was confined in the same status as a sentenced prisoner, and was required to work with prisoners serving a sentence to confinement at hard labor, and was required to observe the same work schedule and duty hours and work assignments as sentenced prisoners) (he was confined under conditions more rigorous than necessary to insure his presence at trial, which were thus illegal and approximated the conditions imposed on prisoners serving sentences to confinement at hard labor) (he was confined without a proper determination having been made that pretrial confinement was necessary).

Therefore, as a matter of law, I have determined that the accused has already served punishment of _____ days confinement at hard labor for the offense(s) of which he has been found guilty, at a time when he was presumed to be innocent. This illegal confinement was a serious violation of the accused's fundamental rights; accordingly, when you deliberate as to the sentence to be imposed in this case, you must give the accused meaningful credit for the illegal punishment already served. There is no formula for this credit, but you have a duty to

reflect this credit in a meaningful way in any sentence you may reach. (You are not limited to thinking of this credit in terms of confinement only, but you must consider it as having a bearing upon the totality of the sentence, including the appropriateness of a punitive discharge (or the type thereof) the amount, if any, of forfeitures, and the degree, if any, in reduction in rank, as well as, or in lieu of, any confinement.)

(The credit granted the accused should not only recompense him for the illegal punishment he has already been subjected to, but should also serve as a deterrent to future unlawful government action.)

Reference: United States v. Kimball,
50 CMR 337 (ACMR 1975)
United States v. Jackson,
41 CMR 677 (ACMR 1970)

* * * *

Law of Principals

You are advised that any person who commits an offense is a principal. Likewise any person who aids or abets the commission of an offense is also considered a principal and equally guilty of the offense. To constitute one an aider and abetter, you must be convinced beyond all reasonable doubt that the accused shared the criminal intent or criminal purpose of the active perpetrator of the (larceny) (____). The accused must have manifested a purposive attitude which revealed an affirmative participation in the criminal venture with the active perpetrator of the larceny. If there was a difference between the accused's purpose or intention and the criminal purpose of the active perpetrators of the (larceny) (____), then the accused is not guilty of being an aider or abetter. Therefore, unless you are convinced beyond a reasonable doubt that the accused shared the criminal intent or criminal purpose of the active perpetrators of the (larceny) (____) and that he acted in some way which demonstrated an affirmative participation or association with the (larceny) (____), then you must acquit the accused and find him not guilty of the offense. 1/

Likewise, you are further instructed that any person who counsels another to commit an offense is a principal and equally guilty of the offense. In deciding whether or not the statements by the accused are such that you are convinced beyond a

reasonable doubt that he counseled the commission of the (larceny) (____), you may consider whether or not the words and acts of the accused convince you beyond a reasonable doubt that he put the design to commit the (larceny) (____) in such shape that without the accused's statements or acts the crime would not have been committed. 2/ For the accused to have aided and abetted the active perpetrators of the crime in the commission of the criminal offense by counseling or encouraging the commission of the offense, the government must prove that the accused knowingly and with criminal intent so encouraged or counseled the commission of such an offense. 3/

Unless you are convinced beyond all reasonable doubt that the accused knowingly and with criminal intent uttered the words and committed the acts with the intention to promote, encourage or counsel the commission of such (larceny) (____) by (names of perpetrators) then you must find the accused not guilty as an aider and abetter to larceny. In this regard, the government must prove that a common intent to accomplish the (larceny) (____) was present at the time the act or statements were made by the accused. That is to say, it was a common intent among (names of perpetrators) to accomplish an unlawful purpose of (larceny) (____). The government must prove beyond all reasonable doubt that the accused knew of this common intent among part of the perpetrators and that with knowledge of this intent sought to encourage or to counsel them in the commission of such unlawful purpose and that the accused knew that the statements or acts committed by him would have this effect. Unless you are so convinced beyond a reasonable doubt, you must find the accused not guilty of (larceny) (____) by aiding and abetting. 4/

- Reference: 1. United States v. Thomas, 469 F.2d 145,147 (8th Cir. 1972);
United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976);
Pereira v. United States, 347 U.S. 1,9, 74 S.Ct. 358,366, 98 L.Ed. 435,444 (1954);
United States v. Craney, 1 MJ 142, 143 (CMA 1975).
2. State v. Rini, 151 La. 163, 91 S. 664, Reid's Branson Instructions to Juries §3382

3. People v. Barnes, 210 Cal. App.2d 740, 26 Cal. Rptr. 793 (1962); State v. Knicker, 366 S.W.2d 400 (Mo. 1963); Reid's Instructions §3382.
4. Wiggins v. State, 238 S.2d 500 (Fla. App. 1970); Reid's Instructions §3382

Others. United States v. Blau, 13 CMR 381 (ABR 1953);
United States v. Bowles, 9 CMR 835 (AFBR 1953);
United States v. Brown, 11 CMR 242 (CMA 1969);
United States v. Keenan, 39 CMR 108 (CMA 1969);
United States v. Outlaw, 2 MJ 814 (ACMR 1976).

