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We encourage readers of The Advocate to submit articles pertaining to legal issues which are of particular importance to trial defense counsel and warrant examination in the pages of this journal; your contributions, comments, and suggestions can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.

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OPENING STATEMENTS

Overview of Contents

In the last issue of The Advocate, we reinstituted the "Proposed Instruction" feature, and announced our intention to regularly publish sample instructions on findings which have been endorsed by civilian courts. This issue's lead article explores in greater detail the infirmities of the military counterpart to the entrapment instruction presented in the first installment of that feature, and should assist trial defense counsel in urging the military judge to substitute the suggested instruction for the standard explanation of entrapment found in para. 6-8, Department of Army, Pamphlet No. 27-9, Military Judges' Guide (1969). In the second article, Mr. Donald A. Timm reviews the judicial interpretations of Article 31(b), UCMJ, and concludes that there is no "undercover exception" to that provision which enables the government to circumvent statutory warning requirements by employing covert investigators. Our seriatim analysis of the exceptions to the Fourth Amendment's warrant requirement continues with the fourth installment of "Search and Seizure: A Primer," in which the staff examines "hot pursuit." Finally, we are introducing a feature designed to assist our readers in resolving the various ethical dilemmas which continually confront the criminal defense attorney. In the first installment of "Ethics Round Table," the staff addresses the problems stemming from an accused's decision to falsify his testimony.

Preview

The upcoming edition of The Advocate comprises part one of a two-part symposium on the guilty plea. The frequency of uncontested courts-martial warrants a concerted examination of the many problems arising from the client's decision to plead guilty; hopefully the symposium will assist trial defense counsel not only in informing accused of the consequences of that course of action, but in protecting their legal rights as well.

A CALL FOR A NEW ENTRAPMENT INSTRUCTION: BANISHING THE "REASONABLE SUSPICION" INTERLOPER

*by Captain Steven T. Cain**
and
*Captain Robert L. Gallaway***

According to the model military instruction on entrapment,[1] the government may rebut the defense by showing that its agents reasonably suspected that the accused was predisposed to commit the charged offense; it is not necessary to show that he was in fact so predisposed. Thus, the Military Judges' Guide provides that

> even if the original suggestion or initiative did not come from the accused, you may nevertheless find that he was not entrapped if you are satisfied beyond a reasonable doubt that the agents of the Government had reasonable grounds to believe or suspect that the accused was already engaged in the same type of criminal activity or business or was about to become so engaged.[2]

The instruction focuses on the government agent's belief of the accused's culpability rather than the latter's predisposition to commit the alleged offense. Thus, if erroneous yet reasonable information prompts the police to entice a servicemember to commit an offense, he cannot raise the defense of entrapment: neither his lack of criminal predisposition nor instances

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1. See Department of Army, Pamphlet No. 27-9, Military Judges' Guide, para. 6-8 (1969) [hereinafter cited as Military Judges' Guide]. The entrapment instruction is based on United States v. McGlenn, 8 USCMA 286, 24 CMR 96 (1957).

2. Id.

of overreaching by the police would negate his culpability under that theory as it is expounded in the Military Judges' Guide. This concept is contrary to the modern view of the entrapment defense.

The Development of the Entrapment Defense

The entrapment defense evolved from the early "decoy letter" cases, in which one finds the genesis of the "reasonable suspicion" theory reflected in the model military instruction. However, "reasonable suspicion" by government agents that an individual is engaged in criminal activity was only intended to justify initial governmental inquiries into the individual's predisposition: it did not constitute license for overbearing government conduct. Thus, in the first such case to reach the Supreme Court,

> [t]he official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him [through the use of a decoy letter]; and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by the government official.[3]

The theory of entrapment would not have been an issue in that case since there was no governmental cajoling involved, and the accused immediately responded to the official's first overture. Nonetheless, the Supreme Court recognized the government's right to invite an individual to commit crime based on its suspicion that he was criminally culpable.

The origin of the entrapment theory in federal jurisprudence can be traced to Woo Wai v. United States.[4] Government agents enticed Woo Wai into illegally transporting aliens into the country, hoping that they could use the threat of prosecution to elicit information from him. Because there was no "evidence that, prior to the time when the detective first approached Woo Wai, any of the defendants had ever been engaged in the unlawful importation of illegal aliens, or had ever committed or

3. Grimm v. United States, 156 U.S. 604 (1875) (emphasis added).

4. 223 F. 412 (9th Cir. 1915).

thought of committing any offense against the immigration laws,"[5] the government's conduct constituted entrapment.

In Woo Wai, the court cited public policy as a justification for the entrapment defense. Reasonable suspicion was never intended to enable government agents to excessively entice an individual until he agrees to engage in criminal conduct. Indeed, the Eighth Circuit, in C.M. Spring Drug Co. v. United States,[6] defined the intended scope of reasonable suspicion by noting:

> It is well settled by the decisions of the Supreme Court of the United States, we think now universally followed in the several circuits, that where the government, through its agents, has reasonable cause to believe that the law is being violated by the defendant, they may legally entrap the defendant by decoy letters or by pretended purchases.

None of the early judicial decisions ever intimated that "reasonable suspicion" justifies anything more than the initial offer to commit crime. The government's tactics were thereafter weighed against the accused's actions under an objective, "reasonable man" standard: if the accused readily joined in illegal conduct, his ready acquiescence demonstrated that he was predisposed to commit the crime. On the other hand, at some point government conduct becomes so outrageous that the courts would cite public policy reasons for exonerating the accused on the basis of the entrapment defense.[7] The practice of focusing the entrapment

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5. Id. at 414.

6. 12 F.2d 852, 856 (8th Cir. 1926).

7. The defense was not uniformly treated as it developed in the various state courts and federal circuits. Some jurisdictions followed the strict "public policy" approach and analyzed the government conduct for outrageousness. Other courts ignored outrageous government conduct as long as the government had "a reasonable suspicion" that the target was criminally predisposed. In Vaccaro v. Collier, 38 F.2d 862 (D. Ct. MD. 1930), there appears a sophisticated mixture of both forms of analysis. Government agents had induced the sale and transportation of narcotics. The court relied heavily on the "reasonable suspicion" justification for the initial contact, finding that "if the person so entrapped was . . . reasonably suspected of having violated the law, such conduct on the part of the officer is lawful." Id. at 870. Nevertheless, "reasonable

(continued)

defense on the reasonable suspicions of government agents crept into federal cases during the 1920's. For example, in United States v. Certain Quantities of Intoxicating Liquors,[8] a federal court held that one of two conditions must exist before the entrapment defense is rendered inapplicable: the accused must initiate the criminal undertaking, or the police officers instigating the offense must reasonably suspect that the accused is engaged or about to become engaged in the criminal activity. This concept was endorsed by the Eighth Circuit in C.M. Spring Drug Co. v. United States[9] and St. Clair v. United States.[10] These opinions echoed earlier (although less strongly worded) opinions by the Second[11] and Sixth Circuits.[12] These cases, however, were not the only interpretations of entrapment; other theories focused on the suspect's predisposition as well as the character of the police conduct.[13]

The Decline of "Reasonable Suspicion" In Federal Courts

It was not until 1932, in Sorrells v. United States,[14] that the Supreme Court attempted to establish uniform federal law in this area. Although the Court recognized the entrapment defense in Sorrells, it failed to mention the concept of "reasonable suspicion" and instead

7. Continued.
suspicion" would not justify putting a suspect "under any form of extraordinary temptation or inducement" because "[p]ublic policy and fair play forbid going to such an extreme. The question, therefore, is always one of degree." Id. Cf. State v. Neely, 300 P. 561, 565 (Mont. 1931), where the court focused on the particular nature of the suspect's mind rather than the suspicions of the police. The early development of the law of entrapment was marked with an exploration of different theories.

8. 290 F. 824 (D.N.H. 1923).

9. C.M. Spring Drug Co. v. United States, supra note 6.

10. 17 F.2d 886 (8th Cir. 1927).

11. Lucadamo v. United States, 280 F. 653 (2d Cir. 1922).

12. Billingsley v. United States, 274 F. 86 (6th Cir. 1921).

13. See note 7, supra.

14. 287 U.S. 435 (1932).

focused upon the accused's lack of predisposition; only Justice Roberts, in his concurring opinion, considered the conduct of the police agents to be relevant. This dichotomy in the theory underlying the entrapment defense has continued in the Court from 1932 until today, with the majority opinions noting that the accused's actual predisposition is the focus of the defense and the concurring and dissenting opinions calling for an examination of police conduct.[15] Thus, after a developmental period during which the federal courts endeavored to analyze the accused's misconduct in conjunction with the practices employed by the police, the Court split the concept: some Justices focused almost exclusively on the accused's criminal predisposition, while others were primarily concerned with the nature of police misconduct. Although Sorrells did not mention the concept of reasonable suspicion, it was incorporated in some federal decisions. In Weathers v. United States,[16] the Fifth Circuit noted that police may approach someone "reliably reported" to be violating the law. In Heath v. United States,[17] the Tenth Circuit confidently noted that police officers cannot furnish a person with the opportunity to commit a crime unless they have reasonable grounds to believe that he is engaged in unlawful activities. In Lunsford v. United States,[18] the Tenth Circuit reaffirmed the reasonable suspicion test.

Notwithstanding the continued vitality of the test in some federal opinions, it has been consistently ignored by the Supreme Court. Both in Sherman v. United States and United States v. Russell, the majority opinions focused on predisposition. Likewise, in Hampton v. United States, none of the three opinions mentions reasonable suspicion as a relevant factor. The position of reasonable suspicion in the entrapment defense has consequently declined in federal jurisprudence and has been increasingly criticized. Courts repeatedly note that the sole test for entrapment, especially after Russell, addresses the accused's predisposition rather than the standard of conduct exhibited by police. As noted by

15. See Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976). See also, Gallaway, Due Process: Objective Entrapment's Trojan Horse, 88 Mil.L.Rev. 103 (1980).

16. 126 F.2d 118 (5th Cir. 1942).

17. 169 F.2d 1007 (10th Cir. 1948).

18. 200 F.2d 237 (10th Cir. 1952).

the Ninth Circuit in United States v. Benveniste,[19] the crucial question is whether government officials implanted in the mind of an innocent person the disposition to commit the offense and induced its commission in order to prosecute him. The Court of Appeals for the District of Columbia likewise recognized that the legality of police inducement is determined by referring to the accused's general intention or predisposition to commit the type of crime solicited.[20] When the accused raises entrapment, the government must prove that he was predisposed. If the prosecution successfully shoulders this burden, other governmental activity is irrelevant.[21]

Many circuits have abandoned the requirement that agents must first suspect an individual before they may approach him. In United States v. Williams,[22] the Ninth Circuit noted that the "reasonable suspicion" requirement adds nothing to the entrapment protections afforded by Supreme Court decisions. Rather, it is the accused's predisposition, whether known or unknown to the government agents, that is the central issue in an entrapment defense. Also, in United States v. Swets,[23] the Tenth Circuit overruled Ryles v. United States[24] and Heath v. United States,[25] which had required a showing of prior suspicion. Instead, the Tenth Circuit held that when entrapment is raised, the government need not show that its agents had prior suspicion in order to rebut the defense. This is especially significant to military practitioners, because the Court of Military Appeals cited both Ryles and Heath as authority in McGlenn.[26] The First,[27]

19. 564 F.2d 335 (9th Cir. 1977).

20. Wager v. Pro, 572 F.2d 882 (C.A.D.C. 1976).

21. United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973); cert. denied, 417 U.S. 950 (1974); see also Whiting v. United States, 321 F.2d 72 (1st Cir. 1963).

22. 487 F.2d 210 (9th Cir. 1973).

23. 563 F.2d 989 (10th Cir. 1977).

24. 183 F.2d 944 (10th Cir. 1950).

25. 169 F.2d 1077 (10th Cir. 1948).

26. United States v. McGlenn, supra note 1 (discussed infra).

27. United States v. Rodrigues, 433 F.2d 760 (1st Cir. 1970); cert. denied, 401 U.S. 943 (1971).

Fourth,[28] Fifth,[29] and Ninth[30] Circuits have also rejected the "reasonable suspicion" requirement.

The view that entrapment can be defeated by showing that the police reasonably suspected the accused, regardless of his actual predisposition, has also been criticized. In United States v. Walton,[31] the Ninth Circuit court wrote:

> There is language in one decision of this court tending to support the view that the critical predisposition inquiry is whether the officers had reasonable grounds to believe the accused had a predisposition to commit the offenses of this kind. See Trice v. United States, 211 F.2d 513, 516 (9th Cir. 1954). The more recent decisions, however, in holding that burden of proof to negate entrapment is on the Government, establish that the critical issue on the predisposition facet of that defense is not whether the officers who induced the accused had reasonable grounds to believe he had such a propensity, but whether he did, in fact, have such a propensity.

Also, in United States v. McClain,[32] that same court noted that at one time it was considered proper for government agents to show through hearsay that when the agent attempted to buy drugs, he had reasonable grounds to believe that the accused was engaged in criminal activities. With regard to that means of rebutting entrapment, the court said:

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28. United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971).

29. United States v. Jenkins, 480 F.2d 1198 (5th Cir. 1973), cert. denied, 414 U.S. 913 (1973).

30. United States v. Martinez, 488 F.2d 1088 (9th Cir. 1973).

31. 411 F.2d 283, 291 at n.12 (9th Cir. 1969).

32. 531 F.2d 431, 435 (9th Cir. 1976).

> If there be any reasonable rationale for this remarkable exception to the hearsay doctrine, we have not found it . . . . We doubt that this notion is valid today; it is not the state of mind of the government agent that is important . . . it is the predisposition of the defendant to commit the offense.[33]

Whether treated as a prerequisite for governmental attempts to solicit offenses or as a means to rebut entrapment, the reasonable suspicion test has the same result: it denies the defense to an accused who is not criminally predisposed. The procedural issue of whether the test is a condition precedent or a matter in rebuttal does not change its effect. With regard to the "reasonable suspicion" test, however, one fact is clear: it has never been recognized by the Supreme Court and the weight of modern federal authority is against it.

The Decline of "Reasonable Suspicion" In The Military

In McGlenn, the cornerstone of the model instruction in the Military Judges' Guide, the court confined its analysis of entrapment to the suspicions of the government agents. In support of this test, the Court relied heavily on federal cases predating Sorrells; consequently, the Court's interpretation of the defense was based on judicial opinions which were losing favor. The accused in McGlenn, who was charged with marijuana offenses, admitted that on at least two previous occasions he had purchased the contraband. Despite this admission, the Court held that "[s]uch evidence is an insufficient substitute for a showing that Government agents had reasonable grounds to suspect the accused prior to the instant offense."[34]

The court unduly emphasized the "reasonable suspicion" theory, a concept originally intended merely to justify the initial approach by the government agents rather than to comprise the foundation of a defense. Judge Latimer's dissenting opinion in McGlenn found no entrapment. His legal reasoning accords with what is regarded as the better view expounded in post-Sorrells federal cases, and he described the subjective test by stating:

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33. Id.

34. United States v. McGlenn, supra note 1, at 294, 24 CMR at 102.

> It just does not sound logical to me to say that a person is innocent of an offense if he is inveigled into committing a crime by an agent who does not know his reputation but, if he is reputed to be a violator under the same facts, he is guilty. To me, he is either entrapped or he is not. If there has been some sort of an inducement, the question is whether it amounts to entrapment.[35]

This is, in fact, the view supported by the most recent military and federal cases. Since McGlenn, the Court of Military Appeals has never held that "reasonable suspicion" by government agents would deny the defense to an otherwise entrapped accused, although several intermediate appellate court decisions prior to United States v. Henry[36] have relied on the analysis in McGlenn.[37]

In three decisions, beginning with Henry, the Court of Military Appeals inferentially overruled the "reasonable suspicion" theory. There, an informant repeatedly attempted to purchase LSD from the accused over a period of several days. Although the entrapment defense was thereby placed in issue, the Court did not examine the informant's reasons for seeking out the accused. The Court affirmed the conviction based solely on a showing of predisposition resulting from another sale by the accused several days after the one underlying the charge. In United States v.

35. Id. at 296, 24 CMR at 104.

36. 23 USCMA 70, 48 CMR 541 (1974).

37. In United States v. Butler, 41 CMR 620 (ACMR 1968), the court actually found that the accused was not predisposed to commit the offense, which was the creative design of the informant. Yet, rather than reverse due to lack of predisposition, the court chose to hold that reversal was required because the government agent had no "reasonable suspicion" that the accused was involved in selling hashish. Likewise, in United States v. Walker, 47 CMR 797 (NCMR 1972), entrapment was found due to the extreme harassment of the accused by the informant in the absence of any evidence that the accused was predisposed. Rather than basing their reversal on a lack of predisposition, the court reversed based on a failure to show prior "reasonable suspicion." The unfortunate inference was that, had an informant gone to the CID and untruthfully said the accused was a narcotics dealer, the court would have forgiven the informant's outrageous conduct, and convicted the otherwise innocent accused.

Hebert,[38] the Court indicated its abandonment of the "reasonable suspicion" test even more clearly. In that case, the informant approached the accused and requested marijuana. The accused apparently agreed but was unable to procure the drug and later asked the informant to try to get some for him. The informant took the accused's money and apparently secured some marijuana from the government. He then asked the accused to sell a portion of this contraband to another agent. The accused readily agreed. The conviction was affirmed on the basis of predisposition, and the Court did not mention why the informant initially approached the accused. Also, in United States v. Garcia,[39] the Court affirmed the accused's conviction based on his predisposition as indicated by his ready willingness to sell marijuana. Again, the Court did not mention what prompted the informant to make the initial inquiry. In Garcia, the Court specifically focused on the accused's predisposition rather than the conduct of the government agents, noting:

> The defense of entrapment is not predicated upon the degree of covert police involvement in the criminal activity of the accused; rather, it is rooted in the concept that Government officers cannot instigate the commission of a crime by one who would otherwise remain law abiding. Consequently, the focus of the defense is not upon the Government agent but upon the accused's intent or predisposition . . . to commit the crime.[40]

The Court's shift from the "reasonable suspicion" test to the test which is more widely followed in federal courts was confirmed by the Army Court of Military Review. Thus, in United States v. Black,[41] the latter tribunal noted that:

> while not expressly overruling McGlenn's focus on the government's activity as it bears on entrapment, the Court of Military Appeals, by following the federal courts, has clearly shifted the focus to the predisposition of the accused. The Court of Military Appeals also appears to have discarded the earlier

38. 1 M.J. 84 (CMA 1975).

39. 1 M.J. 26 (CMA 1975).

40. Id. at 29, quoting United States v. Russell, supra note 15, at 429.

41. 8 M.J. 843, 846 (ACMR 1980).

requirement that the Government must have a reasonable suspicion of the accused's criminal disposition prior to his solicitation.

