

THE ADVOCATE

United States Army Defense Appellate Division

Volume 14

Number 3

May - June 1982

Contents

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146

**MILITARY RULE OF EVIDENCE 412: THE PAPER
SHIELD**

Captain Kenneth G. Gale

160

**A COMPENDIUM OF POST-TRIAL CONSIDERATIONS
FOR TRIAL DEFENSE COUNSEL**

Captain Chuck R. Pardue
Edward J. Walinsky, Esq

169

**THE USE OF LEARNED SCIENTIFIC TREATISES
UNDER FEDERAL RULE OF EVIDENCE 803 (18)**

Edward Imwinkelreid, Esq

177

**SEARCH AND SEIZURE: A PRIMER
PART TEN — Standing**

191

SIDE BAR

200

USCMA WATCH

209

CASE NOTES

212

ON THE RECORD

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OPENING STATEMENTS

Overview

Military Rule of Evidence 412, like its federal rule counterpart, limits the availability of defense evidence in rape cases. Our lead article explores the constitutional questions raised by the "rape shield law" and discusses ways in which defense counsel can cope with the rule. Our second article is a useful compendium of considerations for defense counsel in fulfilling their post-trial responsibilities. In our third article, Professor Imwinkelreid considers the use of scientific treatises in trial practice. Finally, in part ten of "Search and Seizure: A Primer," the staff discusses standing under the fourth amendment.

Preview

In the July - August issue, The Advocate will publish a special issue entitled "Project: The Administrative Consequences of Courts-Martial." The project will cover such topics as discharge upgrading, pay and allowances, excess leave, and clemency. Our regular features will return in September - October.

Staff Personnel Changes

With this issue COL William G. Eckhardt assumes the position of Chief, Defense Appellate Division (DAD). Colonel Eckhardt, a graduate of the U.S. Army War College, served as the Staff Judge Advocate of the 3d Armored Division. The Advocate welcomes our new Chief.

Colonel Edward S. Adamkewicz, Jr. departs DAD to be the Staff Judge Advocate of the U.S. Army Intelligence and Security Command (INSCOM). Colonel Adamkewicz came to DAD in April 1979. Under his guidance The Advocate has grown immeasurably in quality. Colonel Adamkewicz's stalwart leadership established The Advocate firmly as the principal voice of the military defense bar.

With this issue, CPT Kenneth G. Gale becomes the Articles Editor of The Advocate. He is replacing CPT Edward J. Walinsky who is leaving the Army to become a staff attorney for the United States Court of Appeals for the Fourth Circuit. The Advocate will miss CPT Walinsky's dedicated service.

MILITARY RULE OF EVIDENCE 412: THE PAPER SHIELD
by Captain Kenneth G. Gale*

With the adoption of Rule 412¹ of the Military Rules of Evidence [hereinafter cited as Mil. R. Evid.], the military joins other

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1. Rule 412. Nonconsensual Sexual Offenses; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is--

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of--

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(Continued)

jurisdictions in limiting the availability of defense evidence in rape cases.² Based upon the federal rule, Mil. R. Evid. 412 regulates the

1. Continued.

(c)(1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).

(3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

2. See generally Annot., Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences, 1 A.L.R. 4th 283 (1980); Tanford and Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980) [hereinafter cited as Tanford and Bocchino]; Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977) [hereinafter cited as Berger]; Rudstein, Rape Shield Laws: Some Constitutional Problems, 18 Wm. & Mary L. Rev. 1 (1976).

admissibility of evidence concerning the past sexual behavior of the alleged victim.³ Unlike the federal rule, which applies only to rape and assault with the intent to commit rape, Mil. R. Evid. 412 applies to a wide variety of nonconsensual sexual offenses, hence protecting both male and female victims.⁴ Although "rape shield" provisions such as Mil. R. Evid. 412 are generally considered enlightened advancements of the judicial process, serious constitutional difficulties remain in their specific application. Defense counsel wishing to present evidence within the rule's definition should be familiar with the rule itself and with its constitutional limitations.