* * * *

Immunized Accomplice Testimony

Gentlemen, with regard to the witnesses _____ and _____, both testified under an explicit grant of immunity from the prosecution. The testimony of an informant who provides evidence against a defendant for pay, or for immunity from prosecution, or for personal advantage or vindication must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. It is up to you to determine whether the testimony of either or both of these witnesses has been affected by hopes of gain or by prejudice against the accused.

Where, as here, the witnesses who are testifying under immunity are also accomplices, as I have previously explained that term, and have gained their immunity because of their testimony, the testimony should be viewed with great caution, and in such a case it is necessary in order to convict a person of such an offense that there be corroborative evidence of guilt independent of the immunized accomplice's testimony. 1/

However, the fact that a government witness testified under a grant of immunity is not a justification under the law for finding the accused not guilty of you find that his guilt has been proven beyond a reasonable doubt by the whole of the evidence.

Reference: 1. This latter phrase stems from People v. Kress, 284 N.Y. 452, 31 N.E.2d 898 (1940), and appears to differ somewhat from paragraph 9-22, DA Pamphlet 27-9, Military Judges' Guide (19 May 1969).

Others. United States v. Leonard, 484 F.2d 955 (D.C. Cir. 1974); United States v. Demophalis, 506 F.2d 1171 (7th Cir. 1974); Carlson, Witness Immunity in Modern Trials: Observations on the Uniform Rule of Criminal Procedure, 67 J. Crim. L. & Criminology 131 (1976).

* * * * *

DISCHARGE ORGANIZATION MERGES WITH A.U.

On July 1, 1978, the National Military Discharge Review Project will merge with the clinical program at American University. The new organization, the National Veterans' Law Center, will be available for assistance covering the full range of veterans' problems. Their address is:

National Veterans' Law Center
Washington College of Law
The American University
Washington D.C. 20016

Phone: (202) 686-2741

TRIAL AND APPELLATE STATISTICS

The Clerk of Court, Army Court of Military Review, has recently released trial and appellate statistics for the period 1 October 1977 to 31 March 1978. Figures for the period 1 April 1977 to 30 September 1977 were previously published in Volume 9, Number 6 of The Advocate. A comparison of these two statistical periods indicates the following trends:

- 1) The percentage of trials by military judge alone in GCM cases declined from 61% to 49%.
- 2) The percentage of trials in which enlisted members served on the court rose from 19% to 22% in GCMs and from 7% to 11% in BCD Specials.
- 3) The conviction rate for all courts-martial remains constant at about 90%.
- 4) Statistics continue to reveal that the military judges' sentences include a punitive discharge and confinement much more frequently than sentences adjudged by a court with members.
- 5) The percentage of cases which involve drug offenses declined from 24% to 17%.
- 6) The percentage of cases which involve assault charges increased from 9% to 12%.
- 7) On a proportional basis with all service-members, persons court-martialed remain much more likely to be younger, single, have less education, and receive lower scores on mental aptitude tests.
- 8) The number of cases handled by the Defense Appellate Division continues to decline, and as a result, the processing times continue to improve.
- 9) The Army Court of Military Review markedly increased the percentage of cases (8.1% to 13.4%) in which the findings and sentence were disapproved and a rehearing was ordered. This, no doubt, is a result of the numerous rehearings ordered because of Green-King errors.

TABLE II: COMPARISON BETWEEN MILITARY JUDGE AND JURY

1 October 1977 - 31 March 1978

	GCM		BCD SPECIAL	
	Court w/ Members	Military Judge Alone	Court w/ Members	Military Judge Alone
Number of Persons Tried	275	259	68*	229*
Number Convicted	221 (80%)	225 (87%)	68	229
Punitive Discharge Adjudged	146 (66%)	201 (89%)	68	229
Confinement Adjudged	181 (82%)	214 (95%)	45 (66%)	202 (88%)
Forfeitures Adjudged	191 (86%)	212 (94%)	52 (76%)	211 (92%)
Period of Confinement Adjudged				
1 - 12 Months	91 (50%)	116 (54%)		
13 - 24 Months	34 (19%)	55 (26%)		
25 - 60 Months	33 (18%)	28 (13%)		
61 -120 Months	15 (8%)	9 (4%)		
120 + Months	8 (4%)	6 (3%)		

As only those cases in which BCDs are adjudged are forwarded to the Court for review, the only two areas for comparison are in forfeitures and confinement.

TABLE III: BACKGROUND FACTORS*

1 October 1977 - 31 March 1978

	<u>Accused</u>	<u>Army-Wide</u>
<u>Education</u>		
Less than high school graduate	40.3	15.4
High school graduate (GED included)	53.6	59.6
Attended college	4.5	22.2
College graduate	0.5	2.8
Unknown	1.1	—

* Comparison background factors of enlisted personnel whose records of trial were received at the Clerk of Court's Office and all Army-Wide active duty personnel.

