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THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21f, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and officers therein, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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REQUESTS TO APPEAR IN FEDERAL COURT:
AN ALTERNATIVE?

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In the last issue of THE ADVOCATE we suggested that one method by which defense counsel should seek to represent clients in cases involving Article 133/134 offenses or off-post drug offenses would be to request permission from TJAG under AR 27-40 to represent clients in civilian federal courts. Counsel should be aware that two Navy lawyers have filed a class action suit in federal district court to enjoin the Navy from prohibiting Navy defense counsel from appearing in federal courts on behalf of military clients. The suit also seeks a declaratory judgment that Navy lawyers have an affirmative duty to pursue "all available legal claims" (to include federal court relief) on behalf of their clients. The plaintiff's motion for preliminary injunction has been denied and the defendant has sixty days in which to answer. We will keep counsel advised of the outcome. Stahl v. Warner, Civil Action No. 73C 2610, (N.D. Ill).

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ADMINISTRATIVE NOTES

It is periodically necessary to bring our distribution list up to date. Accordingly, it is necessary that all civilian subscribers and all military subscribers to whom THE ADVOCATE is sent by name, or who receive it at a military address other than a unit or installation judge advocate office, advise THE ADVOCATE of their continuing interest and current address, accompanied by their present mailing label, no later than 1 April 1974.

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CONTENTS

Speedy Trial: Burton and Its Aftermath	39
The Unconventional AWOL Case	47
Extraordinary Writs and Post-Trial Delay	52
Challenging Military Judges for Cause and Making it Stick	57
Recent Cases of Interest to Defense Counsel	62

SPEEDY TRIAL: BURTON AND ITS AFTERMATH

During the last two years, no other area of military law has undergone so rapid, marked, and exciting changes as the area of accused's right to a speedy trial. Prior to the landmark United States Court of Military Appeals decision in United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971), the cases dealing with the issue of speedy trial were inconsistent and generated considerable confusion, notwithstanding the fact that certain general rules were postulated. A brief look at the cases is illustrative of this fact.

The question of what constituted a "speedy trial error" in the military, was first faced by the Court of Military Appeals in United States v. Hounshell, 7 USCMA 3, 21 CMR 129 (1956). In that case, the Court stated that Article 10 of the Uniform Code of Military Justice reiterated the guarantee of the Sixth Amendment. Speedy trial issues in the military were also considered in light of Articles 30(b) and 33.^{1/} After Hounshell, the Court was often called upon to determine whether a particular accused was denied a speedy trial. Resolution of the issue occurred on a case by case basis.

Once a denial was found, the remedy has been dismissal of the charges. United States v. Lipovsky, 17 USCMA 510, 512, 38 CMR 308, 310 (1968). Certain general guidelines were delineated. "Brief periods of inactivity" on the part of the government did not constitute a denial of speedy trial so long as the government demonstrated reasonable diligence and did not act in an oppressive manner. United States v. Tibbs, 15 USCMA 350, 353, 35 CMR 322 (1965). The burden was the government's though, to establish that it had proceeded with the prosecution of the case with reasonable diligence. United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959). The time interval from initial confinement until trial was only one of the factors to be considered. United States v. Hawes, 18 USCMA 464, 40 CMR 176 (1969). Each case depended on its own facts and circumstances. United States v. Goode, 17 USCMA 584, 586, 38 CMR 382 (1968). The right to a speedy trial could be waived. United States v. Wilson, 10 USCMA 337, 27 CMR 411 (1959). Delay caused by the accused or requested by his counsel were not considered as chargeable to the government. United States v. Wilson, 10 USCMA 398, 47 CMR 472 (1959). Also, some earlier military cases tended

^{1/} United States v. Brown, 10 USCMA 498, 503, 28 CMR 64, 69 (1959); United States v. McKenzie, 14 USCMA 361, 34 CMR 141 (1964).

to indicate that the accused must have been prejudiced by the delay in such a way as to impede proper preparation of a defense, see, e.g., United States v. Pierce, 19 USCMA 225, 41 CMR 225 (1970); United States v. Brov, 14 USCMA 419, 34 CMR 199 (1964). Others however, seemed to require reversal on a bare delay where no explanation was given and the delay was too long to consider a mere harmless error. United States v. Williams, 16 USCMA 589, 37 CMR 209 (1967); United States v. Schalck, 14 USCMA 371, 34 CMR 151 (1964); United States v. Williamson, 28 CMR 698 (CGBR 1959). Delays caused by administrative errors could result in denial of speedy trial. See United States v. Erwin, 20 USCMA 97, 42 CMR 289 (1970); United States v. Parish, 17 USCMA 411, 38 CMR 209 (1968). This was true because the government is in control of the procedures that affect timely disposition of the charges. United States v. Winston, 21 USCMA 573, 45 CMR 347 (1972). In some situations, the length and circumstances of pretrial confinement and total inaction by the Government were held to be prejudicial in themselves. United States v. Hubbard, 21 USCMA 131, 44 CMR 185 (1971); United States v. Keaton, 18 USCMA 500, 40 CMR 212 (1969).

These inconsistencies prompted appellate defense counsel to seek a clarification of the law. The prospective rules in United States v. Burton, *supra*, resulted:

For offenses occurring after the date of this opinion, however, we adopt the suggestion of appellate defense counsel that in the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds three months. In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed. [footnote omitted].

Similarly, when the defense requests a speedy disposition of the charges, the Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order such a trial may justify extraordinary relief. See Petition of Provo, 17 FRD 183, 200 (1955), affirmed, 350 U.S. 857, 100 L.Ed 761, 76 S.Ct. 101 (1955). *Id.* at 172.

Therefore, after Burton there are three classes of speedy trial situations and three different standards by which to judge a denial of a military accused's right to a speedy trial. The first class is when pretrial confinement exceeds three months. The second is when the defense requests a speedy disposition of charges. The third is when there is no defense request for trial and the accused has not been in pretrial confinement, or has been in pretrial confinement less than three months, or has been in pretrial confinement for more than three months but has requested a delay in the proceedings.

The government is presumed to be in violation of Article 10 (encompassing the military accused's statutory right to speedy disposition of his case) where the accused's confinement exceeds three months.^{2/} When operative, this presumption imposes a heavy burden upon the government to show diligence, and in the absence of such a showing the charges must be dismissed. Id. at 172.