I. History

At common law, evidence of a rape victim's sexual history was always admissible. Three concepts supported this policy. The first was the fear of charges brought by vindictive women which could not easily be disproven. Second was the belief that an unchaste woman was inherently more likely to consent to sexual intercourse. The last was the thought that premarital or extramarital sex by a woman was inherently immoral and could be shown to impeach her general credibility as a witness.⁵ These antiquated concepts came from a time when a woman, considered the property of her husband or father, was not damaged by a rape unless she was chaste prior to the offense.⁶ In rejecting these concepts, modern

3. Mil. R. Evid. 412 is derived from Rule 412 of the Federal Rules of Evidence [hereinafter cited as Fed. R. Evid.] with changes to accommodate the special needs of the military and to correct problems in the federal rule perceived by the drafters of the military rule. Analysis, Mil. R. Evid. 412, Appendix 18, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

4. Mil. R. Evid. 412 (e). See Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 209 (1981) [hereinafter cited as Saltzburg, Schinasi and Schlueter]. This provision should avoid the equal protection challenge sometimes leveled at rape shield provisions. See Annot., A.L.R. 4th supra note 2, § 3.

5. See generally Tanford and Bocchino, supra note 2; Berger, supra note 2. "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman." State v. Sibley, 131 Mo. 519, 531-32, 33 S.W. 167, 171 (1895).

6. Tanford and Bocchino, supra note 2, at 546 n.6.

rape shield laws recognize that, as a practical matter, the admission of such evidence serves to try the victim rather than the accused, and discourages the reporting of an already under-reported offense.⁷ Juries are thought to be confused by such evidence, and unable to separate emotional derogatory information concerning the alleged victim from the factual issues they must decide.⁸

Prior to the adoption of Mil. R. Evid. 412, the military espoused the common law recognition that evidence of promiscuity could be relevant to the issue of consent.⁹ The new rule "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentation common to prosecutions of such offenses."¹⁰ Clearly the rule evinces a sincere intent to protect victims of sexual offenses from needless harrassment through cross-examination and the presentation of irrelevant, or only tangentially relevant, evidence.

7. The effect of rape shield provisions on the reporting of rape offenses, however, has been less than dramatic. See Tanford and Bocchino, supra note 2 at 571-73.

8. Analysis, Mil. R. Evid. 412, Appendix 18, MCM, 1969.

9. Paragraph 153b(2)(b), MCM, 1969 (amended 1980 by executive order 12198). See United States v. Chadd, 13 USCMA 438, 32 CMR 438 (1963); United States v. Ballard, 8 USCMA 561, 25 CMR 65 (1958); United States v. Lewis, 6 M.J. 581 (ACMR 1978). See also Annot. 95 A.L.R. 3d 1181 (1979) (compiling modern cases discussing whether, in rape cases, evidence of the complainant's reputation for unchastity is admissible on various issues).

10. Analysis, Mil. R. Evid. 412, Appendix 18, MCM, 1969. Because the federal rule, like that in the military, is intended to protect the privacy of the alleged victim, the United States Court of Appeals for the Fourth Circuit has held that an alleged victim may appeal under Fed. R. Evid. 412 a ruling of the trial judge allowing such evidence. Doe v. United States, 666 F.2d 43 (4th Cir. 1981).

II. Sixth Amendment Problems

The enactment of "rape shield" provisions has raised serious constitutional questions concerning their application in particular situations.¹¹ The major difficulty is reconciling the language of the rule with the accused's sixth amendment right to present evidence on his own behalf and to confront the witnesses against him.¹² The provision in Fed. R. Evid. 412 which provides for the admission of constitutionally required evidence was added in response to these concerns.¹³ Although the statute may be constitutionally applied in some instances, hence avoiding a facial challenge, there are many situations in which a literal application of the rule will pose serious problems.¹⁴

11. See Saltzburg and Redden, Federal Rules of Evidence Manual 102-108 (2d edition Supp. 1981) [hereinafter cited as Saltzburg and Redden]; Analysis, Mil. R. Evid. 412, Appendix 18, MCM, 1969; Saltzburg, Schinasi and Schlueter, supra note 4; Annot., 1 A.L.R. 4th supra note 2. There may also be a problem with the legislative intrusion into the judicial relevancy determination. See generally, Joiner and Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich. L. Rev. 623 (1957).

12. See Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129 (1968). The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." The right of an accused to compulsory process is not merely a right of access to the government's subpoena power, but an affirmative right to present defense testimony. Although it is not a right to present irrelevant testimony, defense evidence may not be limited by arbitrary rules preventing the admission of whole categories of probative defense evidence. U.S. Const. amend. VI; Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973); Jenkins v. Moore, 395 F.Supp. 1336 (E.D. Tenn.), aff'd, 513 F.2d 631 (6th Cir. 1975).