	<u>Accused</u>	<u>Army-Wide</u>
<u>Age</u>		
17-19	36.0	22.6
20-24	49.8	43.7
25-29	9.5	16.0
30-34	2.8	7.8
35-39	1.0	6.2
40-over	0.9	3.7

<u>Mental Group</u>		
I	2.4	4.7
II	17.6	28.2
III	55.8	55.2
IV&V	20.1	11.9
Unknown	4.1	

<u>Marital Status</u>		
Single	69.6	47.2
Married	28.8	52.8
Separated	0.1	Unknown
Divorced	1.5	Unknown

TABLE IV: DEFENSE APPELLATE DIVISION CASELOAD

1978 Monthly Average

1 January - 30 June 1978

Active Cases	1642
Cases Received Each Month	114
Guilty Plea Cases	65
Not-Guilty Plea Cases	49
Cases closed Each Month	144

ACMR

CMA

Cases Filed Each Month	137	Petition Briefs Filed Each Month	90
Misc. Pleadings Filed Each Month	40	Final Briefs Filed Each Month	22
Oral Argument Each Month	12	Petitions Granted Each Month	22
Days to Brief Filed (G Plea)	24.	Misc. Pleadings Filed Each Month	33
Days to Brief Filed (NG Plea)	71	Oral Arguments Each Month	5

TABLE V: ACTIONS BY ARMY COURT OF MILITARY REVIEW

1 October 1977 - 31 March 1978

Findings and sentence affirmed	652 (72.9%)
Findings affirmed, sentence modified	31 (3.5%)
Findings affirmed, sentence reassessment or rehearing as to sentence only ordered	3 (0.3%)
Findings partially disapproved, sentence affirmed	17 (1.9%)
Findings partially disapproved, rehearing ordered	1 (0.1%)
Findings & sentence affirmed in part, disapproved in part	22 (2.5%)
Findings & sentence disapproved, rehearing ordered	119 (13.4%)
Findings & sentence disapproved, charges dismissed	24 (2.7%)
Returned to field for new SJA & C/A action	18 (2.0%)
Miscellaneous decisions disposing of a case	7 (0.7%)
<u>TOTAL</u>	<u>894</u>

* * * * *

NOLAN REPLACES RECASNER AS ARTICLES EDITOR;
SQUIRES JOINS EDITORIAL BOARD

Captain Peter A. Nolan has succeeded Captain James Recasner as the Articles Editor of The Advocate. Jim has worked on The Advocate for over a year. Throughout that time, Jim has been primarily responsible for the continuing quality of the articles and the recruitment of potential authors. His jovial and cooperative personality will be missed.

Pete Nolan has been at DAD for nine months, following his assignment at Fort McNair as Chief of Military Justice and Chief Defense Counsel. Of interest is the fact that Pete is the brother of John Nolan, a former Editor-in-Chief of The Advocate.

Captain Malcolm ("Mac") Squires has also been appointed to be the United States Army Trial Defense Service (USATDS) representative to the Editorial Board. Having written two articles for The Advocate on McCarthy subject-matter jurisdiction, Mac has gained a reputation as the resident expert on this issue. Mac will act as a liaison between USATDS and The Advocate to insure a reciprocal flow of ideas between two organizations with similar concerns -- the improvement of trial practice and tactics.

CASE NOTES

FEDERAL DECISIONS

SEARCH AND SEIZURE -- AFFIDAVITS FOR SEARCH WARRANTS

Franks v. Delaware, ___ U.S. ___, 23 Cr.L. 3179 (June 26, 1978).

In Franks, the Supreme Court was asked whether an accused is entitled to have a search warrant suppressed when the matters set forth in the affidavit supporting the warrant are untrue. The Supreme Court held that an accused has the right to challenge the veracity of the affidavit. However, automatic suppression does not result where the false information is superfluous to a finding of probable cause. The court held that:

. . . where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id., at 3179-80. It is therefore clear that non-essential and/or good faith mistakes in the information contained in the affidavit will not invalidate the warrant.

SENTENCE - JUDGE'S BELIEF ACCUSED LIED

United States v. Grayson, ___ U.S. ___, 47 L.W. 1004 (June 26, 1978).

The United States Supreme Court resolved another split in authority among the Circuit Courts of Appeal by allowing a judge, when imposing a sentence, to consider his belief that the accused lied on the stand. The Court stated that "[t]here is no protected right to commit perjury."

STATUTORY RAPE STATUTE VIOLATES EQUAL PROTECTION

Helgemoe v. Meloon, 564 F.2d 602 (1st Cir. 1977), cert. denied, ___ U.S. ___, 23 Cr.L. 4080 (1978).

The U.S. Supreme Court has let stand a decision by the First Circuit Court of Appeals that a New Hampshire statutory rape statute is unconstitutional. The now-superseded statute punished a male for having sexual intercourse with a consenting female under the age of 15 years. The statute provided no penalty for a female who has sexual intercourse with a male under 15 years of age. The First Circuit held that the superseded New Hampshire statute violated the Equal Protection Clause of the United States Constitution. The Chief Justice and Mr. Justice Blackmun would have granted certiorari and reversed summarily.

COURT OF MILITARY APPEALS DECISIONS

BOOKER NOT RETROACTIVE

United States v. Cannon, 5 MJ 198 (CMA 1978).

Noting the potential disruption to the administration of the military justice system, the Court of Military Appeals held that their decision in United States v. Booker, 3 MJ 443 (CMA 1977), was to be applied to cases tried or retried after October 11, 1977. While Cannon only concerned the admissibility of a summary courts-martial, the court strongly suggested that Booker was meant to be applicable to Article 15s.