Interestingly, the "reasonable suspicion" theory created in McGlenn has historically hampered the government more than the defense. The fact that it may nevertheless seriously impinge upon the accused's prospects of successfully asserting the entrapment defense, however, is demonstrated in United States v. Silver.[42] There the Army Court of Military Review, following McGlenn, held that "[t]he critical issue [is] whether, at the time of solicitation of appellant by [the informant], the agents of the Government had a reasonable belief or suspicion that appellant was engaged in the commission of a crime . . . or was about to do so."[43] Fortunately for that appellant, Henry had not yet been decided, and the Court reversed the conviction because the only evidence of "reasonable suspicion" was a hearsay statement given nine days after the offense. The Court held that the out-of-court statement indicating that the accused was a dealer with syndicate connections would have been admissible to show "reasonable suspicion" if it had come to the attention of the government prior to the offense. It would not have been admissible to prove the truth of the matter asserted, for "[i]f offered to negate appellant's testimony at trial it was, indeed, inadmissible hearsay."[44]

Toward A New Instruction

The current military entrapment instruction,[45] as well as its proposed revision,[46] incorporates the "reasonable suspicion" test. Defense counsel

42. 39 CMR 767 (ACMR 1967).

43. Id. at 769.

44. Id.

45. See note 1, supra.

46. The proposed instruction affords the prosecution the best of both worlds. In addition to permitting the government to rebut the defense by showing actual predisposition, the government would fully defeat the defense by showing that the agents merely had a reasonable suspicion of that criminal involvement. The proposed instruction will provide, in part:

(continued)

should object to these instructions on the grounds that they are unsupported by and contrary to both military and federal criminal law. The defense counsel should also propose a substitute which benefits his client and avoids the legal failings of the model military instruction. One such instruction is presented in the appendix, and has been cited with approval by various federal courts.[47] It reduces the risk that the accused will be convicted not upon his guilt or predisposition, but upon the government agents' willingness to testify that they "reasonably suspected" that the accused was guilty.

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46. Continued.

> [t]he defense of entrapment does not exist if the original suggestion or initiative to commit the offense came from the accused. However, even if the accused did not suggest or initiate the unlawful activity, you may still find that there was not entrapment if the government agents had reasonable grounds to believe or suspect that the accused was involved or was about to be involved in similar criminal conduct. Entrapment can also be defeated by showing that the accused had a predisposition or inclination to commit the offense . . . . See Department of Army, Pamphlet No. 27-9, Military Judges' Guide, para. 6-8 (Proposed Draft 1981).

47. See, e.g., United States v. Szycher, 585 F.2d 450 (10th Cir. 1978); United States v. Shaw, 570 F.2d 770, 771-772 (8th Cir. 1978); Joyner v. United States, 547 F.2d 1199, 1201 (4th Cir. 1977); Willis v. United States, 530 F.2d 308, 310-311 (8th Cir.), cert. denied, 429 U.S. 838 (1976); United States v. Gardner, 516 F.2d 334, 348 (7th Cir.), cert. denied, 423 U.S. 861 (1975). See also United States v. Johnson, 590 F.2d 250, 251, on rehearing, 605 F.2d 1025, 1027 (7th Cir. 1979) (en banc). The instruction is extracted from Devitt and Blackmar, Federal Jury Practice and Instructions (3rd ed. 1977). The recommended instruction also appears in 13 The Advocate 114 (1981).

Appendix

The [accused] asserts that he was a victim of entrapment as to the offense charged [against him].

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbides his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from the suspected person.

If, then, the [court] should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the [accused] was ready and willing to commit crimes such as are charged [against him] whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the [court] should find that the [accused] is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the [accused] had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty. The burden is on the government to prove beyond reasonable doubt that the [accused] was not entrapped.

COVERT AGENTS AND THE "UNDERCOVER" EXCEPTION TO ARTICLE 31(b), UCMJ

*by Mr. Donald A. Timm**

I. Introduction

In an effort to obtain incriminatory information from a suspect, military policemen commonly employ undercover or covert investigators. Any attempt to introduce this information at trial through the covert agent's testimony raises the question of whether the prosecution must show that rights warnings were administered pursuant to Article 31(b) of the Uniform Code of Military Justice.[1] A review of military and civilian case law indicates that, despite dicta to the contrary, there is no "undercover exception" to Article 31's warning requirements, and a showing that the accused was advised of his rights is a prerequisite to the admission of any inculpatory statements he related to covert agents.

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1. Article 31, Uniform Code of Military Justice, 10 U.S.C. §831 (1976), [hereinafter cited as UCMJ] provides in pertinent part:

> (b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> * * * *
>
> (d) No statement obtained from any person in violation of this article, . . . shall be received in evidence against him in a trial by court-martial.

If it is construed literally, Article 31 apparently requires government agents to warn suspects in most situations involving confidential informants. Indeed, the Court of Military Appeals has observed that the Article is "as plain and unequivocal as legislation can be," and imposes warning requirements on any individual subject to the Code who questions servicemembers suspected of an offense. If proper warnings are not administered, any admissions are inadmissible.[2]

Unfortunately, the courts have not interpreted Article 31 so literally since 1953. In United States v. Wilson,[3] two judges concluded that Congress should be taken at its word and that Article 31 should be applied literally. A third judge, however, believed that the majority's interpretation of the Article's applicability was too expansive, and stated that

> before the advice required by the Article need be given, three conditions should be fulfilled: first, the party asking the question should occupy some official position in connection with law enforcement or crime detection; second, that the inquiry be in furtherance of some official investigation; and third, the facts be developed far enough that the party conducting the investigation has reasonable grounds to suspect the person interrogated has committed an offense.[4]

Under this more restrictive reading, an undercover agent must administer Article 31 warnings if he acts for the police, furthers their investigation, and reasonably suspects that the interrogated servicemember is engaged in criminal activity.

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2. United States v. Wilson, 2 USCMA 248, 251, 8 CMR 48, 51 (1953) (citation omitted).

3. Id.

4. Id. at 261; 8 CMR at 61 (Latimer J., dissenting).

In general, the Military Rules of Evidence simply incorporate the language of Article 31, the provisions do not affect present law.[5]

II. The Official Interrogation Test

A. *Officiality.*

In United States v. Gibson[6], one of the first cases to sanction the use of undercover informants, the Court of Military Appeals adopted the interpretation of Article 31 proposed by the Wilson dissent, and held

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5. Mil.R.Evid. 305(c) provides:

a person subject to the Uniform Code of Military Justice who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) Informing the accused or suspect of the nature of the accusation.

(2) Advising the accused or suspect that the accused or suspect has the right to remain silent; and

(3) Advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

The provision indicates that who is required to give rights warnings and what constitutes interrogation, will be determined by judicial decision, except that Mil. R. Evid. 305(b)(2) defines interrogation as "includ[ing] any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."

6. 3 USCMA 746, 14 CMR 164 (1954).

that Article 31(b) applied only to "official" interrogations.[7] Chief Judge Quinn stressed that Congress intended the codal provision to apply to official investigations as opposed to casual conversations between fellow prisoners of equal military rank. In a separate opinion, Judge Brosman stated that the Article prohibits incrimination by official compulsion rather than incrimination by official trickery and that a contrary holding would deprive the government of the use of "plants," "stool pigeons," and "informants".[8] It appears, therefore, that Judge Brosman sanctioned an "undercover informant" exception to Article 31.

Judge Latimer rejected that conclusion. He identified the compelling policy reasons militating against the exception, and persuasively answered those who claimed that it was necessary for effective police work. He emphasized that Article 31 precludes the use of undercover informants "only when they seek to obtain a confession or admission by questioning an accused;" he "fail[ed] to see why their employment, unfettered by that Article, is of such importance that they are permitted

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7. In Gibson, a number of buildings had been broken into and the change boxes of several vending machines had been rifled. Gibson, who had been posted to guard the area, was missing and was later seen in possession of a large amount of coins. He was incarcerated on the charge of leaving his guard post. At the direction of the CID, a "good reliable rat," a prisoner named Ferguson, was confined with Gibson. Ferguson was not told what information he was expected to acquire, nor was he told of the offense, if any, which Gibson was suspected of committing. During "casual conversation," Ferguson asked Gibson why he was confined, and Gibson told him in detail about the break-ins and thefts. Sometime thereafter Ferguson was removed and taken to the CID where he related the substance of this conversation. The court found Gibson's self-incriminating statements admissible at trial. A recent United States Supreme Court decision limits the applicability of Gibson in many cases where a confidential informant is used in a jailhouse. See note 9, infra.

8. United States v. Gibson, supra note 6, at 756, 14 CMR at 174 (Brosman, J. concurring). Judge Brosman's suggestion that "compulsion" is the key to Article 31's applicability was shortlived. See United States v. Souder, 11 USCMA 59, 28 CMR 283 (1959). But see Section III infra.

to destroy a fundamental right accorded to an accused."[9] Under Judge Latimer's view that Article 31 applies only to "official investigations," the interrogator should serve in some law enforcement capacity, further an official investigation, and suspect the accused of an offense.[10] Thus the use of an inmate as an undercover informant in Gibson did not offend Article 31, under this analysis, because the informant did not view himself as an investigator and did not suspect the accused of committing any offense.

In United States v. Souder,[11] the Court of Military Appeals considered the requirement that the interrogation be "official." The facts in

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9. Id. at 757, 14 CMR at 175-76 (Latimer J. concurring). The Supreme Court recently curtailed the use of undercover informants after preferral of charges or imposition of pretrial arrest, confinement or restraint. In United States v. Henry, __ U.S. __, 100 S.Ct. 2183, 65 L.Ed2d 115 (1980), an indicted accused was confined with a part-time paid informant. The government agents asked the informant to be alert for any statements made by other prisoners, including Henry, but not to initiate any conversations with or question Henry regarding the specific offense of which he was indicted. The informant subsequently related certain inculpatory remarks by Henry, and testified to these remarks at trial. The Court held the statements inadmissible on Sixth Amendment grounds, noting that an indicted accused in custody was at a "critical stage" of his criminal prosecution, a point at which the right to counsel had attached. The Court reasoned that by intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated that right to counsel. Id. at ___, 100 S.Ct. at 2187-88, 65 L.Ed.2d at 123-24.

It remains to be seen whether the same result would obtain if the incarcerated suspect were not indicted or otherwise entitled to counsel. However, Henry clearly implies that it would, if not under the Sixth Amendment then under Miranda v. Arizona, 384 U.S. 436 (1964). The Court noted that there are "powerful psychological inducements to reach for aid when a person is in confinement" and that "confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents." Accordingly the Court concluded that the fact of custody and, by implication, confinement, bears on whether the government "deliberately elicited" the incriminating statements from the accused.

10. Id. at 762, 14 CMR at 181 (Latimer J. concurring).

11. 11 USCMA 59, 28 CMR 283 (1959).

that case indicated that Lieutenant Gallagher owned and operated an off-post music store. Along with other music store owners in the area, he was advised by Naval security personnel that two accordions had been stolen from a local servicemember's automobile. When the accused and a companion entered his store with apparently stolen property, Lieutenant Gallagher began to question them in an effort to elicit information that would assist the police. The two suspects were unaware of Lieutenant Gallagher's status as an officer or the fact that he was assisting Naval security. The Court of Military Appeals held that Lieutenant Gallagher's failure to warn Souder of his Article 31 rights constituted reversible error.[12]

Judge Ferguson interpreted Article 31 literally with respect to officiality; in his opinion, the article necessarily applies if the questioner is subject to the Code and if that person suspects another of an offense:

> Whether viewed from the standpoint of the accused or that of his interrogator, it is obvious that Lieutenant Gallagher was under a duty to advise both sailors of their rights under Article 31, prior to questioning them concerning the stolen musical instrument. He was a 'person subject to this chapter' interrogating an individual whom he 'suspected of an offense.' In fact, it is patent from his testimony, that Lieutenant Gallagher conversed with the accused and his companion for the express purpose of obtaining incriminating admissions from them.[13]

Judge Latimer found that all of his conditions were satisfied: Gallagher played an official role in connection with law enforcement activities, even though he was not a policeman; he posed his questions not for personal reasons, but in furtherance of an official investigation; and, at the time of the questioning, he suspected Souder of an offense.[14]

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12. Id. at 60-61, 28 CMR at 284-85.

13. Id. at 61, 28 CMR at 285 (citation omitted).

14. Id. at 61-64, 28 CMR at 285-89 (Latimer, J. concurring).

Chief Judge Quinn, however, disagreed with Judge Ferguson. Citing United States v. Gibson,[15] he reasoned:

> The mere fact that Lieutenant Gallagher is a person subject to the Uniform Code of Military Justice is not, as the principal opinion implies, the whole of the matter in determining whether there has been a violation of Article 31. There are some situations to which Article 31 does not apply, even though the participants are persons subject to the Uniform Code.[16]

Under the "official interrogation" test, Souder[17] is readily distinguishable from Gibson.[18] Gallagher suspected Souder of having committed a particular offense, and questioned him in order to gather evidence. On the other hand, Ferguson, the fellow prisoner who obtained the statements which were introduced against Gibson, did not ask questions for the purpose of gaining evidence, and he had no idea whether Gibson committed any offense. In United States v. Beck,[19] the Court defined "officiality" in the context of an Article 31 interrogation, and thereby removed any lingering doubt that the Article does not apply solely to members of investigative agencies. After tracing the development of Article 31 case law, Judge Ferguson fashioned these criteria:

> From the foregoing, certain, if not always well-defined, principles regarding the need for the preliminary warning emerge. It is certain, for example, that a military investigator, or one acting as such, who suspects an accused of an offense and questions him in connection with such allegations, is expressly required to advise him of his right. At the other end of the spectrum, it is equally clear that inquiries made by a close

15. 3 USCMA at 746, 14 CMR 164 (1954).

16. United States v. Souder, supra note 11.

17. Id.

18. United States v. Gibson, supra note 6.

19. 15 USCMA 333, 35 CMR 305 (1965).

> friend on a personal basis and without regard to any military relationship between him and the accused is not within the ambit of Article 31. Lying between these two poles are situations involving purported action only on behalf of the civil authorities, participation in interviews by persons not subject to the Code on a claimed private basis, perfunctory inquiries in the ordinary discharge of a nonmilitary type of responsibility, and the lack of any police responsibility on the part of the interrogator. The ultimate inquiry in every case is whether the individual, in line of duty, is acting on behalf of the service or is motivated solely by personal considerations when he seeks to question one whom he suspects of an offense. If the former is true, then the interrogation is clearly official and a preliminary warning is necessitated. If the latter situation is presented, then the warning is not required as a predicate for receipt of accused's responses.[20]

This definition of official interrogation dispels any suggestion that undercover agents are automatically exempt from the responsibilities imposed by Article 31.

B. Interrogation.

The "interrogation" aspect of the "official interrogation" test was addressed in United States v. Hinkson.[21] In that case, Lance Corporal Sasso overheard conversations in an Okinawa bar which led him to suspect that certain Marines were involved in blackmarketing. Corporal Sasso reported this information to the Office of Naval Intelligence (ONI), and ONI agents arranged to maintain contact with Sasso so that he could report what he saw and heard. He was explicitly instructed not to question anybody.

Corporal Sasso established an unsavory reputation and managed to infiltrate circles of illegal activity. On the crucial date, he first

20. Id at 338, 35 CMR at 310. But see United States v. Kelley, 8 M.J. 84 (CMA 1979); United States v. Kirby, 8 M.J. 8 (CMA 1979); United States v. Dohle, 1 M.J. 223 (CMA 1975).

21. 17 USCMA 126, 37 CMR 390 (1967).

conferred with ONI agents and then exited their office, stating, "You ain't getting nothing out of me." Several servicemen who had been summoned for questioning, including Hinkson, were sitting in a small waiting room outside the office during this exchange. Hinkson soon divulged self-incriminating information to Sasso. The manner in which the statements were obtained is significant:

> Sasso had not previously met the accused, and did not know him by name, but he knew he was present for questioning. Although not certain, Sasso admitted it was 'very possible' he started a conversation with the accused. He told the accused he was involved in some 'runs' (the theft and sale of Government property), and 'some of the guys were talking' but others 'weren't.' Sasso asked no questions of the accused, but hoped he 'would talk.' The accused did. He told Sasso he had stolen more than thirty sections of pipe, which he later sold.[22]

In holding that Sasso was not required to warn Hinkson of his Article 31 rights, Chief Judge Quinn cited Gibson[23] and noted:

> We are not inclined to denigrate or defend Sasso's relationship to the ONI . . . . Neither the Uniform Code of Military Justice nor the Constitution of the United States requires that, at all times and in all situations, a person desiring to learn about the criminal activities of another first proclaim himself an arm of the law, or one dedicated to its enforcement. Long ago we held that the Article 31 requirement that an accused or suspect not be interrogated or requested to make a statement without first being advised of his right to remain silent, does not apply to an undercover agent who merely engages in ordinary conversation with an unwary suspect.[24]

22. Id. at 127, 37 CMR 391 (emphasis added).

23. United States v. Gibson, supra note 6.

24. United States v. Hinkson, supra note 21, at 127, 37 CMR at 391.

In his dissent, Judge Ferguson objected to the suggestion that "an undercover agent who engages in ordinary conversation" was not within Article 31(b).[25] The majority was not, as Judge Ferguson may have feared, carving out an "informant exception," but was instead following the Court's past decisions, especially Beck and Gibson. The key to Hinkson was not that it involved an "undercover agent," but rather that it involved "ordinary conversation" instead of questioning.[26]

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25. Id. at 128-132, 37 CMR at 392-398 (Ferguson, J. dissenting).

26. As with Gibson, the validity of Hinkson has also been eroded by subsequent cases. The Supreme Court addressed the issue of what constitutes "questioning" in Rhode Island v. Innis, 446 U.S. 291 (1980) and Brewer v. Williams, 430 U.S. 387 (1977). In Williams, the accused had been arraigned and provided with counsel and was being transported from Davenport to Des Moines, Iowa, in an automobile with only police officers present. Although he had asserted his Miranda rights and the police had been instructed by his lawyer not to begin questioning him until he had talked with his counsel in Des Moines, one of the officers attempted to elicit admissions by delivering the "Christian burial speech," in which he told Williams that they should locate the body and give it a Christian burial. The officer knew that Williams was a former mental patient and deeply religious, and the latter responded by leading the officers to the body. The Court held that, because he had been arraigned, Williams was constitutionally entitled to assistance of counsel at interrogations and that the "Christian burial speech," clearly designed to elicit incriminating admissions from Williams, was tantamount to interrogation. Having disposed of the issue on Sixth Amendment grounds, the Court declined to discuss the implications of Miranda v. Arizona, 384 U.S. 436 (1964).

In Innis, however, the Court dealt with "interrogation" under Miranda, and specifically noted that the definitions of "interrogation" in the Fifth and Sixth Amendment contexts are not necessarily interchangeable. For Miranda purposes, "interrogation" was defined as either express questioning or its functional equivalent; "functional equivalent" was further defined as a practice that the police should know is reasonably likely to evoke an incriminating response from a suspect. This definition focuses on the suspect's perceptions rather than on police intentions, although practices which are designed to and succeed in eliciting incriminating responses will probably qualify as interrogations under Miranda.