13. Saltzburg and Redden, supra note 10, at 102-108.

14. State courts have generally upheld rape shield statutes if they do not operate to exclude relevant evidence. Warren v. State, 272 Ark. 240, 613 S.W.2d 96 (1981); State v. Blue, 225 Kan. 576, 592 P.2d 879 (1979); People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); State v. Ball, 262 N.W.2d 278 (Iowa 1978). See Annot., A.L.R. 4th, supra note 2.

The confrontation clause similarly protects the right of the accused to cross-examine witnesses, and to present rebuttal evidence. In Davis v. Alaska,¹⁵ the Supreme Court held that a state law designed to preserve the confidentiality of juvenile criminal records violated the confrontation clause of the sixth amendment when applied to prohibit cross-examination of a government witness intended to reveal a motive to testify falsely. The Supreme Court did not dispute the validity of the state's interest in preserving the anonymity of juvenile offenders, but concluded that where "[s]erious damage to the State's case would have been a real possibility" if the cross-examination had been allowed, the accused's right to confrontation was "paramount to the State's policy of protecting a juvenile offender."¹⁶ The cross examination was deemed necessary "to show possible bias and prejudice . . . [which] . . . could have affected [the witness's] later in-court identification of petitioner."¹⁷

Mil. R. Evid. 412 is a limitation on the presentation of defense evidence and cross-examination. As such, it will be subject to scrutiny under the sixth amendment. Although the rule represents a valid societal interest, it may not be applied to frustrate an accused's legitimate attempt to present his defense.¹⁸

III. Application of the Rule

Mil. R. Evid. 412(a) purports to be an absolute prohibition on the admission of reputation or opinion evidence of the alleged victim's past

15. 415 U.S. 308 (1974).

16. Id. at 319.

17. Id. at 317. For other cases holding that the interests of the state must bow to the accused's right to cross-examination, see Smith v. Illinois, 390 U.S. 129 (1968) (refusal to allow defense to ask informant witness his true name violated the sixth amendment although informant admitted that the name under which he was testifying was false and defense attorney had formerly represented informant); Alford v. United States, 282 U.S. 687 (1931) (witness' right to be protected from exposure of his criminal record inferior to defendant's right to cross-examine witness concerning that record to show possible bias). See also Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 592 (1978).

18. However, "the quest for fair and just procedures is not necessarily served by the admission of all evidence that is offered by parties to litigation" Saltzburg and Redden, supra note 10, at 102.

sexual behavior. This section does not include the "constitutionally required" provision of section (b). It is curious, therefore, that the drafters should maintain that the provision should "not be interpreted as a rule of absolute privilege," but that "great care should be taken with respect to such evidence." The drafters state the obvious in observing that "[e]vidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in 412(a)."¹⁹

There is little modern support for the proposition that a victim with a reputation for promiscuity is generally more likely to consent indiscriminately to sexual relations, or is inherently less credible.²⁰ Generally, Mil. R. Evid. 412(a) should successfully exclude most such evidence. However, situations may arise in which the admission of such evidence is required notwithstanding the express prohibition of Mil. R. Evid. 412(a). Such a case arises when the defendant offers the evidence on an issue relevant to his defense. The military may have a special problem with 412(a). If the persons who were involved in prior sexual activity with the alleged victim are no longer in the military and cannot be located to enable the accused to present otherwise admissible evidence of specific conduct under Mil. R. Evid. 412(b), the accused may be in the position of having to present reputation or opinion evidence.²¹ A general area which has been recognized as one in which Mil. R. Evid. 412(a) evidence might be admissible is reputation evidence, known to the accused, offered to show that the accused believed that the alleged victim was consenting.²² Although reputation or opinion evidence will

19. Analysis, Mil. R. Evid. 412, Appendix 18, MCM, 1969. This statement invites a query whether the drafters needlessly included the "constitutionally required" section in 412(b) or whether they mistakenly excluded it in 412(a).

20. United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979); see Tanford and Bocchino, supra note 2, at 544-551.

21. Interestingly, this observation was made pursuant to an analysis of Fed. R. Evid. 412. See Saltzburg and Redden, supra note 11, at 103.