NEWCOMB NOT RETROACTIVE

United States v. Mixson, 5 MJ 236 (CMA 1978) (ADC: CPT Milne).

In United States v. Newcomb, 5 MJ 4 (CMA 1978), the Court of Military Appeals held that the convening authority must personally select the military judge and counsel. Failure to do so constitutes a jurisdictional error. In Mixson, the Court of Military Appeals held that Newcomb was applicable to courts "convened" after 1 May 1978, the date of the decision in Newcomb.

COURT OF MILITARY REVIEW DECISIONS

ATTEMPT VS. MERE PREPARATION

United States v. Goff, CM 436226, ___ MJ ___ (ACMR 18 July 1978) (ADC: CPT Curtis).

A CID informant, M, asked appellant if he would obtain some heroin for him. M gave the appellant \$50 to accomplish this task. The appellant went off post, could not find any drugs, returned to post and returned the money to M.

The Army Court of Military Review affirmed appellant's conviction for attempted delivery of heroin. In doing so, the Court stated that it preferred the federal rule as enunciated in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974) as opposed to their previously announced rule announced in United States v. Williams, 4 MJ 507 (ACMR 1977). While both Williams and Mandujano were factually similar, the Court decided that Mandujano was a concise restatement of Article 80, UCMJ. Mandujano set forth a "two-tiered" approach to deciding if the accused's conduct amounted to an attempt:

- (1) the accused must act with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting, and,
- (2) the accused must have engaged in conduct which constitutes a substantial step toward commission of a crime.

Under the facts of this case, the Court held that the appellant's action in receiving the money and driving off-post constituted a substantial step toward the delivery of heroin.

CONFESSIONS - VOLUNTARINESS AS ISSUE FOR JURY

United States v. Clark, CM 436102, ___ MJ ___ (ACMR 12 July 1978)
(ADC: MAJ Hostler).

During an out-of-court hearing, the military judge ruled that the defendant's pretrial statement was voluntary and he had been properly warned pursuant to Article 31, UCMJ. The trial defense counsel re-litigated the issue before the military jury and after argument on the issue, the trial judge disclosed his prior ruling to the Court. The military judge then instructed the court-martial that his determination only concerned the statement's admissibility, and it was up to the jury to determine if the statement was voluntary and whether proper warnings were given.

Although the Court of Review held that the trial judge's procedure was error, they found no prejudice to the accused. The Court felt that the trial judge's instructions that each individual panel member must determine voluntariness for himself cured any taint from the disclosure of his prior ruling.

PRETRIAL AGREEMENT - AUTOMATIC CANCELLATION PROVISION

United States v. Stoutmire, CM 436283, ___ MJ ___ (ACMR 27 June 1978) (ADC: CPT Holmes).

Several jurisdictions have a provision in their pretrial agreement that, if a rehearing on findings is ordered by the Army Court of Military Review or the Court of Military Appeals, the convening authority would not be bound to the pretrial agreement. In Stoutmire, the Army Court of Military Review held that such a provision was in violation of Article 63(b), Uniform Code of Military Justice, 10 U.S.C. §863(b) and paragraph 81d(1), Manual for Courts-Martial, United States, 1969 (Revised edition). Nevertheless, there was no harm to the accused because, at any rehearing, the maximum imposable sentence is limited by law to that initially approved by the convening authority.

Trial defense counsel, if forced to include such a provision in order to get a pretrial agreement, should consider asking the military judge to strike this provision. United States v. King, 3 MJ 458 (CMA 1977); United States v. Green, 1 MJ 453 (CMA 1976). While this may not provide any immediate relief to the accused, it may head off problems in the future. See also United States v. Grover-Madrill, CM 436990, ___ MJ ___ (ACMR 20 June 1978).

SOLICITATION

United States v. Jackson, SPCM 13184, ___ MJ ___ (ACMR 20 June 1978) (ADC: CPT Healy).

The accused approached several soldiers asking each if they wanted to buy marijuana. At no time did the accused produce for viewing or otherwise indicate he was in possession of marijuana. At trial, the accused was convicted of attempted sale of marijuana, in violation of Article 80, UCMJ.

The Court held that the facts showed nothing more than mere preparation and found him not guilty of an attempt, but guilty of soliciting another to possess marijuana, in violation of Article 134, UCMJ. The Court determined that the accused's acts supported the separate, but not lesser included, solicitation offense.

WITNESS - IMMUNITY

United States v. Shaw, CM 436553 (ACMR 17 July 1978) (unpublished) (ADC: CPT Healy).

A witness testified for the government under a grant of immunity. Notice of the grant was not communicated to the defense counsel prior to trial in accordance with United States v. Webster, 1 MJ 216 (CMA 1975). The defense counsel, who knew that the witness was a co-accused and had been convicted, waived the error by not raising it at trial.