In spite of the clarity of the language of the Burton opinion regarding its increased burden of proof, the government continued to take the view that nothing was really changed by Burton and that the government's burden of showing diligence could be carried in the same manner as before. Late this past term the Court of Military Appeals emphatically rejected this concept in United States v. Marshall, 22 USCMA 431, 47 CMR 409 (1973) and United States v. Stevenson, 22 USCMA 454, 47 CMR 495 (1973). Adding substantive content to the Burton guidelines, the Court stated:

Before the Court of Military Review the Government argued that before Burton it was obligated to show reasonable diligence and that Burton did not change the burden of proof but only imposed on the Government an affirmative duty to explain that part of the delay which exceeded 3 months. This argument misses the point of the Burton ruling, which was to establish a standard that included allowances for the several necessary pre-trial stages through which a proceeding must progress. United States v. Marshall, supra, 47 CMR at 411.

To make the point perfectly clear, the Court continued:

^{2/} This period was later also defined as 90 days: United States v. Stevenson, 22 USCMA 454, 456, 47 CMR 495, 497 (1973).

At the risk of redundancy we iterate that when a Burton violation has been raised by the defense, the Government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave contributed to the delay. Id. at 413. (Emphasis added)

In Marshall, the Court rejected as excuses for delay defects in the drafting of the charges, failure to secure statement of witnesses before their reassignment, personnel shortages, illness or injury to the SJA and his assistant, and the temporary absence of the convening authority. The Court found these to be ordinary delays "for which allowance was made" in establishing the Burton rule. Id. at 412-413.

The Court went even further in United States v. Stevenson supra, where the offenses occurred "in West Germany, a foreign country, not a war zone." The Court stated that there was "nothing indicative of a special problem as a result of the foreign locale." Id. at 496.^{3/} Moreover, even though the offense was arson involving eleven defendants, the Court examined the 16-page summary of the testimony taken during the Article 32 investigation and held that there was no basis for concluding that "the complexity of the case was a factor in producing the 80-day delay." Id. The government had argued that the investigating officer was involved in 11 other cases, spent time handling matters not related to the case, and had problems with preparation of the transcript caused by a shortage of clerical personnel. The Court was unimpressed by these "reasons" and reiterated the Marshall rationale.

So strict has the Court of Military Appeals been in enforcing the Burton presumption that several cases have been dismissed without the Court requesting final briefs or oral argument. United States v. M'Latamou, 23 USCMA ____, 47 CMR ____ (30 November 1973) (143 days); United States v. Jackson, 22 USCMA 481, 47 CMR 730 (19 October 1973) (125 days); United States v. Thomas, 22 USCMA 479, 47 CMR 647 (1973); United States v. Kaffenberger, 22 USCMA 47 CMR 646 (1973) (104 days); United States v. Smith, 22 USCMA 47 CMR 564 (1973) (109 days). The coveted tool of stipulated

^{3/} The government may still show diligence in such areas where the war zone or foreign locale is a controlling factor, United States v. Marshall, supra; United States v. Prater, 20 USCMA 339, 43 CMR 170 (1971); United States v. Mladjen, 19 USCMA 159, 41 CMR 159

chronology no longer satisfies the Government's heavy burden under the Burton presumption. United States v. Thomas, supra; United States v. Kaffenberger, supra; United States v. Jackson, supra.

The Army Court of Military Review was also active in the speedy trial area during 1973. The results at this appellate level have, however, been mixed.

A lack of diligence was found on two occasions not falling under the Burton guidelines because the offenses were committed prior to 17 December 1971. United States v. Brewer, 47 CMR 511 (ACMR 1973) (lack of diligence in processing AWOL case where accused subjected to 76 days of restriction and 113 days of pretrial confinement);^{4/} United States v. Boyd, CM 427609 (ACMR 27 February 1973) (143 days pretrial confinement unwarranted in simple case all the evidence for which was available within six weeks of restraint).

Drawing upon the Burton guidelines, the Court of Military Review found a simple AWOL and breaking restriction case "marked more by dalliance than by diligence" in dismissing charges after 96 days of pretrial confinement. United States v. McNew, 47 CMR 156 (ACMR 1973). Opining that the "heavy burden" of Burton is "a reasonable concomitant to the lack of provisions in military law for admitting an accused to bail before trial" two judges of the Army Court of Military Review applied Burton even considering "a reasonable fallibility factor." United States v. Stevenson, 47 CMR 86 (ACMR 1973). Their perceptiveness was affirmed after certification by The Judge Advocate General to the Court of Military Appeals. In strong language condemning the "lack of diligence, incompetence, mismanagement, and other

^{4/} Brewer appears to hold that an AWOL committed prior to 17 December 1971 was not subject to the Burton rules even though the termination date was after that magic date. A very recent decision of a different panel of the Court of Military Review doubted that the Court of Military Appeals intended to carve out an exception for AWOLs terminating one year after the date of Burton and applied the presumption in dismissing charges. United States v. Battie, CM 429673 (ACMR 15 January 1974). Trial defense counsel should act on the basis that AWOLs terminating after 17 December 1971 should be judged by the Burton standards. This is even more true in desertion cases where the critical element of intent to desert may be formed well after the date of an unauthorized absence.

unreasonable and inexplicable circumstances chargeable to agents of the Government" at a particular jurisdiction, a 125-day pre-trial confinement occasioned invocation of the Burton presumption in United States v. Wood, S-8879 (ACMR 27 June 1973). The Burton presumption also led to dismissals in United States v. Hicks, CM 429179 (ACMR 6 September 1973) (101 days confinement caused by "fumbling and bumbling"); United States v. Poloa, CM 429524 (ACMR 14 August 1973) (115 days pretrial caused by heavy case-load no excuse); United States v. Gray, CM 429319 47 CMR 693 (ACMR 6 August 1973) (117 days pretrial confinement chargeable to Government not met by mere presentation of a stipulated chronology). In dismissing a case including over 90 days of pretrial confinement as part of a 6-month delay Judge Alley outlined the rationale behind the speedy trial guarantee:

The reason is that the several grounds for society's concern that trials be speedy, some grounds being concerned with protecting the accused and others not, tend to coalesce. Long delay itself is bad; coupled with affliction personal to an accused, it is worse. The Constitution and the Code do not permit eliding problems caused by troublesome people by summary incarceration for its own sake. Punishment should follow conviction and not precede it. Speedy trials are better trials not only because all evidence is fresh in the minds of witnesses, but because deterrent effects are enhanced by the disposition of cases while other members of the unit still recollect the incident, and because rehabilitation is less likely when one is tried months after the fact at a time when an accused might well ask himself: "If no one has been previously concerned sufficiently to bring me to trial, why is anyone concerned now?" United States v. Fuqua, No. 429333 (ACMR 12 July 1973) (M/S Op. at 6).