22. Berger, supra note 2, at 98-99. For a recent opinion holding that evidence of the defendant's state of mind as a result of what he knew of the complainant's reputation was admissible notwithstanding Fed. R. Evid. 412, see Doe v. United States, 666 F.2d 43 (4th Cir. 1981).

usually be irrelevant, other novel situations may be postulated in which evidence within the Mil. R. Evid. 412(a) definition should be admitted.²³

Mil. R. Evid. 412(b) restricts the admission of evidence concerning a victim's past sexual behavior other than evidence covered by Mil. R. Evid. 412(a). The provision generally will apply to evidence of specific acts.²⁴ Because this provision, unlike Mil. R. Evid. 412(a), includes excepted areas in which evidence may be admitted, it is thought to express a modern preference for evidence of specific acts over reputation and opinion evidence.²⁵ Mil. R. Evid. 412(b) contains two express exceptions. These allow the admission of evidence of past sexual behavior with persons other than the accused upon the issue of whether the accused was or was not the source of the semen or injury, and evidence of past sexual behavior with the accused upon the issue of consent.²⁶

23. For example, if the prosecution theory in a rape case was that the accused was motivated by the victim's virginal reputation, or by his belief that she was a virgin, the ability of the defense to present evidence that her reputation was otherwise would, presumably, be constitutionally protected. If the defense theory was that the alleged victim's scandalous reputation motivated her to describe as rape a consensual relationship with the accused, the accused should certainly be entitled to present evidence to establish that reputation. This latter example falls squarely within the rationale of *Davis v. Alaska*, 415 U.S. 308 (1974).

24. Saltzburg, Schinasi and Schlueter, supra note 4.

25. This preference may, eventually, lead to a revision of provisions like Mil. R. Evid. 405 (prefers reputation or opinion testimony to prove character over specific instances of conduct). Saltzburg and Redden, supra note 11, at 103.

26. Mil. R. Evid. 412(b)(2). These exceptions are among those recognized as relevant to legitimate defense pursuit. See *State v. LaClair*, 127 N.H. 743, 433 A.2d 1326 (1981) (statute could not be applied to exclude evidence that sperm in alleged victim's vagina was from source other than defendant); *Schockley v. State*, 585 S.W.2d 645 (Tenn. 1978) (statute could not be applied to exclude evidence in a rape case that a third party, instead of the defendant, was the father of the complainant's unborn child). See also Berger, supra note 2, at 98-99. The existence of these exceptions, however, will not immunize the defense from the exclusion of such evidence under Mil. R. Evid. 401, 402 or 403.

Mil. R. Evid. 412(b)(1) provides an exception for evidence that is "constitutionally required to be admitted." This exception is an attempt to save the rule from constitutional challenge.²⁷ The application of this section should be the subject of most of the litigation concerning Mil. R. Evid. 412. There are many types of evidence that are recognized as relevant to the defense of rape cases: (1) evidence of a distinctive pattern of conduct closely resembling the defendant's version of the encounter, to prove consent;²⁸ (2) evidence of prior sexual conduct of the alleged victim, known to the defendant, tending to prove that the defendant believed the complainant was consenting;²⁹ (3) evidence showing a motive to fabricate the charge, or showing bias or motive to

27. Saltzburg, Schinasi and Schlueter, supra note 4, at 207. Of course, "even without such a provision, Rule 412 could not take precedence over the Constitution." Saltzburg and Redden, supra note 11, at 105. See note 19, supra and accompanying text.

28. Berger, supra note 2, at 98-99. The following example considered during the legislative committee hearings on Fed. R. Evid. 412 may be found in Saltzburg and Redden, supra note 11, at 107.

A husband and wife allege that they were picked up by the defendant. They state that he ordered the husband out of the car at gun point and, after driving to a secluded spot, raped the wife. The defendant states that he picked up the hitch-hiking couple and shortly thereafter a bargain was struck: he would pay a certain sum of money, and in return the husband would get out of the car and the wife would engage in sexual intercourse with him. He adds that he did drop off the husband and had consensual sexual intercourse with the wife after driving to a secluded spot.

[T]he defense has evidence that on several nights preceding the incident in question the complaining witnesses hitch-hiked in that area, took rides with single men, bargained for an act of intercourse by the wife in exchange for money, and allowed such acts to take place after dropping off the husband and driving to a secluded spot.