Footnote continued next page

In determining whether conversation is "ordinary", it is the relationship between (rather than the rank of) the parties which is relevant. In United States v. Fisher,[27] where the Court held that a doctor was not required to warn a patient before a medical interview, it observed:

> Analysis of the language, the history, and the purpose of Article 31 has identified more precisely the kind of questioning that is subject to the Article. We have determined that if the request for a statement is made in the 'course of official interrogation' by a law enforcement officer or by a person with disciplinary authority over the accused, Article 31 is applicable. Article 31 is also applicable to questioning of a suspect by a person subject to the Code who has no enforcement or direct disciplinary power over the suspect if the questioner is endeavoring to perfect a criminal case against the suspect. Thus, the purpose of the questioning and the functions of the questioner are important to a determination of whether the interrogation or request for a statement is within or outside the purview of Article 31.[28]

Where there is a superior-subordinate relationship between the parties, however, the Court will not scrutinize the "official's" motive for

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26. Footnote continued

Under this test, the informant's actions in Hinkson apparently constitute interrogation. Further, since the Court found that the situation in United States v. Henry, supra, was "likely to induce Henry to make incriminating statements," that the same result would apparently obtain whether the analysis was premised upon the Fifth or Sixth Amendment. Accordingly, Henry should apply, under Miranda, to unindicted or uncharged confinees as well. In United States v. Borodzik, 21 USCMA 95, 44 CMR 149 (1971), the Court of Military Appeals noted that "when conversation is designed to elicit a response from a suspect, it is interrogation regardless of the subtlety of the approach."

27. 21 USCMA 223, 44 CMR 277 (1972).

28. Id. at 224-25, 44 CMR at 278-79.

engaging in conversation. Thus, in United States v. Dohle,[29] a sergeant was detailed to guard a friend, a lower-ranking enlisted man who was to be confined. The guard, Sergeant Prosser, questioned the accused about the theft, and the accused confessed. At trial, the military judge declined to suppress these admissions. With regard to the circumstances leading to the questioning, Prosser testified

> that the appellant was a good friend at the time in issue. He asked the question of the appellant because he was confused and bewildered as to why anyone would want to take the rifles. Moreover, he did not believe when he asked the question

29. 1 M.J. 223 (CMA 1975). A superior-subordinate relationship may exist even where the "superior" is of lower rank. In United States v. Kelly, 8 M.J. 84 (CMA 1979), the accused, an officer, examined his Official Military Personnel Records Jacket (OMPRJ) at a records repository. The noncommissioned officer in charge (NCOIC) of the Records Review Unit released the file to Kelley after determining that it contained a record of nonjudicial punishment. Kelley expressed concern about the document's inclusion in his records, and when the OMPRJ was returned, the record of nonjudicial punishment was missing. Without giving Article 31 warnings, the NCOIC questioned Kelley, and he made certain admissions implying that he had something to do with removing it; he subsequently confessed to the NCOIC's supervisor after proper warnings. At trial, the defense did not object to the NCOIC's testimony concerning Kelley's admissions, and indeed Kelley admitted that he had removed the record, but aserted that he lacked the requisite criminal intent. The Court initially granted the accused's petition for further review on the issue of whether he was prejudiced by the NCOIC's testimony as to his admissions; that grant was ultimately vacated as improvidently granted, see United States v. Kelley, 8 M.J. 84 (CMA 1979). It is uncertain from the lead opinion whether the decision was based on the premise that no Article 31 warnings were required, the premise that Kelley was not prejudiced since he judicially admitted or adopted the facts and defended solely on intent, or upon some other ground. However, in his dissent, Chief Judge Fletcher noted that in view of the NCOIC's official position and duties with regard to the records unit, he did have a "position of authority" over Kelley notwithstanding the difference in rank; since he suspected Kelley, he was required to administer Article 31 warnings before questioning him about the missing record.

> that the appellant had taken the rifles. He stated he was acting in a personal capacity, not professional; he had not been directed to question the appellant; and he did not intend to use any admission against him. Prosser did not communicate the appellant's admission to anyone until he met with the trial counsel just prior to the instant court-martial.[30]

In the lead opinion, Chief Judge Fletcher first alluded to prior cases involving Article 31, then expounded an additional test to determine whether or not the article applies:

> An examination of these cases will reveal that we have analyzed their facts to determine if the interrogator was acting officially or solely with personal motives. The subjective nature of this inquiry requires a difficult factual determination, both at trial and appellate levels. The determination is often made even more difficult by the presence of a questioner's multiple motives.
>
> We are not here concerned with voluntary statements that are made by an accused spontaneously or without prior police action. We are concerned with statements made by an accused or suspect in response to questions by a person, subject to the Code, who is in a position of authority over the accused or suspect. Where the questioner is in a position of authority, we do not believe that an inquiry into his motives ensures that the protections granted an accused or suspect by Article 31 are observed. While the phrase 'interrogate, or request any statement from' in Article 31 may imply some degree of officiality in the questioning before Article 31 becomes operative, the phrase does not also imply that nonpersonal motives are necessary before the Article becomes applicable. Indeed, in the military setting in which we operate, which depends for its very existence upon superior-surbodinate relationships, we must recognize that the position of the

30. Id. at 224-25.

> questioner, regardless of his motives, may be the moving factor in an accused's or suspect's decision to speak. It is the accused's or suspect's state of mind, then, not the questioner's, that is important.[31]

III. The Compulsion Test Revisited

At least one member of the present Court of Military Appeals would apparently abandon the "official interrogation" test, and return to the "compulsion" test which Judge Brosman proposed in Gibson.[32] Judge Cook has strongly implied that he would limit Article 31(b) to those instances where relationships of military rank or disciplinary power are known to the suspect and could cause a "habit of obedience." Such a drastic curtailment of the article's ambit -- unheard of in the Court in over twenty years -- would dramatically alter the protection afforded by that article.

At the time of this writing, Chief Judge Everett's views are not clearly discernible. Recently, however, in the case of United States v. Duga,[33] the Chief Judge relied on Judge Brosman's "official compulsion" position in Gibson, and supplied a new standard for the invocation of Article 31(b):

> In each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. Unless both prerequisites are met, Article 31(b) does not apply.[34]

Such a test, if strictly applied, could validate an informant's unwarned questioning even though he was acting in an official capacity and was endeavoring to perfect a criminal case if the person questioned felt no compulsion. This new test, however, is obiter dictum. In Duga the court

31. Id. at 225-26 (citations omitted) (emphasis supplied).

32. United States v. Gibson, supra note 6.

33. 10 M.J. 206 (CMA 1981).

34. Id. at 210.

concluded that the accused was not acting in any official capacity.[35] If followed, however, this new test would dramatically alter the standard currently applied, and give new life to the heretofore discredited "compulsion test." There is doubt whether the new Duga test is still good law for cases decided after the enactment of the new Military Rules of Evidence. Rule 305(c) seems to incorporate the "official interrogation" test by its terms,[36] and does not mention any requirement that the person questioned subjectively feel compelled to speak.

The "compulsion" test which Judge Brosman proposed in Gibson was properly repudiated in, inter alia, Souder,[37] and Beck.[38] On a policy level, the "compulsion" test raises the possibility that the military's investigative arm could circumvent and emasculate Article 31(b) by the simple expedient of "going underground." In addition, the "compulsion" test erroneously assumes that Congress' sole concern in enacting Article 31(b) was to offset coercion. However, commentators have observed that Congress was also concerned with basic fairness.[39] Moreover, the notion of fairness appears to be at the root of the Supreme Court's decision in United States v. Henry.[40]

Particularly with regard to drug offenses, undercover police work, whether conducted by agents or informants, obviously plays a necessary part in the investigation and prevention of crime,[41] and Article 31 should not be construed to effectively remove this weapon from the police arsenal. Moreover, as a practical matter Judge Cook was correct when he pointed out that warning requirements might endanger the agent's life in some situations. Employing undercover agents to gather information implicates two conflicting policy goals: the need for undercover agents

35. Id. at 211. The Chief Judge went on to say that even if the officiality prerequisite had been met, Article 31(b) would not apply because Duga did not perceive that he was being questioned and no subtle coercion was being applied. Id. at 211-212.

36. See note 5 supra and accompanying text.

37. United States v. Souder, supra note 15.

38. United States v. Beck, supra note 19.

39. See, e.g., Lederer, Rights Warnings in the Armed Services, 72 Mil. L. Rev. 1, 25-28 (1976).

40. __ U.S. __, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

41. See United States v. Russell, 411 U.S. 423, 432 (1973).

in effective police work on the one hand, and, on the other, the risk that total license would undermine the fairness inherent in Article 31(b). The proper balance between these competing interests was articulated by Judge Latimer in United States v. Gibson,[42] where he stated that undercover agents "can be used effectively if they listen, observe, and report," and that "[i]t is only when they seek to obtain a confession or admission by questioning an accused or suspect that they run afoul of Article 31."[43]

Judge Cook correctly rejected the absolutist approach when he noted that drug negotiations, for instance, necessarily involve questions, and that all questions cannot be banned. One possible solution is to prohibit undercover agents from asking questions dealing with other than future criminal conduct. Article 31(b) appears to be addressed to the investigation of offenses already committed the offense of which an individual is accused or suspected rather than contemplated offenses. This policy could easily be applied to undercover investigations as well. For example, an undercover agent who is a law enforcement official or who is working at the direction or behest of law enforcement officials in furtherance of an official investigation could not question a suspect for the purpose of obtaining admissions of his involvement in a past larceny or drug sale, although of course he could report any unsolicited admissions or conversations between the suspect and others concerning the past criminal acts. Thus, while an undercover informant attempting to consummate a controlled drug purchase would be prohibited from asking whether the suspect possessed any drugs for sale, or if he is still selling drugs, he could ask if the suspect would sell him drugs.[44]

IV. Conclusion

There is serious academic argument over the existence of an "undercover exception" to Article 31(b). The cases most often cited as support for such an exception, however, are limited to their particular facts, and stand only for the proposition that, in those cases, there was no

42. United States v. Gibson, supra note 6.

43. Id. at 758, 14 CMR at 176.

44. See Lewis v. United States, 385 U.S. 206 (1966). If the suspect responds that he has drugs for sale such admission could be admissible. See Hoffa v. United States, 385 U.S 293 (1966); Osborn v. United States, 385 U.S. 87 (1966).

"interrogation" or the questioner was not an "official". With the exception of Judges Brosman and Cook, no judge on the Court of Military Appeals has embraced a blanket "undercover exception" to Article 31(b), and the standard established in the leading cases regarding the "official interrogation" test demonstrates that no exception exists. Applying Article 31(b) to undercover activities within the limits suggested in this article would balance the competing interests involved, and appears to be consistent with the philosophy and purpose underlying the Article's warning requirement.

Part Four - The "Hot Pursuit" Exception

Evidence seized pursuant to a warrantless search conducted by government agents in "hot pursuit" of a felon is admissible at a criminal trial.[1] In evaluating the "hot pursuit" exception to the Fourth Amendment's warrant requirement, courts balance the individual's right to liberty[2] and privacy[3] against the societal interest in preventing suspects from fleeing[4] and possibly committing further crimes.[5]

Analytic Framework

The exigencies attending hot pursuit justify this exception: to require the police to terminate the pursuit in order to obtain a warrant would facilitate the escape of the accused and the removal or destruction of evidence.[6] The exception applies only if government agents have probable cause to apprehend the suspect;[7] in addition, the prosecution must show

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1. Warden v. Hayden, 387 U.S. 294 (1967).

2. United States v. Watson, 423 U.S. 411 (1976).

3. See generally United States v. Santana, 427 U.S. 38 (1976); United States v. United States District Court, 407 U.S. 297 (1972); Silverman v. United States, 365 U.S. 505 (1961).

4. See United States v. Hall, 348 F.2d 837, 841 (2d Cir. 1965); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc).

5. Warden v. Hayden, supra note 1; Dorman v. United States, supra note 4.

6. Warden v. Hayden, supra note 1; United States v. Santana, supra note 3; Sibron v. New York, 392 U.S. 40 (1968); Preston v. United States, 376 U.S. 364 (1964); United States v. Debose, 410 F.2d 1273 (6th Cir. 1969).

7. Warden v. Hayden, supra note 1; United States v. Santana, supra note 3; Wong Sun v. United States, 371 U.S. 471 (1963). Accord, United States v. Soto, 16 USCMA 583, 37 CMR 203 (1967).

that the search was justified by exigent circumstances[8] and that it was reasonably limited in scope.[9]

Exigent Circumstances

Although the Supreme Court has declined to comprehensively define exigent circumstances in the "hot pursuit" context, several guidelines can be gleaned from its opinions.[10] In Johnson v. United States,[11] wherein the term "hot pursuit" was introduced, the Court recognized that some element of a chase usually will be involved. Thus, "no element of 'hot pursuit' arises pursuant to the arrest of a suspect who was not in flight, was completely surrounded by agents before she knew of their presence . . . and who made no attempt to escape."[12]

The leading opinion dealing with the exigencies inherent in hot pursuit cases is Warden v. Hayden.[13] In that case, an armed robber entered a cab

8. Warden v. Hayden, supra note 1; United States v. Felton, 1 M.J. 719 (AFCMR 1975).

9. Id.; Chimel v. California, 395 U.S. 752 (1969); United States v. Kinane, 1 M.J. 309 (CMA 1976).

10. That exigent circumstances are required before officers can make a warrantless and nonconsenual entry of a suspect's home was recently settled in Payton v. New York, 455 U.S. 573 (1980). Whether a similar rule will be applied in the military community is uncertain. The Army Court of Military Review has stated that a warrantless entry into premises in the absence of exigent circumstances is illegal. United States v. Jamison, 2 M.J. 906 (ACMR 1976). Although the Court of Military Appeals indicated its agreement with Jamison in United States v. Davis, 8 M.J. 79 (CMA 1979), the issue is now pending before the court in United States v. Mitchel, 7 M.J. 676 (ACMR 1979), pet. granted, 7 M.J. 380 (CMA 1979). [See 12 The Advocate 387 (1980) for a discussion of the case].

11. 333 U.S. 10 (1948).

12. Id. at 16 n.7.

13. Warden v. Hayden, supra note 1.

company's business premises. Attracted by shouts of "holdup", two of the company's drivers followed the suspect to a house. One of the drivers relayed the suspect's description and the address of the house to the company dispatcher. Within minutes, police arrived at the premises and entered it in search of the suspect. In upholding the warrantless entry and search of the house, the Court stated:

> The police were informed that an armed robbery had taken place and that the suspect had entered [the house] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed was essential, and only a thorough search of the house for persons and weapons could have insured . . . that the police had control of all the weapons which could be used against them or to effect an escape.[14]

In the context of the life-threatening situation confronting the officers in Hayden, the Court thus concluded that their warrantless entry into and seach of the house were reasonable under the Fourth Amendment.

The Court's clearest description of hot pursuit appears in United States v. Santana.[15] Police spotted the defendant in that case as she was standing in the doorway to her apartment. They had probable cause to arrest her for possession of heroin.[16] As the police approached her, she fled into the vestibule of her apartment, where she was arrested without

14. Id. at 298-99.

15. United States v. Santana, supra note 3.

16. The defendant possessed marked money that she had received from an undercover police officer's contact. When the officer learned that the sale had been completed, fellow agents arrested her.

a warrant.[17] In upholding the validity of the warrantless entry and arrest, the Court stated:

> In [Hayden] . . . we recognized the right of the police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons. This case [Santana], involving a true "hot pursuit", is clearly governed by [Hayden]; the need to act quickly here is even greater than in [Hayden] while the intrusion is much less. The District Court was correct in concluding that "hot pursuit" means some sort of chase but it need not be an extended hue and cry "in and about [the] public streets."[18]

Despite these guidelines, some uncertainty persists as to the type of "hot pursuit" which will trigger the exception. When the Court's opinions are considered in conjunction with other federal court decisions, however, some of the elements of the exception are clarified. First, the suspect must be physically pursued by police shortly after committing a crime or effecting an escape.[19] Second, the suspect must not have a reasonable expectation of privacy, and instead must be fleeing into the premises for protection.[20] Third, the suspect must be armed or aware that he is

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17. In United States v. Santana, supra note 3, the Supreme Court concluded that the defendant was in a public place while she was standing in her apartment's doorway. Relying upon United States v. Watson, supra note 2, the Court stated that "a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place." 427 U.S. at 43.

18. Id. at 42-43.

19. United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978); United States v. Brightwell, 563 F.2d 569 (3rd Cir. 1976), cert. denied, 434 U.S. 998 (1977), and 435 U.S. 926 (1978); United States v. Scott, 520 F.2d 697 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). In United States v. Lindsay, 506 F.2d 166, 173 (D.C. Cir. 1974), the court stated that "[s]peed and continuous knowledge of the alleged perpetrator's whereabouts are the elements which underpin this exception to the warrant requirement."

20. See United States v. Santana, supra note 3, at 42.

being pursued; in this situation, there is, of course, a likelihood that evidence will be destroyed.[21] In an attempt to clarify this area, the District of Columbia Court of Appeals in Dorman v. United States[22] enumerated several factors which it believed to be relevant to a finding of exigent circumstances arising from hot pursuit: a "grave offense", particularly one of violence, is involved; the suspect is reasonably believed to be armed; there exists a clear showing of probable cause; the pursuing agents have "strong reason" to believe that the suspect is in the premises being entered; there is a "likelihood" that the suspect will escape if he is not swiftly apprehended; the warrantless entry is made peaceably, although forceful entry may occasionally be justified, and the premises are entered at nighttime.[23] While Dorman provides a valuable analytic tool,[24] the factors enumerated therein should not be regarded as a "check-list", and should instead be weighed and balanced in light of Supreme Court guidelines in order to determine whether there is a compelling necessity for immediate police action.[25]

Permissible Scope

Even if the exigencies attending hot pursuit justify a warrantless entry, the subsequent search may be invalid if it is too far-reaching. The police may conduct a reasonable search for a suspect, provided they reasonably believe that he has entered a particular area.[26] The seizure of evidence discovered pursuant to such a search may be supported by the "plain view" doctrine, which provides that police may seize evidence in plain view as long as they are lawfully situated at the time of the

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21. Id. at 43.

22. Dorman v. United States, supra note 4.

23. Id. at 392-393. Although the lateness of the hour may indicate the unreasonableness of the entry, it may also highlight the impracticality of obtaining a warrant.

24. For cases adopting the Dorman approach, see Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); Vance v. State of North Carolina, 432 F.2d 984 (4th Cir. 1970).

25. United States v. Adams, 621 F.2d 41 (1st Cir. 1980).

26. Warden v. Hayden, supra note 1.

viewing.[27] The scope of any search effected subsequent to the suspect's arrest is defined by the "search incident to arrest" doctrine expounded in Chimel v. California.[28] In that case, the Supreme Court held that such searches are limited to the suspect's person and the area within his immediate control, including, of course, the area from which he might seize a weapon or destructible evidence.[29] The permissible scope of a "hot pursuit" search may be somewhat broader.[30] If the police reasonably believe that the suspect's accomplices are hiding on the premises, for example, they may attempt to locate them.[31] Ultimately, however, the permissible scope of searches conducted pursuant to this exception to the warrant requirement can be established only after an ad hoc analysis of the exigent circumstances attending the hot pursuit.