The speedy trial picture before the Army Court of Military Review is, though, far from warmly receptive to claims of speedy trial transgressions. The primary blockade to successful appellate allegations of the denial of a speedy trial is that the issue has been waived by trial defense counsel. In United States v. Sloan, 47 CMR 436 (ACMR 1973) the failure to raise the issue at trial cost the appellant the benefit of the Burton presumption on his 125 days in pretrial confinement. In United States v. Gill, 47 CMR 503 (ACMR 1973) defense counsel without apparent reason let lay dormant a 169-day pretrial confinement period. See also United States v. Rich, CM 429882 (ACMR 28 December 1973); United States v. Bush, CM 429856 (ACMR 8 November 1973) (95 days waived).

In a very interesting decision one panel of the Army Court of Military Review opined that military judges should enforce USAREUR Supplement I to Army Regulation 27-10 which requires dismissal by the general court-martial if the accused was under pretrial restriction or restraint over 45 days. United States v. Walker, 47 CMR 288 (ACMR 1973). The appellant lost the benefit of this local regulation because the issue was not raised at trial.^{5/} The most harsh application of the waiver doctrine recently occurred in United States v. McCloud, CM 429565 (ACMR 30 November 1973). The military judge on his own initiative queried the trial counsel about the 102 days of pretrial confinement. Inexplicably the defense counsel did nothing except pose no objection to three exhibits offered by trial counsel to explain the delay. The utter failure of the defense counsel to pose any objection to the lack of speedy trial was held to be a waiver of the issue.

The question of waiver of speedy trial issues under the Burton rules by the failure to make the appropriate motions is presently awaiting decision by the Court of Military Appeals in three certified cases, United States v. Sloan, *supra*; United States v. Gill, *supra*; United States v. Hatton, 47 CMR 457 (ACMR 1973). In Hatton one panel of the lower appellate tribunal ordered the record returned to the field for a limited rehearing on the speedy trial issue where the 98-day pretrial confinement was not raised by the defense and not one word was said about the delay in the allied papers. While there are some compelling reasons why a waiver doctrine should not operate when the Burton presumption is available it should be noted that the issue was waived under pre-Burton law (United States v. Hounshell, *supra*) except in circumstances amounting to a denial of due process. See United States v. White, 17 USCMA 462, 38 CMR 260 (1968); United States v. Jennings, 17 USCMA 580, 37 CMR 738 (1967); United States v. Schalck, 14 USCMA 371, 34 CMR 151 (1964). A favorable result from the Court of Military Appeals is therefore questionable. However, when pretrial confinement exceeds 90 days trial defense counsel should never allow waiver to become an appellate issue. Considering the heavy burden placed upon the Government a failure to raise the issue may very well provide a basis for an appellate attack on the inadequacy and incompetence of trial defense counsel.^{6/}

^{5/} Another Panel of the Court of Military Review disagreed that the failure to follow this regulation is binding on the speedy trial issue before military judges. United States v. Cruz, S-8626 (ACMR 24 April 1973).

^{6/} In the event your client does desire to waive the issue for some strange reason an affirmative waiver by him should appear in the record.

In addition to the waiver doctrine, the Army Court of Military Review, assisted by the Government Appellate Division, has combed the record of trials and allied papers looking for "defense delays" to utilize in a subtraction process to bring below 90 days the pretrial confinement period attributable to the Government. In United States v. Fuentes, CM 429569 (ACMR 30 August 1973), one panel seized upon a 12-day period noted by the staff judge advocate on the Record of Trial Chronology Sheet (DD Form 490) as caused by defense requested delay in holding that "the Burton standard was not offended." A six-day delay noted by the Article 32 Investigating Officer to be defense created and a request for discharge in lieu of court-martial which contained a sentence asking that the court-martial be delayed pending decision of the request were utilized in United States v. Cook, CM 429795 (3 October 1973) to remove the case from the Burton presumption. The defense counsel's concurrence in the docketing of his client's case 29 days in the future was dubiously relied on in United States v. O'Neal, CM 429804 (ACMR 31 October 1973) to avoid the Burton rule. In United States v. Bush, *supra*, the unrebutted trial counsel's remarks prior to arraignment were cited to show the defense has requested a trial date at least 5 days later than the date proposed by the prosecution.

The problems inherent in the doctrine of waiver and what constitutes defense delay are issues yet to be resolved. Many of the adverse Court of Military Review decisions are being appealed by the Defense Appellate Division and will hopefully yield clarity, if not strengthen, the military accused's protection of his right to a speedy trial. The volume and variety of speedy trial litigation on the appellate level places a heavy burden on trial defense counsel.

Allied papers must be carefully scrutinized by defense counsel in the field. Don't let an Article 32 Investigating Officer or an ingenious trial counsel or staff judge advocate create a defense delay. Beware of stipulated chronologies prepared by the Government. A petition for grant of review was recently dismissed when the Court of Military Appeals noted that the defense had apparently stipulated that all time after a certain date was not to be considered on the motion. United States v. Montague, 22 USCMA 495, 47 CMR 796 (16 November 1973). Delays should not be taken unless absolutely necessary. If a delay is necessary the reasons should be documented and explicitly stated, particularly when it is the result of a heavy workload.

A heavy workload on defense counsel should be argued at trial not to be attributable to the accused. Do not concur in a future trial date if the defense will be ready on an earlier date. Do not suggest or concur in delays pending the processing of Chapter 10 application unless the accused clearly concurs in the consequences. Remember, and remind the Government, that it is the accused's right to a speedy trial that is at issue not yours. Timely demands for trial should be made in writing and, if appropriate, an Article 138 complaint made and extraordinary relief sought if an immediate response is not forthcoming. See United States v. Burton, supra at 118, 44 CMR at 172. Advantage should be taken of local regulations imposing even heavier guidelines than Burton and copies of these regulations attached to the record of trial. Above all the issue of speedy trial should always be raised when pretrial confinement exceeds 90 days or when a demand for trial has been made.