TRIAL JUDGE RULING OF INTEREST

AIR FORCE PRETRIAL AGREEMENT RESTRICTIONS DECLARED INVALID

United States v. MSGT John J. Morehouse, Special Court-Martial convened at Osan AFB, Korea, 25-26 May 1978.*

After referral of charges, the trial defense counsel submitted, through channels, an offer to negotiate a pretrial agreement in accordance with paragraph 4-8, AFM 111-1. This

* The information which formed the basis for this case note was submitted by Captain Donald G. Rehkopf, Jr., USAF, who was the trial defense counsel.

paragraph requires that The Judge Advocate General of the Air Force approve all pretrial agreements before they are consummated. The Judge Advocate General denied the request to negotiate.

At an out-of-court hearing, the trial defense counsel moved for appropriate relief on the grounds that paragraph 4-8, AFM 111-1 interferes with the convening authority's discretion regarding his control over findings and sentence or that it constitutes unlawful command influence. Article 37 and 64, UCMJ; United States v. Allen, 20 USCMA 317, 43 CMR 157 (1971); United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956); United States v. Crawford, 46 CMR 1007 (ACMR 1972) and the citations therein.

In his well-documented Memorandum of Decision dated 1 July 1978, the military judge held that he found no evidence of bad faith or wrongdoing on the part of those who purportedly interfered with the convening authority's discretion. Nevertheless, due to his statutory authority, the convening authority is the sole source of the implied power to negotiate pleas. The judge held that neither the Secretary of the Air Force nor his designees can interfere with the convening authority's exercise of that power. The military judge concluded that paragraph 4-8, AFM 111-1 is not binding on the convening authority but should be considered by him as a guideline in any decision on whether or not to negotiate for a plea of guilty. The judge granted the defense motion, and ordered a continuance in the trial to allow the parties to negotiate a pretrial agreement, if they desired. The convening authority approved the agreement.

STATE COURT DECISIONS

ARREST FOR MINOR TRAFFIC OFFENSES

State v. Hehman, ___ P.2d ___, 23 Cr.L. 2205 (11 May 1978).

The Supreme Court of Washington has held that it is against public policy to arrest a person for minor traffic violations (driving without a license) when the defendant agrees to appear in court. Because the arrest was illegal, the drugs seized incident to that arrest were suppressed. See also People v. Garcia, ___ N.W.2d ___, 46 L.W. 2641 (June 6, 1978).

ENTRAPMENT AS DENIAL OF DUE PROCESS

People v. Isaacson, ___ N.Y.2d ___, 23 Cr.L. 2233 (May 9, 1978).

The New York Court of Appeals has set aside the conviction of a cocaine seller after finding that police tactics, while not rising to the level of entrapment, violated the Due Process Clause of the New York State Constitution.

In 1974, the New York police arrested B for possessing suspected amphetamines. During an interview, B was struck with a fist, kicked and threatened with a gun by a state police investigator. Believing he was facing a long prison term, B agreed to assist the New York police. The police knew the drugs were caffeine, but did not tell B until after Isaacson's trial.

B called Isaacson, an acquaintance of about two years, and pleaded with Isaacson to sell him drugs so that he could re-sell them to get enough money to hire "a decent lawyer." Finally, Isaacson gave in, but fearful of the New York drug laws, insisted that the sale take place in Pennsylvania. B, pursuant to instructions by the New York police, kept moving the meeting place progressively farther north. They finally agreed on a meeting place in Lawrenceville, New York (B told Isaacson that Lawrenceville was in Pennsylvania). Thus, Isaacson was enticed into New York where he was apprehended making the drug sale.

In deciding that the police conduct violated due process, the Court identified four factors as being important:

- (1) The accused's previous drug sales were "small and rather casual."
- (2) The police conduct was "repugnant to a sense of justice."
- (3) The accused's reluctance to commit the crime was overcome by the great persistence of B, who played on the accused's sympathy and their past friendship.
- (4) The police conduct in deceiving the accused as to the location of the sale indicates that the police concern was more than simple crime prevention.

SUFFICIENCY OF PROOF: DRUGS

People v. Park, ___ N.E.2d ___, 46 L.W. 2680 (May 26, 1978).

To establish the identity of marijuana, the prosecution elicited testimony from a deputy sheriff. The sheriff identified the substance by its "feel, smell, texture and looks." To qualify the witness as an expert, the government established that the witness had been a deputy sheriff for four years and had handled what he believed to be marijuana on about 40 occasions. However, the government's question only established that on at least one of these occasions, the substance was in fact marijuana. The deputy sheriff had no formal training in identifying marijuana. The Wisconsin Supreme Court ruled that identifying marijuana by "feel, smell, texture and looks" is "highly prone to error in the hands of anyone but an expert, because of the number of plants whose morphological characteristics closely resemble [marijuana]." One basis for the court's ruling was a state of Wisconsin Crime Lab report which indicated that a substance tentatively identified as marijuana by its looks, and submitted to the lab for confirmation, was correctly identified in only 85.6% of the cases.

It is important to note that the government only relied upon the deputy sheriff's testimony after having failed to establish the reliability of the "narco test kit." Additionally, the court strongly suggested that a different result would have issued if the deputy sheriff had been asked how many times his initial identification of marijuana had been confirmed by lab analysis, and if his reliability had been near 100%.

* * * * *

INDEX FOR THE ADVOCATE

From time to time, we receive suggestions that we publish an index of past Advocate issues. A cumulative index for the entire first ten years of The Advocate is being prepared and will be published in late 1978. In the meantime, Vol. 7, No. 3 contains an index of Volumes 1-7, and Vol. 9, No. 6 includes an index for Volume 9.