Conclusion

The "hot pursuit" exception enables military authorities to conduct warrantless searches of dwellings, the area in which privacy expectations are greatest. The validity of these searches often depends on the government agents' ability to make "on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors."[32] Defense counsel should therefore be prepared to attack the validity of "hot pursuit" searches by arguing, where appropriate, that the circumstances fail to demonstrate any compelling necessity for immediate police action. If exigencies justified the initial entry onto the premises, defense counsel should determine whether any subsequent search was unreasonably extensive.

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27. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). The seizure of evidence from areas where a suspect could not hide, such as drawers or jewelry boxes, however, would not be justified.

28. Chimel v. California, supra note 9. See Vale v. Louisiana, 399 U.S. 30 (1970); Von Cleef v. New Jersey, 395 U.S. 814 (1969); United States v. Kinane, supra note 9; United States v. Brashears, 21 USCMA 552, 45 CMR 326 (1972); United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963).

29. Chimel v. California, supra note 9.

30. See, e.g., United States v. Peterson, 522 F.2d 661 (D.C. Cir. 1975); United States v. Miller, 449 F.2d 974 (D.C. Cir. 1971).

31. Id. United States v. Holland, 511 F.2d 38 (6th Cir. 1975), cert. denied, 421 U.S. 1001 (1975).

32. W. LaFave, Search and Seizure §6.1(c), 390 (1978).

ETHICS ROUND TABLE

The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law. . . . The defense lawyer, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. The defense lawyer has no duty to execute any directive of the accused which does not comport with law or such standards. The defense lawyer is the professional representative of the accused, not the accused's alter ego.[1]

Criminal litigation exposes the defense counsel to a multitude of ethical dilemmas. As an integral part of a system that must balance military interests against the constitutional rights of the accused, he must defend his clients with zeal while remaining within the bounds of professional propriety.[2] These bounds are defined by standards[3] which, although flexible, provide definite benchmarks by which his conduct may be judged. The great difficulty inherent in any ethical question is that it cannot be resolved simply by an intuitive sense of right and wrong. A course of action which the attorney feels is "proper" and which in some abstract sense fulfills what he perceives to be the "ends of justice" may nevertheless be contrary to the dictates of the ABA Code and the ABA Standards.

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1. ABA Standards for Criminal Justice [hereinafter ABA Standards], 4-1.1(b)(a) (2d ed. 1980).

2. See Canon 7, American Bar Association, Code of Professional Responsibility (1976) [hereinafter ABA Code].

3. Army Regulations provide that the ABA Code and the ABA Standards Relating to the Defense and Prosecution Functions are applicable to lawyers practicing before courts-martial. See Army Reg. 27-10, Legal Services - Military Justice, para. 2-31 (C20, 15 August 1980). Although the ABA Standards Relating to the Prosecution and Defense Functions have been replaced by the ABA Standards, supra note 1, there is no reason to believe these new standards are not applicable to military counsel.

In an effort to assist our readers in resolving these dilemmas, The Advocate will periodically present brief narratives posing various ethical issues. Each scenario will be followed by several specific questions and a proposed solution. We encourage defense counsel to submit brief summaries of ethical problems they have encountered, and welcome any comments on the solutions we suggest.

Facts

During your initial meetings with Private Labedeau, he repeatedly asserts that he was innocent of a rape charge pending against him. Unfortunately, although the alleged victim cannot positively identify him, other evidence points to Private Labedeau's guilt. He is unable to account for his whereabouts on the night of the incident, and you inform him that the probability of conviction is greatly enhanced by his inability to remember where he was when the offense allegedly occurred. After several weeks in pretrial confinement, Private Labedeau tells you that during the night of the incident he and a friend had been drinking and looking for female companionship, which they eventually found. They were with these girls for several hours before and after the time of the alleged crime. He does not know the girls, but his friend will confirm his story.

Private Labedeau then explains why he was reluctant to bring this to your attention earlier. Although he is divorced from his wife, they are very close to reconciling, and he was concerned that knowledge of his indiscretion would ruin any chances for matrimonial bliss. You are skeptical, and inform him of the penalty for perjury and that he may be hurting his chances of acquittal if he is caught lying. In addition, you tell him that his friend will make a poor witness and will probably hurt his case. Private Labedeau initially insists that his story is true, but then admits its falsity, saying, "Can you think of any other way for me to get off? I swear I didn't do it." He insists on testifying and demands that you put his friend on the stand. Although your pretrial investigation leads you to believe that Private Labedeau is innocent, it also confirms that he is lying about his activities on the night in question.

a. What do you do about Private Labedeau and his friend?

b. What if there was a possibility that he was telling the truth?

Discussion

The perjurious accused presents one of the greatest of all ethical dilemmas for defense counsel. While withdrawal from the case may be the recommended[4] course of action under certain circumstances, it is hardly a satisfactory solution. Detailed defense counsel often encounter difficulties when they attempt to withdraw.[5] Moreover, this approach has been criticized as "glossing over" the issue;[6] it merely shifts the problem to another attorney — or teaches the accused to be less candid with his new lawyer.[7] Encouraging a client to be less than candid raises ethical problems in itself: the ABA Standards categorize as

4. See ABA Standard 4-7.7(b), supra note 1; Cooke, Ethics of Trial Advocates, The Army Lawyer, December 1977 at 20 n. 183 [hereinafter Cooke].

5. See Cooke, supra note 4, at 21 n. 183. In United States v. Radford, 9 M.J. 769, 772 (AFCMR 1980), pet. denied, 10 M.J. 29 (CMA 1980), the Air Force Court of Military Review noted that such withdrawal might be particularly difficult where the issue arose suddenly at or before trial or in a trial by judge alone. That Court further indicated that when withdrawal is requested the judge should inquire of the accused if he desires to proceed with his appointed counsel. From such an inquiry the judge would determine whether the antagonism between counsel and accused would result in inadequate representation.

6. See id., at 21 n. 183; Freedman, Perjury: The Lawyer's Trilemma, 1 Litigation 26, 29 (1976) [hereinafter Freedman].

7. See Freedman, supra note 6, at 29. An opinion by The Judge Advocate General, Professional Ethics Committee, The Army Lawyer, July 1977, seems to imply that an attorney may have an obligation to notify the court of intended perjury when he withdraws from the case. However, that case involved a client who announced his intention to perjure himself as a witness in a different proceeding. It is probable that had the client intended to perjure himself as a defendant, there would have been no obligation on the part of the attorney to reveal his client's intention. This is true especially in light of the observation in ABA Standard 4-7.7, supra note 2, that the reasons for withdrawal must be withheld from the court. It should be noted that even where the attorney has revealed to the court his client's intention, the defendant has, at least in one case, been deemed not to have been denied effective assistance of counsel. See Maddox v. State, 28 Crim. L. Rptr. (BNA) 2131 (Tex. Ct. Crim. App. 1980).

unprofessional conduct[8] any attempt to urge a client to withhold information.[9] In order to provide an adequate defense, the attorney must have the client's complete confidence. Moreover, he must be thoroughly familiar with all the facts of the case,[10] regardless of whether such knowledge poses a problem.

Nor can the problem be avoided by refusing to let the accused take the stand. He must ultimately make that decision himself,[11] although the attorney may, of course, persuade and advise.[12] Indeed, the ABA Standing Committee on Association Standards for Criminal Justice [hereinafter Standing Committee] proposed that "counsel must strongly discourage the defendant"[13] when he intends to take the stand to perjure himself. The problem involves a conflict between various guidelines and standards. On one hand, the attorney is urged to zealously defend his client;[14] to protect his confidences;[15] and to encourage candor.[16] However, he must also remain within the bounds of the law;[17] uphold the honor of

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8. Unprofessional conduct is defined as conduct which should be subject to disciplinary sanctions pursuant to codes of professional responsibility. See ABA Standard 4-1.1(f), supra note 1.

9. See ABA Standard 4-3.2, supra note 1.

10. See ABA Standard 4-3.1, 4-3.2, supra note 1.

11. See ABA Standard 4.5-2, supra note 1.

12. Id.

13. See ABA Standard 4-7.7(a), supra note 1. The Court in Radford, supra note 5, at 772, suggested that the defense counsel's threat to withdraw might dissuade his client from testifying falsely.

14. See Canon 7, ABA Code, supra note 2.

15. See Canon 4, ABA Code, supra note 2.

16. See ABA Standard 4-3.1(a), supra note 1.

17. Id.

the profession;[18] and refrain from knowingly using perjured testimony,[19] or engaging in fraud or misrepresentation.[20]

Although there is a great deal of controversy surrounding the propriety of allowing a client to commit perjury,[21] the accepted position was articulated by Chief Justice Warren Burger:[22]

> Canons 15[23] and 37[24] of the American Bar Association are explicit and clear and it is sheer nonsense for anyone to claim that they leave doubt about the tendering of perjured testimony . . . . The proposition that perjury may ever be knowingly used is as pernicious as the idea that counterfeit documents can be fabricated and knowingly offered to the court as genuine. This is so utterly absurd that one wonders why the subject need even be discussed among persons trained in the law.

18. See Canons 1 and 9, ABA Code, supra note 2.

19. See Disciplinary Rule 7-102(A)(4), ABA Code, supra note 2.

20. See Disciplinary Rule 1-102(A)(4), ABA Code, supra note 2.

21. See Hansen, Military Legal Ethics: Perjury and the Prosecutor, The Army Lawyer, November 1975 at 4 [hereinafter Hansen]; Freedman, supra note 6; Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich.L.Rev. 1469 (1966); Bress, Professional Ethics in Criminal Trial: A View of Defense Counsel's Responsibility, 64 Mich.L.Rev. 1493 (1966); Noonan, The Purpose of Advocacy and the Limits of Confidentiality, 64 Mich.L.Rev. 1485 (1966).

22. See Burger, Standards of Conduct for Presentation and Defense Personnel: A Judge's Viewpoint, 5 Am.Crim.L.Q. 11, 15 (1966).

23. Canon 15, ABA Canons of Professional Ethics [replaced by ABA Code, supra note 2, in 1970] states that an attorney may not violate law or commit fraud in the interest of his client.

24. Under Canon 37, ABA Canons of Professional Ethics, an attorney may violate his client's confidences if the client announces an intention to commit a crime.

The Chief Justice's comments almost seem to require that the attorney reveal to the court his client's desire to commit perjury. However, it is the active use of perjured testimony which is condemned.[25] This is the view reflected in the ABA Standing Committee's proposed solution:[26]

(1) If the intention to commit perjury comes to light before trial and if the court grants permission, counsel should withdraw without informing the court of the reason.

(2) If withdrawal is impossible and the client insists on committing perjury, the lawyer may not assist him or use the perjured testimony.

(3) The lawyer should make a record, before the accused testifies, that the latter is acting contrary to the advice of counsel. This fact should not be revealed to the court.

(4) The lawyer may then identify the witness as the accused and ask questions of the accused, the answers to which the attorney believes will not constitute perjury.

(5) The lawyer should avoid direct examination as to those matters to which he believes the accused will respond with perjured testimony. The attorney should merely ask the accused if he wants to make an additional statement.

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25. See Freedman, supra note 9, at 30.

26. ABA Standard 4-7.7, supra note 1. The standard was approved by the ABA Standing Committee on Association Standards for Criminal Justice but was withdrawn prior to submission to the ABA House of Delegates. The question will be ultimately resolved by the ABA Special Commission on Evaluation of Professional Standards. ABA Standards, supra note 1, at 4-95. See also United States v. Radford, supra note 5, at 772 n. 3. In Johnson v. United States, 25 Crim L. Rptr. (BNA) 2397 (D.C. Ct. App. 1977), the court held that this procedure merely constitutes an ethical standard and cannot be imposed upon counsel by the trial judge. In that case a defendant had decided not to testify when the trial judge admonished counsel not to question his client with regard to the false material or use that material in argument.

(6) The lawyer may not argue that these known false statements are worthy of belief and may not rely on false testimony in his closing argument.[27]

There are obvious difficulties with this approach. An experienced prosecutor would object to the accused's narrative ramblings.[28] There is also the danger that a court, or especially a trial judge, will draw detrimental inferences from the attorney's complete disregard of his client's testimony.[29] One commentator has accordingly suggested that the accused must be apprised, at the outset, of the possible consequences of this course of action.[30] In spite of its disadvantages, however, this is still the accepted method for dealing with a client who insists on testifying falsely. The problem of a perjurious witness is less difficult. The defense attorney alone determines what witnesses to call.[31] Thus, absent the requirement that the witness take the stand, the prohibitions against using known perjury control: the defense should refuse to allow Private Labedeau's friend to testify.

b. The situation becomes more difficult if the attorney is not convinced that his client will commit perjury. Given the devastating consequences of treating a truthful defendant's testimony as if it were perjured, he must normally proceed as if the client's version were true unless he is certain of his client's intent to commit perjury.[32] The Disciplinary Rules and ABA Standards speak only in terms of what the attorney knows

27. In United States v. Radford, supra note 5, at 772, the Air Force Court of Military Review required that a defense counsel clearly disassociate himself from testimony of an accused he knew to be false.

28. See Freedman, supra note 9, at 30-31.

29. Id.

30. Id. at 31. In Thornton v. United States, 357 A.2d 429 (D.C.C.A. 1976), however, the District of Columbia Court of Appeals held that a defense counsel's use of a procedure essentially identical to ABA Standard 4-7.7 did not deny a criminal defendant effective assistance of counsel.

31. See ABA Standard 4-5.2(b), supra note 1.

32. See Cooke, supra note 4, at 13.

or should reasonably know to be false.[33] If there is the slightest possibility that the accused is telling the truth, our system of justice requires that the trier of fact make the final determination.[34]

33. Disciplinary Rule 7-102(A)(4) ABA Code, supra note 2; ABA Standard 4-7.7, supra note 1.

34. See Hansen, supra note 21, at 5.

PROPOSED INSTRUCTION

INSANITY

Defining "Mental Disease or Defect"

The medical, legal, and moral considerations necessarily embraced by the insanity defense render it a complex doctrine, and highlight the importance of insuring that the fact-finder understands its nuances. In United States v. Frederick, 3 M.J. 230 (CMA 1977), the Court of Military Appeals adopted the following standard for determining mental responsibility:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.*

Although the Court refrained from elaborating on the phrase "mental disease or defect," a clear and understandable definition of those terms is particularly important because it is that definition, rather than the nomenclature used by the expert medical witnesses, which will determine whether the fact-finder concludes that the evidence establishes the kind of mental impairment contemplated by the standard. The Army Court of Military Review has criticized this lack of guidance and has suggested definitions of the key terms. See United States v. Chapman, 5 M.J. 901 (ACMR 1977) and United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980), pet. granted, 9 M.J. 398 (CMA 1980). The recently amended paragraph 120b of the Manual for Courts-Martial, United States, 1969 (Revised edition), reflects the Frederick standard but lacks any additional

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* The second clause is exclusionary, and its intended effect is to prevent psychopaths who habitually engage in antisocial conduct from avoiding conviction under the standard.

explication of the type of mental disease or defect which will exonerate criminal behavior.

To insure that court members understand the insanity defense, counsel should propose the following definition:

> A mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

This definition was formulated in McDonald v. United States, 114 U.S. App D.C. 120, 312 F.2d 847, 851 (1962), and has been cited with approval in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) and Bethea v. United States, 365 A.2d 64 (D.C. App. 1975). It was also suggested by Senior Judge Jones in his concurring opinion in Chapman, supra, and was included in a more expansive definition suggested in Cortes-Crespo, supra.

The definition's advantages stem from its brevity, its practicality, and its avoidance of any confusing or prejudicial terminology. This is especially important in view of the persistent yet erroneous view in military law that so-called personality or character and behavior disorders do not, as a matter of law, constitute mental diseases or defects. Much of the expert testimony in insanity cases will relate to just these kinds of conditions because they comprise one of the four major groups of mental disorders outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1978) (Draft). Any definition of mental disease or defect which includes language suggesting that personality or character and behavior disorders are not per se mental diseases or defects would therefore be potentially prejudicial. Indeed, since much of the psychiatric testimony regarding any mental disorder will include symptomatic descriptions relating to personality, character, and behaviorial manifestations, any definitional language which contrasts a mental disease or defect with character, behavior, or personality defects should be challenged as prejudicially misleading.

The defense counsel should also oppose as prejudicial a separate "personality disorder" or "character and behavior disorder" instruction (as contained in paragraph 7-6, Military Judges' Guide, supra) in any case where the insanity defense is based on such a diagnosis. The standard partial mental responsibility instruction adequately deals with that

condition's effect on an accused's ability to premeditate, entertain a specific intent, or possess a certain knowledge. The suggested definition avoids the foregoing semantical problems and yet provides the court-members with a workable guide to interpret conflicting expert evidence. It encourages psychiatric testimony while discouraging a semantic "battle of the experts." Finally, it is sufficiently responsive to major changes in the field of psychiatry and its attendant diagnostic practices. [For additional information regarding mental responsibility instructions in general, see Devitt and Blackman, Federal Jury Practice and Instructions (3rd ed. 1977).]

SIDE BAR

A Compilation of Suggested Defense Strategies

Investigating a Case

Accused who are dissatisfied with their legal representation before courts-martial frequently complain that their counsel failed to fully investigate the case. The overwhelming majority of these complaints are unfounded and appellate counsel refuse to raise the issue on appeal. However, the Supreme Court's decision in Anders v. California, 386 U.S. 738 (1967), suggests that the appellant's own desires in this regard are controlling. While military discovery rules are comparatively liberal, they are intended to provide access to information which would otherwise be unavailable, and they constitute an inadequate substitute for a defense counsel's own investigation of a case. Indeed, in United States v. McMillan, CM 439434 (ACMR 13 Apr. 1981) (unpub.),[1] the Court held that the military judge did not err in denying a defense counsel's demand for the production of documentary evidence because the latter made no personal effort to secure the documents and there was no showing that they were otherwise unavailable. Unnecessary reliance upon government counsel to perform investigative tasks can adversely affect a client by prematurely revealing the defense's theory of the case. In addition, the investigation may provide the government with damaging information it had overlooked. Finally, even if the prosecutor responds to a specific request, he will rarely identify collateral information from the same source that might benefit the defense.

The appellate courts have held that a failure to present favorable evidence may constitute ineffective representation.[2] The Army Court of Military Review no longer requires the government to perform defense-related tasks which the defense counsel himself is able to complete. Accordingly, defense counsel should make every reasonable effort to secure evidence before submitting a discovery request. If those efforts

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1. In McMillan, the defense counsel demanded that the prosecutor produce a packet of information concerning a key government witness' administrative discharge.