THE UNCONVENTIONAL AWOL CASE

To many practitioners of military justice an AWOL case signifies such mundane matters as morning reports, morning report extracts, authentications, presumptions of regularity and little possibility of a successful defense. While perhaps true in a statistical sense, the law of AWOL continues to be tested by unique situations. These unusual cases require study, research and imagination by trial defense counsel. The military may have no jurisdiction to try your client; the findings of the military judge or court-members may be at fatal variance with the proof; or, the accused may have been convicted of an uncharged offense. These issues have been recently treated by the United States Court of Military Appeals and the Army Court of Military Review.

A.

THE "GO AWAIT ORDERS" CASE

In United States v. Davis, 22 USCMA 241, 46 CMR 241 (1973), the Court of Military Appeals held that when a military judge made special findings of fact that the accused was instructed by an agent of the United States Government to go home and await orders, there was not sufficient evidence to prove an absence without authority. Upon completing AIT, Private Davis was to have reported to the Overseas Replacement Station at Fort Lewis. However, he did not receive this order and was directed during out-processing "to go home and wait for orders."

The Court, noting that the factual circumstances of Davis resembled United States v. Hale, 20 USCMA 150, 42 CMR 342 (1970), in which the evidence was deemed insufficient to support an Article 133 conviction of dishonorably failing to return to military control, held that Private Davis went home to Terre Haute, Indiana with authority. Rejecting the Government's argument that at some point the stay at home became unreasonable Judge Quinn stated, "The Army cannot charge the accused with criminal responsibility for its own mistake; it cannot convert its negligence into punishable misconduct by the accused." United States v. Davis, supra at 242.

The result in Davis clearly depended upon the fact that at trial, defense counsel introduced documents supporting the accused's testimony which required the military judge to make special findings of fact concerning the accused's absence. Whether the special findings were requested by either side is unclear, but the importance of such findings should be readily apparent. In this type of case it may sometimes benefit an accused to seek a special finding of fact from the military judge. If the accused's testimony about being told to go home is believed or is unrebutted (particularly if it is corroborated) a finding of not guilty is required under the rationale of Davis as the accused is absent with authority.

B

FORMER JEOPARDY AND THE DURATION OF THE ABSENCE

May an accused who was found "not guilty" of an absence from 7 November 1969, to 7 January 1971, be subsequently tried for an absence from a different unit to which he was attached beginning 27 November 1969, and ending on 7 January 1971? A unanimous Court of Military Appeals unequivocally decided in the negative because the second alleged absence was included in the specification of which he was originally found "not guilty." United States v. Lynch, 22 USCMA 457, 47 CMR 498 (1973).

Defense counsel at trial had made the appropriate motion in bar but the military judge overruled the objection on the basis that the offense of unauthorized absence is not a continuing offense. The Court of Military Appeals rejected this

simplistic approach upon certification by The Judge Advocate General of the Army Court of Military Review's decision which dismissed the charge. United States v. Lynch, 47 CMR 143 (ACMR 1973). The Court noted that the "protection against double prosecution does not rest upon a surface comparison of the allegations of the charges; it also involves considerations of whether there is a substantial relationship between the wrongdoing asserted in the one charge with the misconduct alleged in the other." United States v. Lynch, supra at 500.

In light of the Government's insistence that an unauthorized absence was not a continuing offense the Court felt compelled to expound on why the duration of the absence was important for the purposes of double jeopardy. Judge Quinn noted that the length of the absence is essential for punishment purposes and that an absence which is single and uninterrupted cannot be fragmented into two or more separate periods of unauthorized absence. If the accused had been convicted at the first trial for the absence as originally alleged (7 November 1969--7 January 1971), he certainly would have been protected against a second prosecution for the absence during this period. Therefore, when the accused was found not guilty at the first trial the effect of the findings covered all lesser included periods.

Several other cases, although not involving former or double jeopardy, are instructive on the importance of the specific time frame alleged in an AWOL specification.

In United States v. Harris, 21 USCMA 590, 45 CMR 364 (1972), the Court of Military Appeals considered the effect of the convening authority's action approving a date for the commencement of the absence other than that charged and found by the trial court. The Government argued that the act of the convening authority in reducing the length of the absence by changing the inception date was an act of clemency, but the Court rejected this argument in toto declaring the convening authority action unsupported.^{7/} "Proof of a date of inception obviously is indispensable to a successful prosecution for unauthorized absence if a conviction is to be had for an unauthorized absence which exceeds one day, the proven date of return." Id., at 367.

In United States v. Reeder, 22 USCMA 11, 46 CMR 11 (1972), the accused testified to a return to military control which broke the absence charged into two parts. The Court of Military Review approved only the initial six days of the absence. The Judge Advocate General of the Army certified the correctness

^{7/} The conviction was upheld because of other evidence in the record.

of the lower court's decision affirming the shorter initial rather than the lengthier second period of unauthorized absence. In the face of a government assertion to the contrary, the Court of Military Appeals affirmed the lower court's holding that findings of guilty to a second absence beginning after the absence alleged had terminated cannot be affirmed. An absence without leave is committed on the day of the inception. An accused may not be convicted of two absences when only one absence is alleged even though the two absences are included within the period of absence at issue, nor may the government obtain a conviction for the second period in lieu of a shorter initial period.

The decisions in Harris and Reeder indicate that the inception date of an unauthorized absence is essential to the charged offense. Unless the inception date specifically set forth in the specification or a date within the time period alleged is proved at trial by competent evidence to be the inception date, an accused can only be convicted of a one-day absence, the day the alleged absence terminated.

The impact of these principals was demonstrated in a recent decision of the Army Court of Military Review. United States v. Espinosa, SPCM 9038 (ACMR 30 November 1973). The accused, Espinosa, was charged with an absence from 15 May 1971 until 26 February 1973. The military judge found him guilty by exception and substitution of an absence from 31 July 1971 until 26 February 1973. The appellate defense assertion that the accused was found guilty of an offense of which he was not charged was accepted and the findings and sentence set aside. Only an absence alleged may properly be affirmed.^{8/} See also, United States v. Wilkins, 47 CMR 161 (ACMR 1973).