"SIDE-BAR"

or

Points to Ponder

1. Preventing Impeachment Problems. Frequently, DAD receives records of trial in which trial defense counsel attempt to impeach hostile government witnesses by a prior out-of-court inconsistent statement made to that same defense counsel. Often times, the trial defense counsel, through prolonged and strained cross-examination, is able to make it clear to the court that the government witness is stonewalling the prior inconsistent statement. However, it should be remembered that absent the infrequent admission at trial of the prior inconsistent statement of the witness, the dialogue between the trial defense counsel and the witness is not evidence of the prior inconsistent statement.

Because counsel are prohibited by the ABA Code of Professional Responsibility, Disciplinary Rule 5-102, from appearing as a witness on behalf of their clients without withdrawing from the case, he or she will not normally be able to take the stand to testify about the existence of a prior inconsistent statement. Thus, absent an in-court admission by the witness of a prior inconsistent statement or some other action by the trial defense counsel, the military judge will not give an instruction on a prior inconsistent statement, and the defense counsel will not be allowed to argue on findings that such a prior inconsistent statement was made. This may deprive the accused of a possible crucial piece of evidence for his defense.

A suggested method to remedy this problem is for trial defense counsel to have a witness present at the pretrial interview. This witness could be a legal clerk, defense investigator, or even another attorney unrelated to the case. Of course, a witness cannot be available for all pretrial interviews conducted by a defense counsel. But he can be present when counsel talks with an important witness who appears to have the potential to backpedal later in court. If the witness then changes his or her testimony in court and denies making the prior inconsistent statement to defense counsel, a defense witness will be available to impeach the errant witness.

2. Judges Cook Change Positions. Those who say that judges rarely change positions on legal issues, or if they do so, do it with delicate and obfuscatory language, can look with interest at two recent decisions of the United States Court of Military Appeals and the United States Army Court of Military Review. In cases decided on 8 and 9 June 1978, Judges William H. Cook of the Court of Military Appeals and Peter H. Cook of the Army Court of Military Review clearly and openly changed their minds on legal positions that they had earlier taken.

Judge William Cook's turnabout appears in Stewart v. Stevens, 5 MJ 220 (CMA 8 June 1978). That case involved a petition for extraordinary relief filed by a member of the Navy challenging an Article 15. The issue before the Court was whether it had jurisdiction over Article 15's; thus the Court of Military Appeals was presented with an opportunity to expand the McPhail doctrine. (In McPhail v. United States, 1 MJ 457 (CMA 1976), the Court had granted a petition from a service-member whose court-martial resulted in punishment that would not normally permit him the right to appeal to the Court of Military Appeals. Thus, by its action and language, McPhail was considered a vast extension of the Court of Military Appeals' jurisdiction.)

However, in Stewart, the Court of Military Appeals refused to extend the McPhail doctrine to Article 15's. In an unsigned order, the Court of Military Appeals dismissed the petition for extraordinary relief. Judge Cook, the author of the unanimous McPhail opinion, concurred in the result in Stewart, and explained his reasons for doing so. He stated flatly: "I was wrong in McPhail as to the scope of this Court's extraordinary relief jurisdiction. I am impelled to my admission of error by perceptions of congressional intention" With this clear language, and the Court's action in Stewart, it now appears that the McPhail doctrine is of uncertain authority.

Judge Peter Cook's change of mind is presented in United States v. Arrington, SPCM 12959 (ACMR 9 June 1978). The issue before the Court there was whether the military judge's inquiry into the pretrial agreement satisfied United States v. Green, 1 MJ 453 (CMA 1976) and United States v. King, 3 MJ 458 (CMA 1977). Prior to Arrington, Judge Cook had consistently dissented in Army Court of Military Review decisions which involved the "compartment" question, explaining that this factor, along with the other elements of the Green-King inquiry, must be specifically satisfied.

However, in Arrington, Judge Cook abandoned that position. In a colorful concurring opinion, he explained that his "volte-face [was] occasioned primarily by a uniform pattern of denials of petitions by the United States Court of Military Appeals in cases which involve this precise omission." Citing the "Rubaiyat" of Omar Khayyam, Judge Cook concluded that "[p]lainly as to this facet of our law which was metagrobolized by the Green-King decisions, the moving finger has writ."

3. Disparate Sentences by Co-Actors. Many criminal offenses are committed by more than one person. Frequently, such combined activity results in more than one trial for the co-actors, and often the several perpetrators receive different punishments. In fact, it is not at all uncommon for these co-actors to be sentenced to widely disparate sentences. An example is a recent case received in DAD which involved three individuals who participated in a robbery. Without any unusual distinction between their involvement in the crime, one accused received a bad conduct discharge and nine months confinement, while the other two accused received only a forfeiture and reduction.

While there is little that a trial defense counsel can do at the trial level to avoid such discrepancies in sentences, he can insure, before convening authority action, that the staff judge advocate's post-trial review includes a comparison of the charges and sentences of all co-actors, and a discussion of the standard for considering this information when approving the sentences.