2. See, e.g., United States v. Broy, 14 USCMA 419, 34 CMR 199 (1964); United States v. Davidson, 27 CMR 962 (AFBR 1958); United States v. Shaw, 30 CMR 531 (ABR 1961); United States v. Emmerson, 44 CMR 602 (ACMR 1971).

are not fruitful, the counsel should set forth, on the record, the steps he took in seeking the information. This procedure protects the counsel and provides a factual basis for appellate review if the military judge denies the request.

Admissibility of Aggravation Evidence in Contested Cases

Chief Judge Everett recently questioned the extent to which paragraph 75 of the Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter Manual], limits the type of aggravation evidence the government may introduce in not-guilty plea cases. During the sentencing hearing in United States v. Castillo, 11 M.J. 163 (CMA 1981), an assault victim's father testified about the effect the offense had on his young daughter. This prosecution tactic was not challenged at trial or on appeal, but Chief Judge Everett dissented from the Court's denial of the accused's petition for further review and stated that he would have specified the issue for consideration. Paragraph 75b of the Manual describes the types of evidence that the government may offer during sentencing hearings. In guilty plea cases, the government may introduce evidence of aggravating circumstances not offered prior to the military judge's acceptance of the plea.[3] In not-guilty plea cases, the government may introduce admissible evidence of previous convictions, information from an accused's field personnel records, and data concerning his service as well as the nature of any pretrial restraint.[4] In contested cases, the government may not introduce additional evidence concerning an offense merely to increase punishment. Relevant post-conviction evidence is admissible in guilty plea cases because there is normally a paucity of evidence concerning the offense and its effects, and that information is relevant to an assessment of the sentence. Counsel should carefully monitor the evidence offered by government counsel in sentence hearings, and object if it fails to comport with paragraph 75 of the Manual.

3. See para. 75b(3), Manual. Evidence offered prior to the plea generally consists of a stipulation of fact.

4. But compare para. 75b with para. 75d, Manual, which indicates that a different rule applies to courts constituted without a military judge. Adverse information from an accused's field personnel files is not admissible in aggravation in a contested case tried without a military judge, nor is it admissible in a summary court-marital. The government may, however, introduce evidence in rebuttal to defense evidence, see para. 75e, Manual.

Defense Witnesses: Testimonial "Surprises"

Occasionally the testimony of defense witnesses conflicts with their statements during pretrial interviews. This situation usually arises during the sentence hearing and typically concerns the accused's rehabilitative potential and his future value to the military service. Needless to say, such testimony can be devastating. Counsel should take preventive measures to reduce the possibility of such testimonial suprises. Reinterview all extenuation and mitigation witnesses on the day of the trial in order to detect any last-minute vacilations. Also, if a commander indicates he will testify as to the inappropriateness of discharging the accused, check his forwarding endorsement on the charge sheet. If he recommended a discharge, ask him to explain his revised opinion; if his explanation is unconvincing, his testimony may be unfavorable. If the commander of an accused in an uncontested case states that he would urge the latter's retention, counsel should ascertain whether he would support, in writing, a pretrial agreement providing for a suspended discharge. Finally, check with other attorneys as to their opinion of a witness' reliability. No combination of preventive measures, of course, can guarantee that counsel will never be surprised by a witness' testimony. He should therefore utilize Military Rule of Evidence 607 to ameliorate the impact of unexpected adverse testimony. That provision permits a proponent to impeach his own witness. To facilitate impeachment, counsel should, whenever possible, have a witness with him whenever he conducts pretrial interviews. When that is impossible, counsel can take notes and ask the prospective witness to attest to their accuracy by initialing them.

Challenging Automobile Searches

The extent of the government's authority to search the contents of an automobile without a warrant following seizure of the vehicle is again before the Supreme Court in New York v. Belton, 29 Crim.L.Rptr. (BNA) 4063, (U.S. Sup. Ct. 20 May 1981). In that recently argued case, the Court will decide whether a warrant was necessary to examine the contents of a jacket found in an automobile in police custody.[5] In United States

5. A policeman stopped the vehicle for speeding. When he approached it, he smelled marijuana and noticed a small envelope of the type used to store the contraband on the automobile's floor board. After "patting down" each occupant, he examined the envelope and discovered marijuana. He then arrested the men, returned to the vehicle, and found five jackets, one of which contained cocaine. Although each of the arrestees denied ownership of that jacket, it was subsequently linked to Belton.

v. Chadwick, 433 U.S. 1 (1976), the Court held that once a locked footlocker was in police custody, the officers could examine the contents of the footlocker only after securing a warrant. The Court reaffirmed Chadwick in Arkansas v. Sanders, 422 U.S. 753 (1979).[6] In both cases the Court focused on the absence of exigencies at the time of the search as well as the privacy expectation in items in a closed container removed from public view. In both Chadwick and Sanders the Court declined to extend the "automobile" exception to the Fourth Amendment's warrant requirement, see Carroll v. United States, 267 U.S. 132 (1925), because no exigencies existed once the item was under exclusive police control.

Placing items out of public view in one's jacket arguably engenders the same expectation of privacy as placing them in a footlocker. Accordingly, counsel should move to suppress evidence obtained in a manner similar to that in Belton. In that case, the government contended that the police officer's actions were necessary to insure personal safety because the suspects could have attempted to reenter the vehicle and secure a weapon, and because the police officer was outnumbered by the arrestees. The Court's questions concerning this contention are instructive as to the manner in which defense counsel can counter arguments that the search was properly conducted incident to a lawful apprehension, see Chimel v. California, 395 U.S. 752 (1969). First, were the arrestees in a position to enter the vehicle? Second, were they physically situated in a manner which would enable them to overpower the arresting officer? Third, did the police officer have reason to apprehend immediate danger? Fourth, were the arrestees armed? Fifth, was assistance available to the police officer? Sixth, does the charge upon which the suspects were apprehended support a custodial arrest? Finally, was there probable cause to search the vehicle's contents?

Multiplicious Specifications

Records of trial received in the Defense Appellate Division (DAD) occasionally reflect convictions on multiplicious offenses. Until recently, United States v. Walters, 43 CMR 93 (ACMR 1973), was the principle authority for dismissing specifications which are multiplicious

6. In Sanders, the police conducted a warrantless examination of a suitcase placed in a taxi by the accused. The suitcase was seized when the cab was stopped pursuant to the accused's apprehension. The Court held that the warrantless search was invalid because exigent circumstances must be assessed immediately before the luggage is opened; in this case, the police exercised exclusive control over it. See 13 The Advocate 108 (1981) for a discussion of the case.

for findings purposes. Then, in United States v. Neverson, 11 M.J. 151 (CMA 1981), and United States v. Thompson, 10 M.J. 405 (CMA 1981), the Court of Military Appeals held that a specification alleging the nature of the force used to perpetrate a rape was multiplicious for findings purposes with the rape charge. To insure that an accused's record does not appear to reflect the conviction of more offenses than he actually committed, defense counsel should move to dismiss multiplicious specifications.

Expeditious Post-Trial Processing

Extensive intervals between the announcement of findings and the convening authority's action are denying many convicted servicemembers their right to expeditious appellate review. This problem typically arises where the accused receives a relatively short sentence of four to six months and action is not taken until the 90th day after trial, or where the accused is sentenced to several years of confinement but action is not taken until four or more months have elapsed since trial.[7] In some cases, accused whose sentences include relatively brief periods of confinement serve their sentence before the record is received in DAD. A confined accused is not considered for parole, clemency, or an upgrade in custody until the convening authority completes his action.[8] In addition, forfeitures are extracted in accordance with the adjudged sentence until the action is completed, and the accused will not receive the benefit of any pretrial agreement regarding that aspect of the sentence.

In United States v. Dunlap, 23 USCMA 135, 138, 48 CMR 751, 754 (1974), the Court of Military Appeals noted that "Congress has commanded timeliness of proceedings not only for the pretrial stages of the court-martial processes and the trial, but also in the appellate process," and established a mandatory 90-day limit on post-trial processing; absent

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7. The Court of Military Appeals recently entertained a writ of habeas corpus in United States v. Curry, 11 M.J. 158 (CMA 1981), a case where action had not been taken six months after trial. In Kreer v. Commander, United States Disciplinary Barracks and the United States, CM 440224, Mis. Docket No. 81-39/AR, an accused was confined at the USDB and served his entire sentence notwithstanding the convening authority's action suspending the punitive discharge and ordering him to the retraining brigade in lieu of confinement at the USDB.

8. Army Reg. No. 190-47, The U.S. Army Correctional System (1 Oct. 1978).

justifiable delays, failure to take action within that timeframe resulted in reversal of the conviction and dismissal of the charges. In United States v. Banks, supra, the Court eliminated the 90-day rule but reaffirmed an accused's right to speedy appellate review, stating that applications for relief would be tested for prejudice.[9] In United States States v. Johnson, 10 M.J. 213 (CMA 1981), however, Chief Judge Everett expressed his willingness to reconsider reviving Dunlap if frequent problems with post-trial delay continue to occur:

> The very difficulty in demonstrating that prejudice to an accused has resulted from delays in completing the action provides a temptation for a convening authority to lapse into dilatory habits in completing his action. Thus, the demise of the Dunlap presumption may produce a return to the intolerable delays that persuaded the Court to adopt the presumption in the first place. Indeed, to help prevent such an occurrence, the Court should be vigilant in finding prejudice wherever lengthy post-trial delay in review by a convening authority is involved. Moreover, if the problem of post-trial delay occurs frequently in the future, the Court will have to consider resurrecting the Dunlap presumption of prejudice.[10]

In United States v. Jones, CM 439980 (ACMR 20 March 1981), a case involving lengthy post-trial delays, the court repeated Chief Judge Everett's warning, although it found that the delays in that case were harmless.

Clearly, the appellate courts' concern over expeditious appellate review may prompt a reinstitution of the Dunlap 90-day rule. In appropriate cases, defense counsel should submit a request for expeditious processing to the convening authority, setting forth any prejudice incurred by delays, especially if it becomes apparent that an accused

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9. In Banks, Judge Cook stated that he disagreed with abandoning Dunlap. See United States v. Banks, 7 M.J. 92, 94 (CMA 1979) (Cook, J., concurring in result).

10. United States v. Johnson, supra at 218 (Everett, C.J., concurring in result).

will serve all of his confinement before the convening authority takes action. If the request is denied, counsel should address the problem in his response to the post-trial review, and enumerate the events from trial to action and the nature of prejudice suffered by the accused as a result of the delay. Counsel should also consider requesting a deferment of confinement where substantial errors occurred during trial and the preparation of the record will be time consuming.[11]

Selection of Trial Fora

Commentators have noted that in determining whether to waive a jury trial, the defense counsel should consider "[w]hat . . . judge will try the case if a jury is waived, and how appealing to him is [the] case or the defendant's defense or the defendant as a person," and whether the particular judge is "'hard' or 'easy', for instance on narcotics cases or sex cases."[12] At the end of each fiscal year, the Chief Judge of the Army Trial Judiciary prepares a consolidated report of trial activities, expenses, and related administrative data. The following statistics for Fiscal Year 1980 reflect the relative differences between trials by judge alone and with members as to the imposition of punitive discharges:

11. See United States v. Brownd, 6 M.J. 338 (CMA 1979).

12. Trial Manual 3 for Defense of Criminal Cases, §317, Election or Waiver of Jury Trial (1975).

GENERAL COURTS-MARTIAL

	Judge Alone				With Members				
AREA	TOTAL	GP	DISCH.	%	TOTAL	GP	DISCH.	%	%Dif
USAREUR	521	331	449	86	257	79	150	58	28%
KOREA	28	9	27	96	12	2	7	58	38%
CONUS	265	173	221	83	308	147	181	59	24%
ARMY WIDE	814	513	697	86	577	228	338	59	27%
BCD SPECIAL COURTS-MARTIAL									
USAREAR	579	315	346	60	202	64	66	33	27%
KOREA	112	58	69	62	38	12	18	47	15%
CONUS	755	447	361	48	646	237	200	31	17%
ARMY-WIDE	1446	820	776	54	886	313	284	32	22%

While these differences may be caused by a number of factors not reflected in the statistical abstract, they nevertheless highlight the importance of an accused's selection of the trial forum. This choice must be made by the accused, but his selection will be knowing and intelligent only if it is based on the informed advice of counsel.

USCMA WATCH

Synopses of Selected Cases In Which The Court of Military Appeals Granted Petitions For Review or Entertained Oral Argument

Four years ago, in an opinion marked with a cautious desire to place military law in harmony with its civilian counterpart, the Court held in United States v. Frederick, 3 M.J. 230 (CMA 1977), that the criminal liability of an allegedly insane military accused must be determined in accordance with the American Law Institute's (ALI) standard for mental responsibility. The Court recently expressed its willingness to reexamine the role of the insanity defense in military law during oral argument in United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980), pet. granted, 9 M.J. 398, argued 23 June 1981. The specific issue raised by that case involves the definition of a "mental disease or defect" capable of triggering the standard, although the Court was also invited to examine the broader question of whether military courts may systematically exclude personality disorders from the category of mental infirmities contemplated by the ALI test. Another issue of far-reaching importance is pending before the Court in several cases; in, e.g., United States v. Bond, ACMR 439172, pet. granted, 11 M.J. ___ (CMA 1981); United States v. Miles, ACMR 439313, pet. granted, 11 M.J. ___ (CMA 1981); and United States v. Boone, 10 M.J. 715 (ACMR 1981), pet. granted, 11 M.J. ___ (CMA 1981), the Court will examine the retroactivity of the recent amendment to Article 2, Uniform Code of Military Justice, 10 U.S.C. §802 (1980 Suppp.), Act of 9 Nov. 1979, Pub. L. 96-107, 93 Stat. 810. Only three service court of review decisions have expounded on the principles involved in this issue. The Court in United States v. Quintal, 10 M.J. 532 (ACMR 1980), upheld the application of the amendment to cases tried before its effective date on the general principle that appellate courts should apply the law in effect at the time it renders its decision. In United States v. McDonagh, 10 M.J. 698 (ACMR 1981), another panel of the Army Court of Military Review split: two judges held that the amendment was applicable, while Senior Judge Fulton concluded that its application to cases previously tried violated the ex post facto clause of the United States Constitution. Most recently in United States v. Marsh, 11 M.J. ___, (NCMR 26 May 1981), the Navy Court of Military Review, sitting en banc, adopted Senior Judge Fulton's position by a 6-3 vote. That case may well be certified to the Court.

APPREHENSION: Probable Cause

Naval law enforcement agents suspected the accused of starting two fires in his barracks over a 5-day period; on both occasions he had performed fire-watch duty and had been one of the first persons on the scene. Following the second fire, he was apprehended at the hospital after receiving treatment for smoke inhalation. Several incriminating admissions made during a subsequent interrogation were admitted over his objection at trial. In United States v. Schneider, NCMR 80-1524, pet. granted, 11 M.J. ___ (CMA 1981), the Court will determine whether the admissions were the product of an illegal apprehension. The Court will also consider whether the statements were elicited by the agents' threats that the accused would be endangered by other servicemembers living in the barracks, or by the agent's promises of psychiatric help and a possible administrative discharge if he confessed.

SENTENCE: Improper Argument

During his sentencing argument, the trial counsel urged the court members to consider the fact that the accused lied under oath as a matter in aggravation. The trial defense counsel did not object, and the military judge did not present any curative instruction. The Court continues to grant petitions for further review to determine whether this type of argument constitutes prejudicial error. See United States v. Grace, ACMR 439493, pet. granted, 11 M.J. ___ (CMA 1981). It previously granted review of a similar issue in United States v. Warren, 10 M.J. 603 (AFCMR 1981), pet. granted, 10 M.J. 407 (CMA 1981). [See 13 The Advocate 126 (1981) for discussion.] Defense counsel should continue to object to prosecutorial arguments or judicial instructions which imply that a finding of guilty necessarily indicates that the accused committed perjury and that he therefore deserves a more severe sentence. Although the Supreme Court has ruled that a sentencing judge may consider the apparent falsity of an accused's testimony as a factor relevent to an appropriate sentence, the Court of Military Appeals has not considered whether the rule should be applied to military practice generally or to trials before court members in particular.

DEFENSE COUNSEL: Effective Assistance

Defense counsel often represent accused who will almost certainly receive a punitive discharge. In such cases, it may be advantageous to concede the appropriateness of a punitive discharge in an attempt to minimize other forms of punishment or the type of discharge itself. If

this strategy is used, the defense counsel should insure that the accused is aware of the tactic, understands it, and approves of it. Any decision to affirmatively request a punitive discharge in lieu of other punishment or to concede the appropriateness of a punitive discharge should be memorialized in a written statement prepared prior to trial, or established on the record. In United States v. Volmar, AFCMR 22717, pet. granted, 11 M.J. ___ (CMA 1981), the Court will consider whether a defense counsel's sentencing argument, in which he conceded the appropriateness of a bad-conduct discharge as an alternative to a dishonorable discharge, denied his client the right to effective assistance of counsel.

JURISDICTION: Amendment of Article 2, UCMJ

The Court continues to grant petitions for further review in cases involving the application of the recent amendment to Article 2, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §802 (1980 Supp.), Act of 9 Nov. 1979, Pub. L. 96-107, 93 Stat. 810. See e.g., United States v. Bond, ACMR 439172, pet. granted, 11 M.J. ___ (CMA 1981); United States v. Miles, ACMR 439313, pet. granted, 11 M.J. ___ (CMA 1981); United States v. Boone, 10 M.J. 715 (ACMR 1981), pet. granted, 11 M.J. ___ (CMA 1981). The difficulty in applying the amendment, which extends in personam court-martial jurisdiction, arises from the fact that the date of the accused's enlistment, the dates of the offense and trial, and the effective date of the statutory amendment are all relevant to the Court's determination of the provision's applicability. At least one panel of the Army Court of Military Review has held that the amendment should be applied retroactively to validate enlistments contracted prior to the effective date of the amendment. See, e.g., United States supra; United States v. McDonagh, 10 M.J. 698 (ACMR 1981); United States v. Marsh, NMCM 80 1281 ___ M.J. ___ (NCMR 26 May 1981).

GUILTY PLEA: Providence

The defense of duress was raised during the providence inquiry in two unrelated cases, United States v. Palus, ACMR 440010, pet. granted, 11 M.J. ___ (CMA 1981), and United States v. Mountain, ACMR 440043, pet. granted, 11 M.J. ___ (CMA 1981). In each case, threats were directed not against the accused, but against his immediate family. The providence inquiry revealed that the commission of the offenses stemmed directly from the accused's belief that his family was in danger. In Mountain, the accused went AWOL because CID Agents were threatening his family. In Palus, the accused presented bad checks because his creditors had threatened to harm his family if a debt was not paid. In neither case did the military judge inquire about the possibility of a

duress defense. The Court will consider whether duress may render a guilty plea improvident even when the subject of the duress is someone other than the accused.