C

LACK OF JURISDICTION

A most interesting AWOL-related case is United States v. Kilbreth,²² USCMA 390, 47 CMR 327 (1973). Private Kilbreth objected at his court-martial to the entire proceeding because the Army had not followed the proper procedure in ordering him to active duty because of his alleged unsatisfactory participation in training meetings of his National Guard Unit. This objection was made even though he had been tried by an earlier court-martial for a prior absence to which he had pleaded guilty.

^{8/} This case may be limited by its facts insofar as the Court of Military Review declared the military judge could have found an unauthorized absence from 15 May 1971 until 31 July 1971 but attempted to convict on the larger uncharged period of absence.

The Court of Military Appeals held that the evidence adduced at trial indicated that the Army had not followed its own regulations in calling Kilbreth to active duty; therefore, the order to active duty was invalid. For such an order to active duty to be effective, the Army must strictly comply with Army Regulation 135-91. Any other procedure deprives the accused of the due process of law to which he is entitled.

The importance of affirmatively establishing at the trial level the facts relevant to this possible defense cannot be over-emphasized. All available evidence regarding the call to active duty should be presented including the accused's efforts of resisting the call to active duty when he believed such call to have been erroneous. These protestations should be specifically enumerated in order to prevent the government from successfully asserting a theory of constructive enlistment.

D.

OFFICIAL RECORDS

A more common matter was litigated before the Army Court of Military Review in United States v. Fowler, No. 430031 (ACMR 31 October 1973). At trial, photocopies of separate pages of an original morning report were introduced. Neither of the exhibits contained the first page of the original morning report and neither exhibit contained the signature of the authenticating officer. Appellate defense counsel contended on appeal that since there was no evidence that the original morning report was signed by the responsible officer under the regulations the two exhibits did not qualify as official records. Even though both of the exhibits contained the seal of The Adjutant General, the Court of Military Review termed this a "custodial act," which did not authenticate the exhibit or show that it was prepared in accordance with regulations. The affected AWOL convictions were set aside.

SUMMARY

The cases discussed above should remind trial defense counsel that the relatively simple charge of unauthorized absence has the potential to be a case of substance. The law of AWOL is not as firmly fixed as is generally believed. Not until twenty-two years after the implementation of the Uniform Code of Military Justice did the Court of Military Appeals clarify the significance of an inception date. Trial defense counsel must be alert to the continuing vitality and movement in the law of AWOL.

EXTRAORDINARY WRITS AND POST-TRIAL DELAY

Since the Court of Military Appeals first decided in United States v. Frischholz, 16 USCMA 150, 36 CMR 306 (1966), that it possessed All Writs jurisdiction under Title 28, United States Code, section 1651 (1964), extraordinary writ practice before the Court has been cautiously expanded. The most productive area of military practice presently before the Court of Military Appeals on the Miscellaneous Docket is post-trial delay. Thus it has become important for trial defense counsel to understand this phase of the Court's practice in order to properly protect the post-trial rights of the client.

Post-trial delay, while frequently condemned by military appellate courts, has not yielded much relief on appeal. The Court of Military Appeals has declared and demonstrated a reluctance to dismiss charges for post-trial delay unless such delay would clearly prejudice a required rehearing. In United States v. Timmons, 22 USCMA 226, 227, 46 CMR 226, 227 (1973), the Court of Military Appeals stated:

In Ervin [20 USCMA 97, 42 CMR 289 (1970)] and in Tucker [9 USCMA 587, 26 CMR 367 (1958)] dismissal of charges was warranted because the original findings and sentences were invalid, and circumstances had made it impossible for a fair trial ever to occur again. In a word, the criminal proceedings in those cases could neither be purged of error on appeal, nor cured remedially at a rehearing. Later cases, however, have emphasized that post-trial delay, standing alone without prejudicial error in the trial proceedings will not require relief on otherwise proper findings and sentence.

In United States v. Gray, 22 USCMA 443, 445, 47 CMR 484, 486 (1973), the Court of Military Appeals reiterated the rule for appellate review of post-trial delay:

This Court has ruled that before ordering a dismissal of the Charges because of post-trial delay there must be some error in the proceedings which requires that a rehearing be held and that because of the delay appellant would be either prejudiced in the presentation of his case at a rehearing or that no useful purpose would otherwise be served by continuing the proceedings.

However, the Court opined in Timmons, supra, that the government may not delay the post-trial review of a case with impunity. The Court specifically noted that "the Uniform Code provides one means of insuring against unnecessary delay in the disposition of a case, Article 98, Uniform Code of Military Justice, 10 U.S.C. 898, while this Court stands prepared to terminate the delay itself, upon timely request for relief. Rhoades v. Haynes, 22 USCMA 189, 46 CMR 189 (1973)." (Emphasis added.) It is therefore incumbent upon trial defense counsel to monitor their cases after trial to insure that the government is not needlessly delaying the post-trial processing of the case. The Court by its statement in Timmons, supra, and its opinion and order in Rhoades, supra, provided a clear mandate for trial defense counsel to require the government to show cause why the record of trial has not been prepared, authenticated and acted upon by the convening authority when inordinately long post-trial delays have occurred for seemingly no reason. This "call to arms" was issued to trial defense counsel by the Court of Military Appeals with the belief that Article 98 and a timely request from the court are sufficient to eradicate post-trial delay.

The availability of extraordinary relief for unreasonable post-trial delay was set forth in Rhoades v. Haynes, 46 CMR at 190:

When, upon application of a petitioner, a prima facie case of unreasonable delay in the appellate processes appears in a case over which we may obtain jurisdiction, this Court will take appropriate action to protect its power to grant meaningful relief from any error which might appear upon our ultimate review of the record of trial pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. § 867(b)(3). Chenoweth v. Van Arsdall, Mis. Docket No. 73-1 (USCMA March 13, 1973). In such an instance we will not determine responsibility for the delay, nor assess its impact upon substantial rights.