The general policy, of course, is that appropriateness of a sentence in a particular case is to be determined on the basis of its own facts and circumstances, and not on the comparison with sentences in other cases. United States v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959). However, concepts of fairness and justice may temper this rule in cases which involve connected or closely related facts, but contain disparate sentences. United States v. Capps, 1 MJ 1184 (AFCMR 1976); United States v. Perkins, 40 CMR 885 (ACMR 1969). As stated in Capps, ". . . fundamental interests of fairness and justice to the accused require consideration of the other sentences in the overall determination of sentence appropriateness." Id., at 1187 (emphasis added).

The Air Force Court of Military Review has taken the next logical step in application of this standard of law. In United States v. De Los Santos, 3 MJ 829 (AFCMR 1977), the Court required

that the post-trial review contain the charges and sentences received by all co-actors, an explanation of the standard for considering the other sentences, and a "meaningful comparison of the facts and circumstances of the two cases as well as sentencing considerations in each." Id., at 831. Thus it is suggested that trial defense counsel who represents one of two or more co-actors closely examine the post-trial review to insure that the convening authority is advised in accordance with De Los Santos. If the review does not comply, counsel should consider providing the convening authority with the same information in the Goode rebuttal or a petition for clemency.

4. The Impact of the Magistrate on Pretrial Confinement Litigation. As the Army Court of Military Review grapples with the meaning of United States v. Heard, 3 MJ 14 (CMA 1977) (see United States v. Otero, CM 436196 (ACMR 6 July 1978) and United States v. Gaskins, CM 436837 (ACMR 22 June 1978)), an overlooked issue involving pretrial confinement has come to light - that of the impact of the magistrate program on pretrial confinement litigation. The government argued in Otero that because the magistrate program places a determination of the legality of pretrial confinement in the hands of a judicial official, as required by Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975) and Courtney v. Williams, 1 MJ 267 (CMA 1976), the involvement of the military judge and appellate court in pretrial litigation should be substantially reduced. Specifically, the government contended that once pretrial confinement has been determined to be permissible by the magistrate, the accused has the burden of showing that this official abused his discretion. Further, the government explained that this "abuse of discretion" standard should apply at both the trial and appellate levels.

The defense in Otero argued that pretrial confinement is such a harsh and onerous circumstance, i.e., punishment prior to an adjudication without the opportunity to post bail, that the government should always have the burden of proving the necessity for it. Therefore, the defense contention was that the legality of pretrial confinement can be litigated at any level, trial or appellate, and that the burden remains with the government.

The Court of Review in Otero answered some of these questions, yet left others uncertain. The Court held that at the appellate level, it would review the military judge's ruling on

pretrial confinement for an abuse of discretion. As such, the appellant would have the burden of proof, and the court's ruling would be based on the evidence presented on the record at the trial level.

The Court did not specifically rule on the military judge's responsibility for pretrial confinement litigation and the effect of the magistrate on his authority, but it did give an indication of its thinking. It noted that prior decisions (e.g., Horner v. Resor, 19 USCMA 285, 41 CMR 225 (1970)) established an "abuse of discretion" standard for review of the pretrial confinement decision, nevertheless, it noted with approval the action by the military judge in Otero in conducting a de novo review at the trial level. More importantly, in two footnotes, the Court questioned the vitality of this "abuse of discretion" standard, and postulated a "better rule." The Court suggested that, consistent with the ABA Standards on Pretrial Release, an accused should be permitted to litigate the issue of pretrial confinement at the trial level. In that de novo hearing, the appellant would ". . . bear the burden of rebutting th[e magistrate's] findings, but once that burden was met, the Government should then have to establish by a preponderance of the evidence the legality of the confinement."

Because this conclusion was presented in two footnotes, it cannot be cited as established law. But it clearly reflects a foreshadowing of future decisions. Further litigation involving pretrial confinement should settle this important issue.

5. Parole Eligibility and the Guilty Plea. Prisoners with unsuspended discharges are only eligible for parole if they are serving confinement in excess of one year. Paragraph 12-5a, Army Regulation 190-47, The United States Army Correctional System (C1, 3 March 1976). A prisoner whose approved sentence includes confinement at hard labor for one year or less is ineligible for parole consideration. Thus, a prisoner who receives more than a year's confinement may be released on parole after six months, while a prisoner who receives one year or less will not normally be released until he has served ten months. Paragraph 13, Army Regulation 633-30, Military Sentences to Confinement (C5, 10 December 1975).

In a good faith effort to obtain favorable pretrial agreements on behalf of their clients, trial defense counsel have often negotiated sentence limitations which provide for suspension or disapproval of adjudged confinement in excess of one

year. Such sentence limitations have rendered clients ineligible for parole consideration - thus they might serve longer prison terms than persons whose pretrial agreements were for longer periods of time.

While a grant of parole is by no means a certainty, counsel should consider avoiding pretrial agreements which include confinement periods of seven months to one year. Where the convening authority sets one year as the normal minimum acceptable period of confinement, counsel should consider negotiating an agreement for a year and a day. Whatever action is taken, it is suggested that parole considerations be made an integral part of any discussion with defense clients, so that they will be aware of the full effect of any possible agreed-to sentence limitation.