GUILTY PLEA: Providence

In United States v. Smith, ACMR 14931, pet. granted, 11 M.J. ___ (CMA 1981), the accused pled guilty to robbery in violation of Article 122, UCMJ. During the providence inquiry, he explained that a former roommate who owed him twenty dollars had told him that he could collect ten dollars from a third party who owed the former roommate that sum. When the accused attempted to collect the money, the third party refused to pay him. The accused then threatened to use a knife to collect the ten dollars. The Army Court of Military Review affirmed his conviction, reasoning that because the accused had no right to collect the debt from the third party, his use of force to obtain the money constituted a robbery; the tribunal did not directly address the question of whether the appellant's mistaken belief that he had a right to forcibly collect the money could negate the specific intent element of robbery. The Court will determine whether the lower appellate tribunal correctly interpreted the defense of mistake concerning a claim of right.

REPORTED ARGUMENTS

EVIDENCE: Admissibility of Expert Testimony

Whate are the limits to the use of psychologists or psychiatrists in the courtroom? In United States v. Moore, CM 438897, pet. granted, 9 M.J. 251 (CMA 1980), argued 13 May 1981, the Court has an opportunity to address this question. In Moore, the appellant was convicted of rape, despite his assertion that the act of sexual intercourse was consensual. The victim's testimony revealed a questionable background, including previous rapes, premarital sex and pregnancy, venereal disease, suspicion of prostitution, sexual abuse from her father and stepfather, and provocative dress and behavior. In addition, she voluntarily entered the appellant's barracks room. The government presented testimony by three expert witnesses. A military psychiatrist and psychologist testified that they had examined the victim and that a person with her personality characteristics could unknowingly place herself in a sexually compromising situation. They also stated, in response to hypothetical questions, that consensual intercourse was not a probability. A civilian psychologist testified that the government's version of the incident fit one of the three recognized types of rape, and that victims who had been sexually abused as children would be less likely to resist.

The appellant contended that the trial judge abused his discretion by admitting the testimony, arguing that the absence of an adequate scientific foundation, as well as the risk of undue prejudice and confusion of the issues, rendered the testimony inadmissible. The defense also maintained that the subject matter of the testimony was not beyond the ken of the court-members and that the use of expert witnesses was therefore improper. Government counsel responded by asserting that the expert testimony was based on a proper scientific foundation, was relevant to the issue of consent, and was not unfairly prejudicial or confusing. Both Chief Judge Everett and appellate counsel agreed that the unusual facts appeared to present a case of first impression. The Court questioned the relevance of expert testimony on a rape victim's subjective state of mind, and expressed concern about the risk of undue prejudice and confusion. Regardless of the outcome, trial defense counsel should challenge expert testimony by attacking its foundation (both the expert's qualifications and the underlying scientific principle involved) and relevance. Counsel should also contend that the presentation of such evidence will be unnecessarily time consuming, and will unduly prejudice the accused and confuse the issues.

APPELLATE REVIEW: Preservation of Issues

One of the trial defense counsel's most important responsibilities is to preserve legal issues for appellate review. In United States v. Cofield, ACMR 438090, pet. granted, 9 M.J. 204 (CMA 1980), argued 12 May 1981, the Court will address the manner in which this obligation must be discharged in order to enable review of a trial judge's ruling that impeachment evidence will be admissible if the accused places his character in issue by testifying. Must the accused take the stand, or can the defense counsel adequately protect the record through a specific offer of proof as to his client's testimony? At the appellant's court-martial, the defense counsel tendered a general motion in limine in an effort to prevent the government from introducing a prior summary court-martial conviction which pre-dated (and did not comply with) United States v. Booker, 5 M.J. 238 (CMA 1977), if the accused testified. During litigation of the motion, the defense counsel averred only that the accused would be reluctant to take the stand if the conviction was deemed admissible. Citing United States v. Cannon, 5 M.J. 198 (CMA 1978) and United States v. Syro, 7 M.J. 431 (CMA 1979), appellate defense counsel contended that the military judge erred by ruling that the prior conviction could be admitted to impeach the appellant if he decided to testify on the merits. But see United States v. DeOliveira, 5 M.J. 623 (ACMR 1979). The Court encountered difficulty in ascertaining the nature of the appellant's testimony, had he taken the stand; since he did not testify, there was no indication of the basis upon which the government

may have introduced the prior conviction. For instance, government appellate counsel argued that the conviction would have been independently admissible if the accused had testified that he had an unblemished record.

If an accused is dissuaded from testifying by the government's intention to introduce impeachment evidence once his character is placed in issue, the defense counsel should submit a proffer of evidence as to the contents of the testimony, and aver that the accused will not testify if the judge rules that the impeachment evidence is admissible. See United States v. Cook, 608 F.2d 1175 (9th Cir. 1979). This procedure insures that a decision not to testify at trial will not waive any error which can be raised before the appellate courts. The law is ambiguous in this area, however, see United States v. Toney, 615 F.2d 277 (5th Cir. 1980); United States v. Fountain, 642 F.2d 1083 (7th Cir. 1981), and the military judge may require the accused to testify in order to preserve any error, and decline to rule on the motion in limine. Under those circumstances, the defense counsel should litigate the admissibility of the impeachment evidence in an Article 39(a) session prior to cross-examination of the accused. If the military judge determines that the evidence is relevant, the defense counsel should argue that it should nevertheless be excluded because of the risk of unfair prejudice. See Mil. R. Evid. 403.

SEARCH AND SEIZURE: Collaboration with Foreign Officials

In United States v. Ravine, 8 M.J. 744 (AFCMR 1980), pet. granted, 9 M.J. 152 (CMA 1980), argued 23 April 1981, the Court was invited to extend the rule announced in United States v. Jordon, 1 M.J. 334 (CMA 1976), to confessions made to foreign officials. The appellate defense counsel also argued that the appellant's confession was tainted by an illegal search and seizure. The appellant's conviction for possession of marijuana arose out of a lawful border search by German customs officials. Pursuant to a request for assistance by Air Force agents, the German officials searched the appellant's off-base residence on the following day and seized additional contraband. Air Force agents were present during this search. The appellant subsequently made an oral and written confession, and, still later, signed another written confession. The admissibility of this latter confession formed the basis of the issue presented to the Court. The defense counsel objected at trial to the admission of all items seized in the search of appellant's residence and all fruits of that search, pursuant to United States v. Jordon, supra. The military judge ruled that the Air Force's search of the appellant's residence triggered the rule announced in Jordon. He therefore excluded all items seized in this search, as well as the appellant's

initial confession. However, the military judge refused to exclude the last confession, ruling that the passage of time and the appellant's statement that he was confessing in order to exonerate his brother of related charges attenuated any taint resulting from the illegal search.

While the Court expressed no real objection to extending Jordon to statements obtained in violation of the accused's Fifth Amendment rights, government appellate counsel pointed out that there was insufficient evidence that the Air Force had aided, assisted, or directed foreign officials in securing the statement, other than by supplying the physical facilities in which the questioning was conducted. With regard to the Fourth Amendment question, the Court was primarily concerned with the issue of whether the taint of the illegal search had been attenuated. Specifically, they were interested in the effect of the appellant's assertion that he was confessing to the German customs police in order to help his brother. Regardless of the outcome in this case, defense counsel should consider the potential two-prong argument which may be advanced for excluding confessions. First, is the confession tainted by a prior search by foreign officials which the United States government aided or instigated? Second, if the confession was made to foreign officials without the benefit of rights warnings, did United States officials aid or instigate the questioning?

PRETRIAL AGREEMENT: Enforceability

Is the government bound by a company commander's agreement with a suspect pursuant to which the latter would cooperate in a larceny investigation in return for nonjudicial punishment for an offense pending against him? In United States v. Joseph, CM 438327, pet. granted, 9 M.J. 241 (CMA 1981), argued 12 May 1981, post-trial affidavits from the accused and his second company commander established that his first commander entered into such an agreement. Affidavits from the battalion legal clerk, the second commander, and the accused established that an Article 15 form was prepared and signed by the initial commander after the accused waived his Article 31 rights and discussed the case with CID agents. The accused's affidavit indicated that although the form was shown to him, the first commander declined to administer it, claiming that it contained a typographical error. At the time of the agreement, the government believed the accused only received stolen property. After the investigation was completed, the accused was listed as a suspect for larceny. In the interim, the second company commander assumed command and preferred charges against the accused. The battalion legal office informed him that the first commander's agreement was not binding, and the accused then entered into a new pretrial agreement with the convening authority and pled guilty.

The defense argued that the government was bound by the first company commander's agreement. The right to have a pretrial agreement enforced is of constitutional dimensions. See Santabello v. New York, 404 U.S. 257 (1971); Cooper v. United States, 594 F.2d 12 (4th Ch. 1979); United States v. Carter, 457 F.2d 426 (4th Cir. 1972); Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976); Correale V. United States, 479 F.2d 28 (2d Cir. 1973). The company commander was acting in a judicial, rather than an investigative role when he entered the agreement. Although no legal authority permits him to bind the convening authority, the government must nevertheless adhere to the agreement because the commander acted with apparent authority and the accused fulfilled his obligations under the instrument. See Geiser v. United States, 513 F.2d 862 (5th Cir. 1975); Karger v. United States, 388 F.Supp. 595 (D. Mass. 1975). The accused's failure to raise the issue at trial does not preclude review because the error is of constitutional dimension. The government argued that the error, if any, was waived since it was not raised at trial, and that the agreement was mooted by the subsequent pretrial agreement. Further, as a matter of law, the imposition of nonjudicial punishment for a major offense does not bar future prosecution. Finally, the government argued that the accused received what he bargained for since he was not prosecuted for receiving stolen property. The Court queried whether this was not really a Fifth Amendment problem which was waived by the appellant's plea and whether the agreement would be affected since the law permits prosecution of a major offense notwithstanding the prior imposition of nonjudicial punishment for the same criminal act. Because the affidavits indicated that the first commander never intended to fulfill his obligations under the agreement, the Court was concerned with whether the appellant was accorded due process. The tribunal also questioned whether the accused's cooperation assisted the government in obtaining inculpatory evidence.

SEARCH AND SEIZURE: Delegation of Authority to Order Search

Assuming that a commander may order searches based upon probable cause, may he delegate that authority? In United States v. Kalscheurer, AFCMR 22327, pet. granted, 5 M.J. 363 (CMA 1978), argued 21 April 1981, the deputy base commander issued a search authorization pursuant to an unrevoked letter of delegation from the former base commander. During a search of the accused's quarters, law enforcement agents obtained evidence which ultimately led to his conviction for possession of methamphetamine and marijuana. Appellate defense counsel recognized that past decisions do not support the proposition that the authority to order searches is nondelegable, see, e.g., United States v. Drew, 15 USCMA 449, 35 CMR 421 (1965); United States v. Albright, 7 M.J. 473, 474 (CMA 1979), and instead based his argument on Judge Ferguson's dissenting

opinion in Drew: authorizing searches is a "judicial" function which commanders may properly perform because of military exigencies. The crucial contention made by appellate defense counsel is that the delegation of authority to authorize searches is a matter of substantive rather than procedural law. This distinction is critical because, in the context of courts-martial, the President may regulate only procedural matters; Congress alone establishes substantive law. He emphasized Judge Ferguson's view that the conferring of authority to order searches upon another member of the command is clearly a substantive matter because it vests in that individual a judicial office, the creation of which is solely a matter of legislative regulation. Because Congress has not authorized delegation of this judicial authority, a commander's authority to order searches is nondelegable.

In response to a question by the Court, appellate defense counsel stated that he did not believe that United States v. Stuckey, 10 M.J. 347 (CMA 1981), was contrary to the appellant's position, since that decision merely reaffirms the commander's power to authorize searches, and is at least as consistent with the view that the commander alone may authorize searches as it is with the view that he may delegate that authority. Government counsel emphasized that paragraph 152 of the Manual, which was in effect at the time of the search, specifically provides that "[t]he commanding officer may delegate to persons of his command . . . the general authority to order searches upon probable cause[.]" He argued that the commander does not act in a judicial capacity when authorizing searches, and instead exercises that authority in furtherance of his responsibility to maintain order and discipline within his command. The government counsel also contended that the practice of delegating authority to order searches has worked successfully for many years and cited Drew, Albright, and Stuckey in support of the view that this delegation is reasonable under the Fourth Amendment.

GUILTY PLEA: Providence

An accused who has been warned that a heroin dosage was too high and who neverthereless assists the victim inject the drug may be convicted of negligent homicide. United States v. Romero, 1 M.J. 227 (CMA 1975). In United States v. Mazur, 8 M.J. 513 (ACMR 1979), pet. granted, 9 M.J. 137 (CMA 1980), argued 22 April 1981, the Court will confront the question of whether the accused's plea of guilty to involuntary manslaughter by culpable negligence was rendered improvident by his admissions during the providence inquiry that he assisted the decedent inject heroin; that he had extensive experience with the drug and had observed the decedent use twice the amount injected; and that he did not believe there was any danger because he had injected himself at that

time. Appellate defense counsel argued that these statements were inconsistent with the foreseeability of death required for a finding of culpable negligence. Counsel agreed with Chief Judge Everett that the standard for measuring foreseeability of harm is an objective one, but noted that military law requires a subjective acknowledgement at trial. Government counsel argued that foreseeability could be assumed because of heroin's inherently dangerous nature, the fact that the decedent was unsteady and needed assistance, and the accused's lack of medical training. Responding to questions by the Court, government cousel asserted that, regardless of the amount sold, every heroin seller is guilty of manslaughter if the user dies, because a synergistic reaction is foreseeable. The Court then expressed concern as to how far the government's argument should be extended. Would it include gun dealers and sellers of alcoholic beverages, and under what classification system would the "inherently dangerous nature" of the substance be determined?

MILITARY JUDGE: Impartiality

When does a military judge abandon his impartiality and assume the role of a partisan advocate in summarizing or commenting upon the evidence? That is one of the questions confronting the Court in United States v. Grandy, ACMR 13785, pet. granted, 9 M.J. 209 (CMA 1980), argued 22 April 1981. The appellant contended that the trial judge abandoned the neutral and dispassionate role mandated by paragraph 73c of the Manual when, in commenting upon the evidence, he repeatedly emphasized the "important factors" of the prosecution's theory of the case and posed rhetorical questions that supported it. The case also presents issues concerning the legal sufficiency of the evidence and the propriety of the trial counsel's argument on findings, which allegedly referred to facts not in evidence. Government counsel urged affirmance of the conviction, arguing that there was sufficient credible evidence of record to support the conviction, that the other issues were waived by defense counsel's failure to object, and that both the military judge's summary and the prosecutor's argument constituted fair comments on the evidence.

MILITARY JUDGE: Duty to Instruct

When an accused obtains drugs, at no profit, from a seller pursuant to a government informant's request, the defense of agency precludes his conviction for selling to the informant-principal. See United States v. Henry, 23 USCMA 70, 48 CMR 541 (1974). In United States v. Steinruck, ACMR 438660, pet. granted, 9 M.J. 179 (CMA 1979), argued 22 April 1981, undercover agents engaged the accused, a bouncer at a German club, in conversation. The agents testified that the accused offered to sell them drugs. The accused testified that the agents continuously importuned him and that he obtained drugs for them in exchange for money

they supplied for that purpose. The accused defended on an entrapment theory. Both the staff judge advocate in his post-trial review and the government counsel before the Army Court of Military Review recognized that the accused's testimony raised the issue of agency. However, the staff judge advocate concluded that the testimony was incredible, and, on appeal, government counsel argued that entrapment instructions presented at the court-martial foreclosed an acquittal based on agency. The Army appellate court rejected both theories and held that no instruction was required because the accused was only an agent of the seller. In oral argument before the Court, the government withdrew its concession below, contended that any error was waived, and urged the Court not to reevaluate the lower appellate tribunal's factual findings. In response to questions by Chief Judge Everett, however, government counsel acknowledged that such findings do not bar the Court from determining whether legal issues have been raised at trial.

MILITARY JUDGE: Duty to Instruct

To what extent is a military judge required to sua sponte inform the court-members of the range of punishment they may impose? In United States v. Henderson, AFCMR 22578, pet. granted, 9 M.J. 142 (CMA 1980), argued 14 May 1981, appellate defense counsel contended that the military judge committed prejudicial error by failing to present, on his own volition, sentencing instructions addressing the option of imposing reduction to an intermediate grade. Opposing appellate counsel emphasized that, under current law, the military judge need only inform the court-members of the maximum imposable punishment, see paragraph 76b(1), Manual; United States v. Wheeler, 17 USCMA 274, 38 CMR 72 (1967), and argued that the defense counsel should bear the onus of proposing instructions on lesser forms of punishment. While the Court acknowledged that court-members need adequate guidance in fashioning penal sanctions, it was apparently concerned that a recognition of the military judge's sua sponte duty in this area would circumscribe the proper role of the trial defense counsel. In addition, the Court seemed apprehensive about the manageability of such a requirement, in light of the variety of available sentencing options. Regardless of whether the court decides to impose a duty to sua sponte instruct the court-members on lesser punishment options, defense counsel should continue to propose such instructions in appropriate cases.

MILITARY JUDGE: Duty to Issue Special Findings

Article 51(d), UCMJ, provides that in courts-martial composed of a military judge alone, the judge "shall make a general finding and shall in addition on request find the facts specially." Does that provision

require the judge to enter findings in response to an oral request by the defense counsel, or must the latter submit the request in writing prior to authentication of the record in order to preserve the issue? In United States v. Gerard, NCMR 800476, pet. granted, 9 M.J. 272 (CMA 1980), argued 13 May 1981, the defense counsel requested the military judge to enter special findings before announcing his general findings. The military judge directed the defense counsel to reduce the request to writing and append it to the record of trial, and stated that he would consider the request when he authenticated the record. The written request was not attached to the record, however, and its resubmission after authentication was dismissed as untimely. The appellate defense counsel contended that Article 51(d) is mandatory, and that it may be invoked by an oral request. In this connection, he cited Federal Rule of Criminal Procedure 23c, the counterpart to Article 51(d), UCMJ, and observed that judicial interpretations of the former provision require the judge to enter findings regardless of whether the request is submitted in writing. The government appellate counsel countered that Article 51(d)'s requirements are not imposed upon the military judge unless the request for special findings is tendered in writing. The military judge cannot address questions which are absent from the record, and his failure to respond to the request submitted after authentication was not unreasonable. Judge Fletcher expressed concern about the authentication of a record of trial containing an unresolved motion for special findings. Chief Judge Everett observed that special findings are generally requested in order to orient the military judge's deliberation, in a manner similar to jury instructions, and asked whether the judge's withholding of a decision on the motion until authentication effectively denied the defense the intended benefits of Article 51(d), UCMJ.