In Rhoades the relief granted was an order to the convening authority to complete his review of the record of trial on a specified date.

of trial in this case was due in part to loss of a recording disc necessitating "reconstruction" of that portion of the record concerning a speedy trial motion, preliminary instructions to the court members, their voir dire examination, and the testimony of a prosecution witness. The record has now been so "reconstructed" and the convening authority's action is anticipated so that the record will arrive in the Department of the Army by October 22, 1973.

Reconstruction of a record of trial to supply missing material is impermissible. *United States v. Boxdale*, 22 U.S.C.M.A. 414, 47 C.M.R. 351 (1973); *United States v. Weber*, 20 U.S.C.M.A. 82, 42 C.M.R. 274 (1970). The accused was tried on April 6, 1973, and it does not yet appear that action has been taken by the convening authority. This delay is not satisfactorily explained by the Government and it is apparent that the "reconstruction" of the record will require reversal. *United States v. Boxdale*, supra. In order to obviate further delay necessitated by additional appellate consideration of the issue, with attendant prejudice to the accused, we will direct such action here

It is, by the Court, this 17th day of October 1973,

ORDERED:

That the findings of guilty and the sentence be set aside. A rehearing may be directed, if the convening authority deems it practicable. Otherwise, the charges shall be ordered dismissed.

Experience in the Defense Appellate Division in the last six months has proven that trial defense counsel have a real opportunity to represent their clients before the Court of Military Appeals by protecting their client's post-trial rights.

While most petitions will result in the convening authority being ordered to take his action by a specified date and will be dismissed as moot when the order be satisfied, additional relief may also be realized. Defense counsel in the field should actively pursue this tool in the court-martial process particularly when post-trial delay frustrates the resolution of obvious defects and errors in the record of trial such as nonverbatim records, improper military judge or court member requests, or cases involving disqualification of the convening authority. The needs of military accused are not served by delayed post-trial processing which may prevent meaningful sentence relief on appeal and for which there is little appellate remedy in the normal case.

The petition to the Court of Military Appeals for extraordinary relief should name the convening authority as respondent. The respondent should be formally and personally served with a copy of your pleadings and exhibits. A certificate of service should be attached to the pleadings filed with the Court. The Court of Military Appeals requires an original with four copies of all pleadings. Questions regarding the form of the petition, any other procedural matters, and any substantive matters should be directed to the Chief, Defense Appellate Division. A sample petition form is attached.

⁹ A more detailed discussion of Extraordinary Writs and proper pleading is found in Vol. 2, No. 7, The Advocate, September 1970.

THE UNITED STATES COURT OF MILITARY APPEALS

Misc. Docket No. _____

Rank, Name
SSAN
Correctional Holding Detachment
United States Disciplinary Barracks
Fort Leavenworth, Kansas 66027

v.

United States

PETITION FOR EXTRAORDINARY RELIEF

On _____ 197_ I was convicted of _____ in violation of Article(s) _____ Uniform Code of Military Justice, respectively, The adjudged sentence was _____.

I, _____, am presently a member of the U.S. Army currently confined in the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas.

As of this date I have not received my record of trial or action by my convening authority. I am classified as a detained prisoner. I have been harmed and prejudiced by this illegal delay in my post-trial review.¹

It is requested that this Honorable Court:

- (1) Order that appellate defense counsel be appointed to represent and protect my interests in the matter of this petition.
- (2) Order dismissal of my court-martial due to prejudicial post-trial delay; or in the alternative,
- (3) Order that my record of trial and convening authority's action be immediately completed and furnished to me and filed with² the Clerk, U.S. Court of Military Review, if appropriate; and/or, ²/
- (4) Order any other relief that the Court deems just and equitable.

Inclosed herewith and incorporated in this petition in support hereof, are affidavits signed by the Director of Classification and the petitioner

(name) (rank)
(SSAN _____) U.S. Army

STATE OF KANSAS)
COUNTY OF LEAVENWORTH) SS

Subscribed and sworn to before me this _____ day of _____ 197_ at Fort Leavenworth, Kansas 66027

¹/Specific claims of prejudice should be detailed in the affidavit. Prejudice may include being ineligible for parole, being held beyond one's service obligation, nonpromotable status if not in confinement and inability to obtain meaningful relief on appeal.

²/ This prayer should be omitted if the delay is clearly excessive.

CHALLENGING MILITARY JUDGES FOR CAUSE --
AND MAKING IT STICK

Recent developments in military law coupled with changes precipitated by the Military Justice Act of 1968 which permits trial by military judge alone make it imperative that military judges grant timely challenges for cause against them in certain situations. Further, cases currently pending before the Court of Military Appeals suggest that even a timely challenge for cause may not be enough to overcome the multifaceted waiver monster. As with most legal errors, the appropriate forum for litigating these issues is the trial courtroom; do not expect relief on appeal when the record of trial is barren of operative facts.

A

CHALLENGES

Instances where a challenge for cause of a military judge may be appropriate are:

(1) Where a request for military judge alone is approved and the accused pleads guilty but subsequent developments give rise to an improvident guilty plea and the government elects to contest the charge rather than dismiss it.^{10/}

(2) Where a request for military judge alone is approved and the military judge denies a motion to suppress an involuntary confession during an Article 39(a) session, and thereafter the military judge is confronted with determining beyond a reasonable doubt the factual issue of voluntariness because the accused wisely desires to relitigate the matter on the merits;

(3) Where the military judge has issued a search warrant and thereafter sits as the judge on charges arising from the issuance of that warrant;

^{10/} Dicta in United States v. Hodges, USCMA, CMR (23 November 1973) suggests that "generally there is no restriction on the military judge" in such a situation. However, Military Judge Memorandum #78 (Revised), 18 July 1973, suggests that a military judge recuse himself if the accused wishes to be tried by judge alone and this factual situation presents itself.

(4) Where a request for trial by military judge alone is approved and the judge is advised that the accused will plead guilty but at trial the actual plea is not guilty;^{11/}

(5) Where a request for trial by judge alone is approved and the military judge has previously sat as a fact-finder in a closely related case. (E.g., After A1 is tried for arson and the military judge sitting alone finds A1 guilty, A2 is tried for accessory after the fact to arson;^{12/} OR, A1 is charged and found guilty by judge alone of robbing a victim in conjunction with A1, and A2 is then brought to trial for robbing the victim in conjunction with A1.).