Counsel should be aware that this discrepancy in the parole procedure is currently under attack before both ACMR and COMA on a due process/equal protection violation theory. Additionally, COMA recently granted a petition for review in a Navy case in which a denial of equal protection of the law was alleged in the lack of uniform parole procedures among the armed services. United States v. Taylor, pet. granted, 5 MJ 257 (No. 35,793, 1978).

6. Questioning by the Military Parent. DAD has received a record of trial in which the trial defense counsel objected to the admission of a purported confession by the accused to his father on grounds which are worthy of passing on to all trial defense counsel.*

At trial, the trial counsel announced to the military judge that he was going to call the father of the accused as a witness. He indicated that he had become aware that the accused had discussed with his father, a fellow servicemember, the events which were the basis for the present court-martial charges.

In an extension of United States v. Dohle, 1 MJ 223 (CMA 1975), the trial defense counsel objected to the introduction of the purported confession on the ground that the accused's father, as a member of the military, was subject to Article 31b, UCMJ. Thus, the failure of the father to give his son the Article 31 warnings precluded the introduction of the alleged confession.

* The military judge refused to admit the statement on relevancy grounds.

Additionally, the trial defense counsel, without articulating it in legal terms, objected on the grounds of fairness - implying a right to privileged communications between child and parent. It should be noted that at least one state appellate court has found such a child-parent privilege. People v. Doe, 43 N.Y.2d ___, ___ N.E.2d ___, 403 N.Y.S.2d 375 (1978).

7. COMA to Re-examine Searches by Duty Officers. In United States v. Hessler, 4 MJ 303 (CMA 1978), the Court of Military Appeals upheld the legality of an entry by a staff duty officer into a barracks room with probable cause based upon the smell of burning marijuana in the hallway. Judge Cook, who wrote the primary opinion, found that the facts of the case required that the officer take immediate steps to preserve the evidence, and therefore, that the entry into the room was reasonable and constitutionally valid. Chief Judge Fletcher concurred in the result, explaining that the doctrine of military necessity permitted such searches as an exception to the Fourth Amendment. Judge Perry dissented, stating that the warrantless entry into the room was not justified by any of the recognized exceptions to the Fourth Amendment.

On 12 April 1978, Hessler filed a Petition for Reconsideration, alleging that there were no exigent circumstances for the immediate search by the duty officer. On 10 July 1978, the Court granted the Petition for Reconsideration (Judge Cook dissenting), and specified the following additional question:

Does the principle of military necessity prevent application of protections afforded by the Fourth Amendment to the Constitution of the United States, where, under the circumstances of this case, a duty officer enters an occupied room in a military barracks and seizes evidence therein without the consent of the occupants or without a lawfully issued search authorization particularly describing the place to search and the persons or things to be seized?

A resolution of this issue may obviously have significant impact on military courts-martial. Until a decision is announced, trial defense counsel should, where appropriate, consider objecting to warrantless searches that do not come within any of the recognized exceptions to the warrant requirements of the Fourth Amendment. Such a tact should, in particular, be considered in situations in which warrantless searches are justified on a concept of "military necessity," e.g., so-called "health and welfare" inspections.

"ON THE RECORD"

or

Quotable Quotes from Actual
Records of Trial Received in DAD

* * * * *

Q: As a matter of fact, the fact that I'm a hemophilia bleeder and get these without any question means that they are just ordinary bumps like what you're talking about.

A: That's correct.

IDC (B): May I see your bump, please?

IDC (W): This is a non-bump injury.

IDC (C): Could we have that bump marked?

* * * * *

Q: And is it correct that you are telling this court that during this whole first two hours of his - of this interview you had no suspicion of Private X. Is that correct?

A: Sir, I suspect everybody that comes in my office.

* * * * *

Q: Did you receive any medals or . . .

A: The Army Accomodation Medal.

* * * * *

A: Yes, we ran into two Puerto Rican fellows who were drinking some Scotch.

Q: What kind of scotch were they drinking?

A: Old Lords.

Q: How do you recall that particular name?

A: Because when I saw the name, I thought, "Oh Lord," to myself.

MJ: Over the recent weeks I have had occasion to learn and perhaps one might say the hard way, that a number of decisions of the Court of Military Appeals and the Court of Military Review ought to be stamped like the old excursion train tickets -- "Good for this train and good for this date only."

* * * * *

MJ: What do you say about that, Captain X?

TC: I don't have a stock response for that, Your Honor.

MJ: Make up one.

* * * * *

TC on cross . . .

Q: Well, what from that makes you think that he wanted to fight?

A: Well if somebody talked to you like that, what you going to do?

Q: I asked you first.

* * * * *

TC: Does he tell you the truth?

ACC: Yes sir, he tells me the truth. He knows I'm big enough to whip his ass.

TC: Oh, that's why he tells you the truth.

* * * * *

TC: So _____ (the accused in an agg. assault case) wanted to get the first lick in?

W: I guess so, sir . . . would you, sir, I mean, if you was fighting someone, would you want to have me, as an example, if you was fighting me, wouldn't you want to hit me first before I hit you, sir?

TC: Maybe we should talk about that later?

W: No problem, sir.