EVIDENCE: Admissibility of Airman Performance Report

May defense evidence of an informant's lack of truthfulness be rebutted by an Airman Performance Report (APR)? In United States v. Blanchard, 8 M.J. 655 (AFCMR 1979), pet. granted, 9 M.J. 128 (CMA 1980), argued 23 April 1981, the appellant was convicted of wrongfully transferring cocaine in violation of Article 134, UCMJ. The defense counsel attacked the credibility of the informant upon whose testimony the conviction was based by introducing evidence of his prior drug use, his inconsistent pretrial statements, his poor reputation for truth and veracity, and several psychological tests revealing a personality and character disorder that could affect his truthfulness. The government rebutted this evidence by introducing the informant's APR. The defense counsel unsuccessfully objected to the admission of that document on the ground that it was not probative of the informant's truth and veracity. Although the lower appellate court acknowledged that APR's are

generally inadmissible to prove truth and veracity, that tribunal held that the military judge did not abuse his discretion in admitting the document because he accorded the defense counsel broad latitude in attacking the informant's credibility.

In oral argument before the Court, appellate defense counsel stressed the distinction between evidence of good character and evidence of truthfulness and veracity, and contended that the informant's work report should not have been admitted to bolster the informant's reputation with respect to the latter qualities. The government counsel argued that the informant's character was placed in issue by evidence that he sold drugs to a juvenile, and that distinctions betwen evidence of good character and evidence of truth and veracity are artificial and should not bar the admission of the APR. The Court was primarily concerned about the extent to which the informant's admission of drug use enabled the defense to present further evidence of his drug-related activities. In addition, the Court queried whether the defense counsel's overly extensive inquiry into the informant's truth and veracity entitled the government to present evidence pertaining to the informant's good character without first objecting to the defense's line of questioning.

MILITARY JUDGE: Duty to Instruct

The accused allegedly stole one wallet and attempted to steal another during the same time period. Although he was only charged with the theft, the prosecution, over defense objection, elicited evidence concerning the attempted theft as well. The defense counsel unsucessfully requested an instruction to the effect that evidence of the attempted theft could used only to "fill in a gap" in the course of events and should not be considered as evidence of guilt. The government argued that the attempted theft was inextricably connected to the other offenses and showed the accused's intent to commit robbery. The military judge instructed the court that they could use the evidence to "prove a guilty intent; that is, that the accused intended to commit robbery." In United States v. Thomas, pet. granted 9 M.J. 247, argued 13 May 1981, the Court will rule on the propriety of this instruction. The appellant argued that since the evidence was introduced merely to explain the sequence of events, the military judge should not have presented the instruction. United States v. James, 5 M.J. 382 (CMA 1978). The Court expressed interest in the fact that the evidence of the attempted theft appeared to be confusing, incomplete, and unconvincing and asked whether it should have been admitted at all. The appellant further argued that the instruction incorporated the wrong standard and in fact implied that the court members could properly

find the accused guilty of robbery. The military judge should have instructed the members that evidence of the attempted theft could only be used to prove specific intent to permanently deprive. See para. 138g, Manual; Department of Army, Pamphlet No. 27-9, Military Judges' Guide, para. 9-31 (1969).

SEARCH AND SEIZURE: Lawfulness of Apprehension

After learning from a reliable informant that the accused possessed drugs in his barracks room, the company commander went to the barracks and encountered the accused descending the steps with a suit slung over his shoulder. The company commander directed the accused back to his room, informed him that he was going to conduct a search, and asked if he would consent. The accused did consent and drugs were found in the vest pocket of the suit. The lower appellate court ruled that the commander had become too personally involved, United States v. Ezell, 6 M.J. 307 (CMA 1979), but that there was probable cause to search based on a proper apprehension, United States v. Aiello, 7 M.J. 99, 100 (CMA 1979); United States v. Garcia, 3 M.J. 927, 931 (ACMR 1977). United States v. Wallace, ACMR 14075, pet. granted 9 M.J. 180 (CMA 1980), argued 21 April 1981. The appellant contended that the search was illegal under several theories. The commander did not maintain a neutral, detached, and judicial attitude in authorizing and conducting the search. Further, the search was not incident to a legal apprehension because the apprehension was not effected until after the drugs were found. The accused did not voluntarily consent, and instead merely acquiesced to military authority. Finally, even if the Court recognized the lawfulness of the apprehension, the attendant search was invalid because the vest was under the government's exclusive control; accordingly, a search authorization should have been secured by someone other than the personally involved commander. United States v. Chadwick, 433 U.S. 1 (1977); United States v. Berry, 560 F.2d 861 (7th Cir. 1977). During argument, the Chief Judge asked whether the accused could be under arrest before the search since he was never informed that he was under apprehension, see para. 19c, Manual. The court also wondered whether an apprehension did in fact ever take place.

TRIAL: Request for Continuance

The "determinant question" to be resolved in assessing the propriety of a military judge's denial of a continuance to enable an accused to retain civilian counsel is "whether the ruling amounted to an abuse of discretion." United States v. Black, 8 M.J. 843 (ACMR 1980). See Conmy v. Williams, 20 USCMA 282, 43 CMR 122 (1971). The Court will address that issue in United States v. Montoya, SPCM 14503, pet. granted,

9 M.J. 283 (CMA 1980), argued 14 May 1981. After the military judge informed the accused of his rights to counsel, the accused stated that he wanted a civilian attorney. The military judge granted a 5-day continuance (including Thanksgiving and the following weekend) in which to obtain counsel. The appellant located a civilian counsel but was uncertain as to when he would have the funds to pay the attorney. When court resumed, the accused explained the situation to the military judge, who was unsympathetic to any further continuance and required the accused to make an election of counsel. The accused elected to be represented by both detailed and individual military counsel but continued to request a continuance to allow civilian counsel to represent him if he could procure the necessary funds. The military judge refused to rule on the request and indicated that he would decide whether to grant any continuance of the accused elected to be represented by civilian counsel. The Court was concerned about the manner in which the military judge refused to tell the accused whether he could have a continuance if he elected civilian counsel. The accused was told he could have either civilian or individual military counsel, but not both. If he elected civilian counsel but was not given a continuance, the court-martial would proceed without the presence of civilian counsel. If he elected individual military counsel he would have to forego his right to be represented by civilian counsel. The Court was interested in the propriety of a continuance under these circumstances and also whether an accused who had individual military counsel could also retain civilian counsel.

PRETRIAL AGREEMENT: Enforceability

In United States v. Mills, 9 M.J. 687 (ACMR 1980), pet. granted, 9 M.J. 283 (CMA 1980), argued 14 May 1981, the Court will consider whether a convening authority may condition his compliance with a pretrial agreement upon a lack of success on appeal. The issue arose when Specialist Mills offered to waive his right to present live testimony of extenuation and mitigation witnesses at a sentencing hearing and instead rely exclusively on stipulations of expected testimony to present favorable defense evidence on sentencing; in exchange, the convening authority agreed to remit all punishment in excess of a specified amount at the conclusion of appellate review. However, if the findings or sentence were set aside during the course of appellate review, the convening authority was released from his obligation to remit any portion of the sentence and, upon further rehearing, the maximum imposable sentence would be determined in accordance with the provision of Article 63(b), UCMJ. The Court must determine whether such a provision in a pretrial agreement impermisibly chills the accused's free exercise of his right to appellate review or whether it contravenes public policy by avoiding the intent of Article 63(b) and paragraph 81(d) of the Manual. The

Court may also address the related issue concerning the propriety of bargaining away the right to present live testimony and whether such a provision is an attempt to orchestrate the court-martial's proceedings.

INSANITY DEFENSE: Standard of Mental Responsibility

In United States v. Cortes-Crespo, 9 M.J. 717 (ACMR 1980), pet. granted, 9 M.J. 398, argued 23 June 1981, the Court will examine the lower appellate tribunal's definition of the term "mental disease or defect" as contained in the American Law Institute's (ALI) standard for mental responsibility adopted in United States v. Frederick, 3 M.J. 230 (CMA 1977). The lower court expressed dissatisfaction with the uncertainty inherent in the standard, and although the granted issue related to the legal sufficiency of the government's rebuttal to the insanity defense presented at trial, Chief Judge Everett asked counsel to discuss the definitional problem. Appellate defense counsel argued that, implicit within the military judge's findings and subsequent recommendation of clemency, which was based on appellant's mental condition, was a determination that while the appellant was severely disturbed, the insanity defense did not lie since he suffered from a personality disorder, which, regardless of its severity, was beyond the ambit of a "mental disease or defect." The appellate counsel contended that military courts consistently exclude personality disorders from the category of mental diseases or defects required under the ALI test. As a result, those disorders tend to be compartmentalized into a separate category of mental infirmities which may preclude a finding of premeditation, specific intent, or criminal knowledge, but which will not completely exonerate an accused. Appellate government counsel countered that because there was no indication in the record that the military judge applied an incorrect standard, the lower court's opinion was based on a factual determination which could not be reviewed. Conceding that a lack of definitional clarity created problems in applying the ALI standard, the government counsel suggested that any ambiguity could be eliminated by modifying the term "mental disease or defect" with the word "serious".

CASE NOTES

Synopses of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

ARTICLE 31(b): Applicability
United States v. Summers, 11 M.J. 585 (NCMR 17 Apr. 1981).
(ADC: LCDRs Davidson and Muschamp)

The accused was ordered to report to Naval Investigative Services (NIS) headquarters, where an agent noticed that he matched the description of an alleged offender. He was questioned and photographed. While the victim was summoned, the agents left him in an empty room for more than an hour. The victim later identified the accused as her assailant. He allowed the agents to search his car and quarters, and they subsequently informed him of his rights under Article 31(b), Uniform Code of Military Justice [hereinafter UCMJ]. He then made a written statement. The military judge denied the accused's motion to suppress the statement and any evidence derived therefrom. The Navy appellate court reversed because the NIS employed blatant delaying tactics before warning the accused of his rights. Relying heavily on United States v. Rice, 3 M.J. 1094 (NCMR 1977), the court emphasized that the determination of when an individual becomes entitled to the protections of Article 31(b), UCMJ, is an objective process. Although government agents may, for administrative purposes, classify individuals as "possible", "potential", or "prime" suspects, these distinctions are legally irrelevant. The accused was clearly suspected by the agents of having engaged in criminal activity, and he was therefore entitled to receive rights warnings. That protection may not be suspended while the government accumulates evidence of the suspect's guilt.

CHARGES AND SPECIFICATIONS: Amendments
United States v. Sweat, SPCM 15299 (ACMR 24 Apr. 1981) (unpub.).
(ADC: CPT Currie)

The accused was charged with willfully disobeying a noncommissioned officer, in violation of Article 91, UCMJ. The evidence established that he actually disobeyed an order issued by a noncommissioned officer other than the one alleged, and the government moved to amend the charge. Although the defense counsel objected that the requested amendment was not minor, the military judge allowed it. The Army appellate court held that he erred. See United States v. Marsh, 3 USCMA 48, 11 CMR 48 (1953). While the identification of the disobeyed officer is irrevelant

when an accused is charged under Article 92, UCMJ, see United States v. Johnson, 12 USCMA 710, 31 CMR 296 (1962), a violation of Articles 90 or 91 involves a "personal" element which "colors and permeates the orders." An amendment in the identification of the officer who issued the order therefore changes the offense. See paragraph 44f and 69b, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter Manual]; United States v. Squirrell, 2 USCMA 146, 7 CMR 22 (1953).

CONVENING AUTHORITY: Duty to Follow Judicial Instructions

United States v. Finney, NMCM 80 1896, ___ M.J. ___ (NCMR 29 May 1981). (ADC: CPT Burnette, USMC)

The military judge ruled that the accused had been illegally detained for seven days prior to trial and ordered that his sentence to confinement be credited by an equal period of time. The convening authority attempted to disapprove the Court's ruling by ignoring its order. The Navy appellate court held that the convening authority erred, noting that neither "the Code, the [Manual], nor decisional law authorize [him] to reverse trial rulings favorable to the accused, which are made by a military judge acting within the scope of his authority." See United States v. Strow, 11 M.J. 75 (CMA 1981); United States v. McElhinney, 21 UCSCMA 436, 45 CMR 210 (1972).

EVIDENCE: Admissibility of Prior Convictions
United States v. Bateman, CM 440222 (ACMR 12 May 1981) (unpub.). (ADC: CPT Walinsky)

During the presentencing hearing the military judge questioned the accused about his pre-service larceny conviction. While this information is inadmissible under paragraph 75b(2) of the Manual, which pertains only to previous court-martial convictions, see United States v. Williams, 11 M.J. 552 (ACMR 1981); United States v. Cobb, 9 M.J. 786 (ACMR 1980), the court noted that records of preservice convictions included in an accused's personnel records may be admissible under paragraph 75d of the Manual.

EVIDENCE: Admissiblity of Prior Conviction
United States v. Martin, CM 440101 (ACMR 13 Apr. 1981) (unpub.). (ADC: CPT Wheeler)

The prosecution introduced two exhibits relating to the accused's prior summary court-martial conviction: the promulgating order, and the

Department of Army Form 2-2 reflecting that conviction. The Army appellate court held that the first exhibit was inadmissible because it lacked the convening authority's action. Since it was prepared from an incomplete promulgating order, the second exhibit, although regular on its face, was also inadmissible. The defense counsel's failure to object did not waive the error.

EVIDENCE: Admissibility of Record of Nonjudicial Punishment
United States v. Hutt, CM 440107 (ACMR 29 Apr. 1981) (unpub.).
(ADC: CPT Harders)

The military judge erred in admitting a record of nonjudicial punishment over the defense counsel's objection where the misconduct for which the accused had been punished did not constitute an offense under the UCMJ.

EVIDENCE: Admissibility of Witness' Personality Disorder
United States v. McMillan, CM 439434 (ACMR 13 Apr. 1981) (unpub.).
(ADC: CPT Brower)

The primary prosecution witness against the accused, who was convicted of several drug offenses, was an undercover military police investigator who had been discharged because of a personality disorder immediately prior to trial. The military judge prevented the accused from eliciting the factual circumstances surrounding the discharge, and only admitted evidence of the date on which and regulatory provision pursuant to which the witness was separated. The court held that the accused's cross-examination rights were impermissibly limited because the extent of the witness' disorder was relevant to his "mental processes and ability to perceive, assimilate, recall and relate to the court" the events he allegedly observed.

EVIDENCE: Authentication
United States v. Barnes, SPCM 15546 (ACMR 8 Apr. 1981) (unpub.).
(ADC: CPT Pardue)

Over the defense counsel's objection, the military judge admitted a Department of Army Form 2-1 and a record of nonjudicial punishment during the sentencing stage of the accused's court-martial. Both exhibits were accompanied by authentication certificates signed by a staff sergeant over the signature block of an assistant personnel officer acting "for the regional personnel officer." The court held that the judge erred. Authentication certificates must indicate that the signer is the official he purports to be and that he is signing in an official capacity as a custodian of the record or agent of the custodian. See Mil.R.Evid. 902(4)(a).

GUILTY PLEA: Providency
United States v. Turner, SPCM 15590, ____ M.J. ____ (ACMR 13 May 1981).
(ADC: CPT Martin)

Pursuant to his pleas, the accused was convicted of assault and battery upon a military policeman. The military judge conducted a thorough providency inquiry and established a factual basis for the plea. During the presentencing hearing the accused testified under oath that "I didn't throw [the rake] to hit [the MP] at all. . . I just threw it to get it out of my hands." On appeal, the accused submitted that this statement rendered his plea improvident. The court concluded that because assault consummated by a battery is a general intent crime, the accused's "self-serving rationalization is of no consequence . . . where no affirmative defense [is] raised." After examining the accused's testimony and the circumstances set forth in the record, the court determined that the statement was not "truly inconsistent" with his plea. United States v. Hebert, 1 M.J. 84 (CMA 1975); United States v. Logan, 22 USCMA 349, 47 CMR 1 (1973); United States v. Schocken, 1 M.J. 511 (AFCMR 1975). The court did express its willingness to consider, if necessary, other matters in the record, including the Article 32 investigation, in order to determine the providence of an appellant's guilty plea. United States v. Young, 2 M.J. 472 (ACMR 1975); United States v. Stouffer, 2 M.J. 528 (ACMR 1976). A sharp dissent challenged this conclusion. Cf. United States v. Davenport, 9 M.J. 364 (CMA 1980).

INSTRUCTIONS: Sentencing
United States v. Van Gutman, NMCM 80 2993 (NCMR 10 Apr. 1981) (unpub.).
(ADC: LCDR Caruthers, USN)

The trial defense counsel unsuccessfully requested a sentencing instruction that "a bad-conduct discharge is more severe than confinement at hard labor for six months and forfeitures of a like period." The court held that although such an instruction correctly states the law, United States v. Johnson, 12 USCMA 640, 31 CMR 226 (1962); United States v. Davenport, No. 79-0859 (NCMR 13 March 1980), the military judge is not required to present it. Further, after applying United States v. Winborn, 14 USCMA 277, 282, 34 CMR 57, 62 (1963), the court found that the military judge did not abuse his discretion by refusing to present the requested instruction.

JURISDICTION: Retroactivity of Revised Article 2, UCMJ
United States v. Marsh, NMCM 80 1281, ___ M.J. ___ (NCMR 26 May 1981).
(ADC: LCDR Davidson, USN)

The accused, who committed several offenses before Article 2, UCMJ, was amended by Department of Defense Authorization Act of 1980, Pub. L.

No. 96-107, Sec. 801(a), (b), and (c), 93 Stat. 810, claimed, after the amendment took effect, that his court-martial lacked in personam jurisdiction due to recruiter misconduct. See United States v. Russo, 1 M.J. 134 (CMA 1975). In a split decision, the court held that the military judge's retroactive application of the amendment violated the constitutional prohibition against ex post facto laws. Analyzing a long line of Supreme Court decisions, the court reasoned that although the amendment does not render criminal a heretofore innocent act or aggravate an offense, it "takes away or impairs the defense which the law had provided the defendant at the time." Kring v. Missouri, 107 U.S. 221, 228 (1883). See also Weaver v. Graham, ___ U.S. ___, 101 S.Ct. 960 (1981). But see Judge Cook's concurrence in United States v. Buckingham, 11 M.J. 184 (CMA 1981); United States v. McDonagh, 10 M.J. 698, 711-13 (ACMR 1981) (Foreman and Clause, JJ. concurring in part and dissenting in part).

MILITARY JUDGE: Duty to Instruct
United States v. Newman, CM 440013 (ACMR 15 June 1981) (unpub.).
(ADC: CPT Russelburg)

The accused drove a soldier and a German national to a nightclub. After arriving, he left the car with the others inside; the German then removed a package of heroin from the passenger's sun visor and a spoon and syringe from the glove compartment and prepared to inject the narcotic. At trial, the soldier testified that the accused was not surprised when he returned and saw what was happening. The German police, who had been watching the car, arrested its occupants and found additional packets of heroin above the passenger's sun visor. The accused was convicted of wrongfully possessing heroin in conjunction with the German national. On appeal, he contended that the military judge erred when he instructed the members that they could find that the accused possessed the heroin if he "deliberately tried to avoid" the knowledge that the drugs were in the automobile. The court disagreed, citing United States v. Aulet, 618 F.2d. 182 (2d Cir. 1980) and United States v. Batencourt, 592 F.2d. 916 (5th Cir. 1979). The dissent, while recognizing the "rule of calculated indifference," stated that it was inapplicable.