(6) Where the military judge has resolved identical factual questions in a closely-related case involving the same legal issue. (E.g., Two defendants are arrested for robbery, placed in pretrial confinement by the same officer, and both cases are similarly processed. The military judge hears and denies speedy trial motion at the trial of A1, and a similar speedy trial motion is anticipated for A2. The military judge has obviously expressed his predisposition on the factual questions (such as credibility of witnesses who testify as to processing of the case) surrounding the speedy trial legal issue.)

The above situations arise not infrequently in military practice and a challenge for cause might be appropriate. Categories 3 and 6 directly affect the judge's ability to determine the proper application of legal principles to a given factual situation which raises the possibility of disqualification to sit even though the trial may proceed with court members. Categories 1, 2, 4, and 5 may only affect the judge's ability to sit alone as fact-finder. Absent a showing of predisposition on the record during the trial, the judge might not be disqualified if the trial proceeded with court members. In these situations how far defense counsel desires to press the issue depends to a large degree upon how important it is that the particular military judge sentence your client (discussed in WAIVER Section, infra).

^{11/} The Court in Hodges, supra, held that the military judge's failure to grant a challenge against himself in this situation was not error, but strongly urged "that where a trial judge has received information that a plea of guilty has been offered, it would be better if he exercised his prerogative to recuse himself or to insist upon a jury trial. 'The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious.' United States v. Walker, 473 F.2d 136, 138 (D.C. Cir. 1972)."

^{12/} Which necessarily requires proof that A1 committed the arson.

VOIR DIRE

The first step in handling this delicate issue is to voir dire the military judge.

Voir dire should seek to establish the predisposition of the military judge as to facts (not law) with which he has previously come in contact. It is not really significant that the military judge continues to profess his impartiality even though he has previously resolved the same facts adversely to your client. Such a disclaimer will not get the judge off the hook, for we are dealing with the appearance of evil. United States v. Watson, No. S8826 (19 October 1973) (Two defendants tried separately, both by judge alone. Defendants were charged with offenses in conjunction with each other. CMR set aside findings and sentence of second defendant tried where the same judge heard identical speedy trial testimony in both cases (category 6 disqualification) and during voir dire at second trial revealed that the speedy trial issue in the companion case was "close" but that his inclination was to rule the same way. Judge also admitted during voir dire that he had previously found second defendant guilty during earlier trial (Category 5 disqualification) but he could "forget" that and remain impartial; United States v. Cardwell. CMR (ACMR 1973) (The findings and sentence were set aside on appeal where judge issued search warrant and then was detailed to sit as military judge (Category 3 disqualification) when that individual was later brought to trial based upon evidence seized with judge's warrant); see United States v. Jarvis, 22 USCMA 260, 46 CMR 260 (1973) (COMA went out of its way to rule that military judge should have stepped down in a closely-related case (Category 5 disqualification). "The record may reflect that judges have expressed enough in one proceeding to give an accused the impression that his guilt in another has already been determined." Id. at 262); United States v. Creagh, CM 427781 (ACMR 13 December 1972). Although reversed on other grounds Judge Alley commented adversely on a single judge resolving confession voluntariness during Article 39a and also on the merits (Category 2 disqualification) See also United States v. Crider, 21 USCMA 193, 44 CMR 247 (1972); United States v. Broy, 15 USCMA 382, 35 CMR 354 (1965). All of these cases discuss in some manner paragraph 62f(13), Manual for Courts-Martial, United States, 1969 (Rev. ed.) which requires recusal in the interest of having trials free from substantial doubt as to "legality, fairness, and impartiality."

C

WAIVER

After eliciting facts during voir dire which show a previous exposure to and resolution of identical facts by the same military judge, the next dilemma is building a record which will preserve the error for your client on appeal. Again, this will depend upon several considerations, not the least of which is your client's welfare. You may not want to press the issue to its ultimate limits if, for example, your client is charged with desertion from an overseas replacement station and you do not relish contesting the case and/or having your client sentenced by the detailed court members.

A similar dilemma may arise if your client is charged with the sale of a large quantity of heroin or with several specifications alleging barracks larcenies. Simply stated, your client may be willing to cope with the judge's predisposition rather than face a potentially stiffer sentence adjudged by court members. This becomes even more significant if your client desires to plead guilty.

Obviously, the best opportunity to avoid waiver where a proper basis for challenge exists is a case in which the accused desires to plead guilty and has a very favorable pretrial agreement with very little hope of "beating the deal" at trial. What follows is a suggested procedure for insuring that the challenge for cause is preserved as an issue on appeal. It is pointed primarily at trial by military judge alone.

Factors previously discussed may preclude your use of the same procedure in all circumstances. However, do as much as you can without hurting your client's interests with respect to sentence.

(1) During the voir dire of the military judge, establish his previous exposure to the facts and point out how that adversely affects the interests of your client. Develop this on the record by leading questions.

(2) Ask for a brief recess for the purpose of discussing with your client the matter of challenging the military judge for cause.

(3) Make your challenge for cause and, if it is denied, proceed as suggested. Remember this entire subject must be approached cautiously and the tactics discussed herein must also be considered in the event the military judge does grant a challenge for cause against himself or rejects a request for trial by judge alone. The accused must be fully advised about the trial tactics to be utilized and their possible consequences and concur in what is proposed.

(4) During the inquiry into the request for judge alone, [if your client anticipates pleading guilty and there is very little hope of beating the deal by going with judge alone (e.g., where the judge has previously meted out a harsh sentence to a co-accused), but you do not wish trial by a jury], tell the judge that his decision not to recuse himself in the eyes of your client makes a not guilty plea worthless (since the judge has previously found your client guilty) unless he elects to be tried by a military jury in which case he must risk a more severe sentence. Tell the judge that when your client submitted his request for trial by judge alone, the name of the judge was inserted on the form for jurisdictional purposes only. United States v. Dean, 20 USCMA 212, 43 CMR 52 (1970). Indicate your continuing desire to be tried by judge alone, but not by him. Cite Article 16 UCMJ, as conferring upon the accused the right to be tried by an impartial judge alone. Make an equal protective argument as embodied in the due process clause of the Fifth Amendment if a co-accused was previously tried by judge alone. The right to trial by military judge alone should not depend on a race to the courthouse! If the judge still refuses to step down, then state that your client has decided to plead guilty for two reasons: because he is, in fact, guilty and because he does not wish to be sentenced by a military jury. Make sure the judge understands that your client appreciates his right to make the government prove its case, but that your client cannot exercise that right without risking a more severe sentence. If the military judge forces you to go to trial by jury, go ahead with your planned plea of guilty so that the deal is not lost and make no further comment.