MILITARY JUDGE: Recusal
United States v. Banks, SPCM 14790 (ACMR 10 Apr. 1981) (unpub.).
(ADC: CPT Walinsky)

The accused's disrespect, disobedence, and disorderliness during his first court-martial were prosecuted in a second trial. During the first trial, the military judge refused to recuse himself after being

challenged on the ground that his observations of the accused's misconduct would adversely effect his opinion of the accused's credibility. The accused then testified on an unsuccessful motion attacking the court's in personam jurisdiction. He was convicted and sentenced. Immediately thereafter, the second trial began with the same participants as the first. The judge was challenged on the ground that he had formed an opinion of the accused's guilt. He refused to recuse himself because he had not witnessed any of the charged misconduct and would disapprove a request for trial by judge alone. The same jurisdictional motion was raised and denied. Approximately thirty days later, the trial resumed with a different judge. On appeal, the accused contended that he was erroneously denied the opportunity to request trial by military judge alone. The court concluded that the accused's decision to be tried by members was made before the judge's statement, and there was no indication that the accused ever sought any other forum after the new judge was appointed. Finally, citing United States v. Bradley, 7 M.J. 332 (CMA 1979), the court held that the first military judge did not abuse his discretion in failing to recuse himself from the second trial before he ruled on the accused's motion.

MILITARY JUDGE: Rulings on Motions
United States v. Johnwell, CM 439627, ___ M.J. ___ (ACMR 16 June 1981). (ADC: CPT McAtamney)

Before the effective date of the amendment to Article 2, UCMJ, the accused moved for dismissal on the ground that recruiter misconduct deprived the court-martial of in personam jurisdiction. The military judge deferred his ruling on the motion until after the trial on the merits. The members arrived at a sentence, which was "sealed" by the military judge. More than 90 days later, after hearing arguments concerning the effect of the recent amendments to Article 2, UCMJ, in other pending courts-martial, he denied the motion and announced the sentence. The Army appellate court held that the amendment to Article 2, UCMJ, does not violate the ex post facto provision of the United States Constitution. See United States v. McDonagh, 10 M.J. 698 (ACMR 1981). The court also stated that although the arrangement of the proceedings was "contrary to the Manual," the judge did not abuse his discretion because his actions promoted judicial efficiency in a case involving a "complex and time-consuming" issue and the appellant suffered no apparent prejudice. Inexplicably, the court failed to note that the defense had served notice of the motion on the trial judge and counsel ten days before trial and that the government presented no evidence on the motion. Holding that it was not error for the military judge to rely upon arguments presented by counsel on the same issue in other cases, the court observed that "not all of a military judge's legal education is presented

to him during the course of a single trial." Transcripts or summaries of those arguments were not made part of the record. See paragraphs 39c and 53b, Manual.

OFFENSES: Aggravated Assault
United States v. Brunson, CM 439791 (ACMR 10 Apr. 1981) (unpub.).
(ADC: CPT Lukjanowicz)

The accused was charged with an assault by intentionally inflicting grievous bodily harm, in that he "severed" the victim's eyebrow by biting him. The Army appellate court found that the military judge erred by failing to instruct the court members that an assault with a means likely to produce grievous bodily harm was a lesser-included offense; that form of assault may be committed even if the assailant only uses parts of his body.

OFFENSES: Multipliciousnes for Charging
United States v. Nelson, NMCM 81 0995, ___ M.J. ___ (NCMR 22 May 1981).
(ADC: CPT Axelrod, USMC)

The accused was convicted of three violations of Article 92, UCMJ, arising from the simultaneous discovery of various illicit drugs in his wallocker. Although the military judge deemed the offenses multiplicious for sentencing, the Navy appellate court, citing United States v. Hughes, 1 M.J. 346 (CMA 1976), held that under the circumstances of this case, the simultaneous possession of various drugs is a single act and that the offences were multiplicious for charging. See United States v. Griffin, 8 M.J. 66 (CMA 1979). Multiple charging may not be employed in an attempt to obtain a stiffer sentence. In closing, the court reminded "those who have responsibility for initiating charges that one transaction or what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." See paragraph 125b, Manual.

POST-TRIAL HEARINGS: Vacation Proceedings
United States v. Lynch, 10 M.J. 764 (NCMR 27 February 1981).
(ADC: CPT E. A. Burnette, USMC)

The accused was sentenced to, inter alia, a bad-conduct discharge, which the convening authority approved. The general court-martial convening authority suspended the discharge. The accused subsequently received nonjudicial punishment, and a hearing was conducted pursuant to Article 72, UCMJ, to determine whether the suspension should be vacated. During the hearing, the accused made a statement through counsel; it was reduced to writing, but disappeared and was never incorporated into

the record. A successor general court-martial convening authority later endorsed the hearing officer's recommendation that the suspension be vacated. The Navy Court of Military Review set aside the action of the original general court-martial convening authority, who approved the bad-conduct discharge on remand. The court held that improper vacation proceedings nullified the new action. Such proceedings are an integral part of a court-martial and are subject to appellate review, United States v. Ward, 5 M.J. 685 (NCMR 1978); United States v. Borneman, 10 M.J. 663 (NCMR 1980); in order to insure meaningful review, the hearing officer must therefore document the evidence he relied upon and the reasons for his decision. United States v. Hurd, 7 M.J. 18 (CMA 1979); United States v. Bingham, 3 M.J. 119 (CMA 1977). Without the accused's statement, the court could not properly review the vacation proceedings; it therefore affirmed a sentence including a suspended bad-conduct discharge.

POST TRIAL REVIEW: Service on Substitute Counsel
United States v. Lolagne, 11 M.J. 556 (ACMR 6 Apr. 1981).
(ADC: MAJ Ganstine)

After the accused's conviction but prior to completion of the post-trial review, the trial defense counsel was released from active duty. A substitute counsel was appointed to represent the accused, who had already been transferred to the Disciplinary Barracks. After accepting service of the post-trial review, the substitute counsel repeatedly attempted to contact the accused, who was then on excess leave, and finally informed the staff judge advocate that she had no comments or rebuttal. On appeal, the court addressed the issue of whether the accused's failure to keep authorities advised as to his whereabouts enables substitute counsel to perform the Goode review without establishing an attorney-client relationship. See United States v. Kindlon, 6 M.J. 52 (CMA 1978); United States v. Iverson, 5 M.J. 440 (CMA 1978). The court held that it did. The method of service mandated by United States v. Goode, 1 M.J. 3 (CMA 1975), is "a court-made procedure not mandated by the Constitution or statute," and when a substitute counsel has been designated for "good cause," see United States v. Harris, 8 M.J. 668 (ACMR 1979), but is unable to contact the accused in spite of good-faith efforts because the accused has failed to keep appellate authorities advised as to his whereabouts, the substitute counsel "can properly act for the accused, notwithstanding the accused has not had the opportunity to express his own desires or choices." United States v. Iverson, supra at 450 (Cook, J., concurring).

VERDICT: Impeachment by Members' Affidavits
United States v. Howard, SPCM 15499 (ACMR 13 Apr. 1981) (unpub.).
(ADC: CPT McCarty)

The accused submitted affidavits before the Army appellate court in which two court members stated that, contrary to the military judge's instructions, the members voted on sentence proposals starting with the most severe alternative. Citing Mil. R. Evid. 606(b), the court held that, except under certain circumstances not present in this case, affidavits of court members may not be received to impeach their verdict. See United States v. Bourchier, 5 USCMA 15, 17 CMR 15 (1954); United States v. Higdon, 2 M.J. 445 (ACMR 1975).

FEDERAL COURT DECISIONS

CUSTODIAL INTERROGATION: Waiver of Right to Counsel
Edwards v. Arizona, ___ U.S. ___, 101 S.Ct. 1880 (18 May 1981).

The petitioner was arrested for murder. He was taken to the police station and informed of his Miranda rights. Although he waived those rights, the police terminated the questioning when he requested a lawyer. He had not yet talked to an attorney when, on the following day, the police told him that he "had to" talk to law enforcement agents. After they identified themselves and informed him of his Miranda rights, the agents elicited incriminating statements which were admitted, over his objection, at his trial. The Court stated that a waiver of counsel must not only be voluntary, but knowing and intelligent, and noted that the latter issue had not been addressed by the lower courts. After an accused has been informed of his Miranda rights, he may validly waive them and submit to interrogation. See North Carolina v. Butler, 441 U.S. 369, 372-376 (1979). However, relying on Miranda and its progeny, the Court emphasized that "when an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." See Rhode Island v. Innis, 446 U.S. 291 (1980); Michigan v. Mosley, 423 U.S. 96 (1975). Because the petitioner did not validly waive his right to remain silent, his statements were inadmissible.

EVIDENCE: Consideration of Law-Abiding Character
United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981).

At the accused's trial for unlawful possession and receipt of firearms, the trial judge overruled a motion to allow the accused to present

witnesses who would have testified about his law-abiding character; the judge noted that the accused had not testified and determined that his character was not otherwise placed in issue. The appellate court observed that Fed.R.Evid. 404(a)(1) [see Mil.R.Evid. 404(a)(1)] appears to allow evidence of a pertinent character trait rather than general good character. The court criticized this "false dichotomy between 'pertinent traits of character' and 'character generally'," and concluded that a "general trait of character, such as lawfulness, is no less pertinent for being general." Citing Michelson v. United States, 335 U.S. 469 (1948), the court stated that although testimony as to the accused's reputation for truth and veracity was properly excluded, evidence that an accused is a law-abiding citizen is always relevant and should have been admitted. See Darland v. United States, 626 F.2d 1235 (5th Cir. 1980).

POST-TRIAL REVIEW: Jurisdiction of Correction Boards
Baxter v. Claytor, No. 77-1984 (D.C. Cir. 24 April 1981).

The petitioner was convicted by a Navy special court-martial in 1956; his sentence included a bad-conduct discharge, which was ultimately upgraded to a discharge under other than honorable conditions. In 1976, he petitioned the Navy Board for Correction of Military Records to vacate the conviction and further upgrade his discharge because he was denied the assistance of legally trained counsel at trial, even though that right had not been extended to accused servicemembers at the time of his trial. The Board refused to act, claiming it lacked jurisdiction to review any aspect of a court-martial other than the sentence. The Board may correct a military record containing an error or injustice, see 10 U.S.C. §155 (1976). While it may not invalidate or overrule a conviction, it can remove all traces of an invalid court-martial from a serviceman's record and upgrade his discharge. See Owings v. Secretary of the United States Air Force, 447 F.2d. 1245 (D.C. Cir. 1971), cert. denied, 406 U.S. 926 (1972); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). Therefore, the court held that the Board does have jurisdiction to act on the petition, and indeed has a "non discretionary, judicially enforceable duty to exercise this power to correct such records if [they are] based on unconstitutional military trials." (emphasis added). See Hancy v. Resor, 455 F.2d 1345, 1348-49 (D.C. Cir. 1971). The court remanded the case to the Board because it had failed to exercise its express statutory jurisdiction. The court did not discuss the merits of the appellant's claim that he was improperly denied counsel at his court-martial. See also Denton v. United States, 204 Ct. Cl. 188, 191 (1974), cert. denied, 421 U.S. 963 (1975), where the court noted that the Air Force Board for Corrections of Military Records is apparently of the view that it can "set aside . . . the findings and sentence of [a] court-martial."

PSYCHIATRIC EXAMINATION: Rights Warnings
Estelle v. Smith, ___ U.S. ___, 101 S.Ct. 1866 (18 May 1981).

A Texas trial court ordered a psychiatric evaluation of the accused to determine his competency to stand trial. Thereafter, he was tried and convicted of murder. During a presentencing hearing, the same psychiatrist testified, over defense objection, that the accused was a recidivist; the accused received the death penalty. Noting that there is no basis to distinguish between the guilt-determining and penalty phases of the trial with regard to the applicability of Fifth Amendment protections, the Court ruled that it was error not to advise the accused of his right to remain silent during the examination. Since he had an attorney and had been indicted, he had the right to consult with counsel before submitting to the interview. The Court did not determine whether he had the right to have his attorney present during the examination. (See paras. 121 and 122, Manual; Mil.R.Evid. 302).

SEARCH AND SEIZURE: Warrant Requirement
Steagald v. United States, ___ U.S. ___, 101 S.Ct. 1642, 68 L.Ed.2d 38 (21 April 1981).

Armed with an arrest warrant for one Ricky Lyons, government agents entered the petitioner's home without his consent or a search warrant. While searching for Lyons, the agents seized illegal drugs and other incriminating evidence, which was later introduced at the petitioner's trial. The Court reviewed the issue of whether the agents could search for the subject of an arrest warrant in a third party's home without first obtaining a search warrant. Absent exigent circumstances or the third party's consent, the Court concluded that the question must be answered negatively. An arrest warrant, by itself, inadequately protects the Fourth Amendment interests of persons not named therein. While an arrest warrant shields an individual from unreasonable seizures, a search warrant safeguards privacy. Although the arrest warrant reflected a judicial determination that there was probable cause to believe Lyons was a fugitive, it did not establish that he could be found in the petitioner's home. The Court also noted, in dicta, that an arrest warrant alone would would enable government agents to enter the suspect's residence.

STATE COURT DECISIONS

EVIDENCE: Admissibility of Complainant's Prior Sexual Conduct
Commonwealth v. Joyce, 415 N.E.2d 181 (Mass. 6 Jan. 81).

At the accused's trial for rape, the judge refused to admit evidence that two charges of prostitution were brought against the complainant

several months before the alleged offense. The judge based his decision on Massachusett's rape-shield statute [cf. Mil.R.Evid. 412], which bars evidence of the complainant's sexual reputation or specific instances of her sexual conduct. The court did not address the accused's contention that the statute unconstitutionally deprived him of his Sixth Amendment confrontational rights, and instead resolved the issue by finding that evidence of the complainant's prior conduct might tend to establish bias on her part: since she had been arrested for prostitution, she might attempt to protect herself from further prosecution by alleging that the accused raped her. While the Court emphasized that prostitution is not relevant to credibility or the question of consent and that the policies underlying the rape-shield act cannot be ignored, the statute is not so broad as to bar evidence of specific instances of a complainant's sexual conduct which are relevant to credibility. See also State v. Howard, 426 A.2d 457 (NH Sup. Ct. 23 Feb. 81) (portions of rape-shield act conflict with State and Federal Constitutions).

OFFENSES: Classification of Cocaine as Narcotic
People v. McCarty, 418 N.E.2d 26 (Ill. App.Ct. 2 Mar. 81).

The accused was convicted of unlawful delivery of cocaine in violation of that provision of the Controlled Substances Act [Ill. Rev. Stat. 1979, ch. 56 1/2, para. 1401(b)] pertaining to narcotics; the Act distinguishes between narcotic and non-narcotic substances, and imposes harsher penalties for offenses involving the former. On appeal, the accused successfully challenged cocaine's classification as a narcotic. The court noted that although similar contentions have been rejected by various state and federal courts, see, e.g., United States v. Erickson, 574 P.2d 1 (Alas. 1978); United States v. Lustig, 555 F.2d 737 (9th Cir. 1977), cert. denied 434 U.S. 1045 (1978), scientific advances have undermined the persuasiveness of the opinions in those cases. The court noted that it is undisputed that cocaine is not a narcotic; its classification as such is therefore irrational and in violation of the equal protection clauses of the United States and Illinois Constitutions. See People v. McCabe, 275 N.E.2d 407 (Ill. 1971) (marijuana's classification as narcotic is irrational).

PRETRIAL LINEUP: Accused's Entitlement
In re W.C., 29 Crim. L. Rptr. (BNA) 2021 (NJ Sup. Ct. 26 Feb. 81).

By equating a pretrial lineup with other discovery procedures, the New Jersey Supreme Court concluded that the judiciary may order a pretrial lineup even though it is not statutorily or constitutionally required. See Cicenia v. Lagay, 357 U.S. 504, 510-511 (1958). Because of the potential burdens and costs to the victim, witnesses, and government,

however, an accused is not automatically entitled to such a lineup. The trial judge must first determine whether identification is a substantial, material issue; whether there is a reasonable likelihood that a lineup would be of some probative value; and whether the accused's request is timely. Other factors a court may consider include the burden imposed on the prosecution and its witnesses, and the probability that they may be subjected to intimidation, annoyance, harrassment, or embarrassment.

RIGHTS WARNINGS: Waiver
State v. Wilson, 29 Crim. L. Rptr. (BNA) 2054 (Conn. Sup. Ct. 10 Mar. 81).

A policeman approached the accused (who was in custody on an unrelated charge), informed him that he was suspected of robbery, and warned him of his rights. The accused indicated that he understood these rights but never said that he waived them or that he was willing to answer questions. He then confessed. The court held that if questioning continues without an attorney present once the required warnings have been given, the government bears a heavy burden of establishing that the defendant knowingly and intelligently waived his rights. See Tague v. Louisiana, 444 U.S. 469 (1980). Although the Supreme Court in North Carolina v. Butler, 441 U.S. 369 (1979), held that such a waiver may be inferred from the suspect's actions and words, silence alone is insufficient. In this case the record disclosed no evidence that the appellant wished to waive his rights, and waiver cannot be presumed "simply from the fact that a confession was in fact eventually obtained." Miranda v. Arizona, 384 U.S. 436, 475 (1966).

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

DC: How far did you go in school?

ACC: Tenth grade, sir.

DC: And what was the reason for your leaving school?

ACC: Join the Army.

DC: Why did you join the Army?

ACC: To continue my education.

* * * * *

MJ: Let the record reflect that the court was out of session for approximately an hour and 20 minutes because the prosecutor had to perform the extremely important duty of bus monitor.

* * * * *

MJ: Let's take a recess until those jets are done flying overhead, gentlemen. The court's in recess . . .. The Court will come to order. Just a minute the jets are coming back.

TC: I don't believe it.

DC: Divine intervention.

TC: The Government makes an objection for the record, your Honor.

* * * * *

(Trial counsel during argument on motion to suppress.)

TC: But the [military police] officers, I will concede, did not compare notes and say, "Let's add this factor plus this factor plus this factor." Military police officers, to my knowledge, generally don't do that. They can communicate by words and gestures, or sometimes merely a grunt.

* * * * *

(During litigation of jurisdictional motion based on concealment of accused's head injury prior to enlistment.)

MJ: Before you leave the witness stand, let me say for the record that there appears to be a surgical scar in the witness' head that is about a quarter of an inch wide and about six to seven inches long. Is that a surgical scar in the center of your head?

ACC: No, sir. It's just a part. It's a part, sir.

* * * * *

ACC: I've never been in but one fight and that was at a beer fest, your Honor, and I was drunk then. And I got beat up and got scars on me where the dude bit me. It was a cook, too. He must have thought I was dinner or something.

* * * * *

A: I expressed some surprise that an officer . . . would be using marijuana.

Q: And what was his response?

A: He told me that he was from California and that everybody from California gets high.