(5) If your client desires to plead guilty and there is a good chance of beating the deal by electing to have your client sentenced by the judge, after the challenge is denied tell the judge that your client still desires to be tried by judge alone (do not use the judge's name) and that your client has now decided to plead guilty. If the judge should ask either you or your client why he wishes to plead guilty, simply state that it is because he is guilty and no longer wishes to make the government prove its case.

(6) If your client desires to plead not guilty and there is little risk of more severe sentence by going with a full court, tell the military judge that his denial of your challenge leaves you no alternative but to withdraw your request for trial by judge alone since your client does not believe the judge would be impartial on the facts. Stress the fact that your client believes he is entitled to be tried by an impartial military judge. Merely because the co-accused was tried first, your client should not have to forfeit his right to trial by an impartial judge, a right which was enjoyed by the co-accused. Cite Article 16 of the code and the equal protection concept in the Fifth Amendment.

(7) If your client desires to plead not guilty but because of the charges you and your client have determined that trial by full court would be suicide, make your challenge and when it is denied tell the judge you still wish to be tried by judge alone (do not use the judge's name). Say no more lest the military judge feed your client to the lions!

RECENT CASES OF INTEREST TO DEFENSE COUNSEL^{13/}

EVIDENCE - HEARSAY EXCEPTIONS

Government agent was permitted to testify to contents of overheard conversation between informant and counterfeiting defendant concerning bills and equipment. A prosecution objection to the defendant's testimony concerning the same conversation was upheld by the trial judge on the basis of hearsay. The United States Court of Appeals reversed holding that the government "opened the door" with its version of the conversation and should be thereafter precluded from "muzzling" the defendant's version. Military defense counsel should be aware of this possibility in cases in which CID agents or informants have testified to conversations with the accused. United States v. Paquet, F.2d (5th Cir. 1973) 14 Cr. L. Rep. 2036.

^{13/} Due to the publication of the decisions of the various Courts of Military Review in advance sheet form together with Court of Military Appeals decisions, the digest of military cases will be limited to significant cases which will not be published.

HOUSEBREAKING: NECESSARY INTENT

Defendant was discovered lying on floor of a house which he had just forcibly entered during nighttime. He was convicted of burglary, despite absence of facts to establish criminal intent after entry. Court held here that proof of such intent is necessary to sustain conviction. The same consideration should apply to a military prosecution for burglary or house-breaking, which include as elements an intent to commit criminal offense after entry. Articles 129, and 130, Uniform Code of Military Justice. Mere entry does not constitute the offense. United States v. Mellon, ___ F.2d ___ (D.C. Cir. 1973) 14 Cr. L. Rep. 2050.

SEARCH AND SEIZURE: INFORMANTS

Informant walked into police station and said he's seen a man bend over, lose his hat, and drop a bag of "green vegetable material" from under the hat. He described the man, his companion and a car in detail. Police observation corroborated details about car and occupants, but Court held these were "innocent" facts which did not rise to reasonable belief a crime was being committed. Despite fact that this was anonymous "citizen" informant his information did not justify stop and search of accused because no facts appeared from which officers concluded that the informant was reliable, under the second Aguilar test. The Court noted leniency in the test with respect to nonprofessional "citizen" informants but if the informant wishes to remain anonymous even to the police, the Court would require corroboration by at least a "description of him, his purpose for being at the locus of the crime, and the reason for his desire to remain anonymous." A similar issue is pending before the Court of Military Appeals in United States v. Gamboa. State v. Chatmon, ___ P.2d ___ (Wash, 1973) 14 Cr. L. Rep. 2114.

SEX OFFENSES: CORROBORATION

The United States Court of Appeals for the District of Columbia held that a conviction for carnal knowledge could not be predicated on testimony of a 12 year-old victim which was uncorroborated by medical evidence of penetration. The only corroboration was police officers' observation that the victim was crying and upset, her clothing was disheveled, she wore no coat despite the cold day, and made a prompt complaint to the officers. The divided Court held that this was not corroboration of the essential element of penetration, which could be proved only by an eyewitness or by medical testimony, which was not presented due to prosecution ineptitude. Counsel should consider this case in light of the military corroboration rules under paragraph 153a, Manual for Courts-Martial. United States v. Wiley, ___ F.2d ___ (D.C. Cir. 1973) 14 Cr. L. Rep. 2113.

DISCOVERY -- TESTIFYING POLICE OFFICERS' PERSONNEL FILES

Not unlike the military 201 File, police departments normally maintain personnel files on their individual members. The Supreme Court of the States of New York, New York County, recently upheld a subpoena duces tecum issued by a defense attorney in order to discover the files of police officers who were expected to testify at trial. In a published opinion, the trial judge held that the proper procedure is an in camera inspection to determine the relevancy of the contents of such files for impeachment under the circumstances of the case. Military defense counsel should seek discovery of 201 files of CID agents or military police, as they would the files for any witness. Surely there is nothing sacred about such files unless some privilege attaches. The New York Court recognized a possible "public interest" privilege, especially in the case of undercover officers, or those using confidential informants. However, exercise of that privilege would have to depend upon the results of the in camera inspection. People v. Sumpter, N.Y. Supp., 13 Cr. L. Rep. 2554 (NY Sup. Ct. September 13, 1973).

DISCOVERY -- PROSECUTION DOSSIERS ON JURORS

In People v. Aldridge, 13 Cr. L. Rep. 2555 (August 24, 1973), the Michigan Court of Appeals recognized the right of a criminal defendant to obtain discovery of a prosecutor's dossier on background information on jurors. Noting that the files might have contained information to support challenges for cause, the Court held that its "sense of fundamental fairness requires placing defendant upon an equal footing by requiring disclosure of the prosecutor's investigatory report upon prospective jurors." Defense counsel in courts-martial should use this case to advantage when seeking discovery of court members' 201 files. But see United States v. Perry, 47 CMR 89 (ACMR 1973).