29. Berger, supra note 2, at 98-99. This evidence will usually be a Mil. R. Evid. 412(a) problem. See note 22 supra and accompanying text.

testify falsely;³⁰ (4) evidence offered to rebut prosecution evidence concerning the complainant's sexual conduct;³¹ (5) evidence as the basis for expert testimony that the complainant fantasized the act;³² and (6) evidence of prior similar accusations of forcible sexual offenses by the complainant later admitted to have been consensual.³³ This list should not be considered exhaustive. Defense counsel should consider the admission of Mil. R. Evid. 412(b) evidence possible whenever such evidence is material to the defense theory of the case.

30. Berger, supra note 2, at 98-99. In *Commonwealth v. Joyce*, ___ Mass. ___, 415 N.E.2d 181 (1981), the Supreme Judicial Court of Massachusetts held that its rape shield statute could not be constitutionally applied to exclude evidence relevant to the defense's proof of the complainant's motive to testify falsely. In *Joyce* the defendant and the complainant were strangers. The defendant alleged that they had just engaged in consensual sexual acts in his automobile, and were naked, when a police car approached. The defendant intended to present evidence that the complainant had been found in similar situations on two prior occasions and, each time, had been arrested for prostitution. The defense intended to argue that she was induced to fabricate the rape story in this instance to explain her presence and condition in the defendant's vehicle. See also *State v. Jalo*, 27 Ore.App. 845, 557 P.2d 1359 (1976). Similarly, such evidence should be admissible if offered as prior inconsistent statements by the complaining witness. See *State v. LaClair*, supra note 26.

Another example from the legislative history involves a complainant whose sexual relationship with another is discovered by her fiancé, inducing her to allege that the relationship was forcible. Saltzburg and Redden, supra note 11, at 107. It is clear that an accused has a strong sixth amendment right to present evidence to show that a witness is biased or has a motive to testify falsely. *Davis v. Alaska*, 415 U.S. 308 (1974).

31. Berger, supra note 2, at 98-99.

32. Berger, supra note 2, at 98-99. But see *Government of Virgin Islands v. Scuito*, 623 F.2d 869 (3d Cir. 1980) (spirit of Fed. R. Evid. 412 cited to uphold trial court's denial of defense motion for a psychiatric examination).

33. Saltzburg and Redden, supra note 11, at 108.

Mil. R. Evid. 412(c) describes the procedure the defense must follow to present evidence under Mil. R. Evid. 412(b). This section is based upon, but differs from, the federal provision.³⁴ It recognizes the need for the court and the government to have appropriate notice that the evidence will be offered, and the need to have procedures and guidelines for determining its admissibility. It is this section, more than the substantive sections, to which defense counsel must pay particular attention. The best argument that the evidence is relevant and must constitutionally be admitted will be to no avail if the rule's procedural requirements are ignored.

Initially, Mil. R. Evid. 412(c)(1) requires that the defense serve notice upon the military judge and the trial counsel that evidence of specific acts, under Mil. R. Evid. 412(b), will be offered. The 15-day notice requirement in the federal rule, however, was rejected by the military in recognition of the military's stringent speedy trial requirements.³⁵ Under the military rule "[d]efense counsel should provide sufficient notice to facilitate litigation. If notice is late, a continuance is preferred to exculsion of the evidence."³⁶ The notice must be accompanied by an offer of proof sufficient to describe the evidence and explain the basis for its admission.³⁷ If the trial is before members the military judge will conduct an out-of-court hearing to determine the admissibility of the evidence.³⁸

34. Fed. R. Evid. 412(c).

35. Saltzburg, Schinasi and Schlueter, supra note 4, at 207.

36. Id. If such evidence is excluded because of defense counsel error, the case may be reversed because of ineffective counsel. To avoid this result, judges should favor a continuance rather than exclusion. Id. at 207-208.

37. Mil. R. Evid. 412(c)(2).

38. Id. There is probably no fifth amendment self-incrimination problem in requiring an accused to give notice before trial. See Williams v. Florida, 399 U.S. 78 (1970) (notice of alibi requirement not unconstitutional). But cf. Brooks v. Tennessee, 406 U.S. 605 (1972) (statute requiring defendant to testify first invalid).

The military judge shall determine that the evidence is admissible if it is relevant and if the probative value of the evidence outweighs the danger of unfair prejudice.³⁹ Commentators have suggested that the balance of the rule favors exclusion rather than admission, unlike Mil. R. Evid. 403.⁴⁰ Defense counsel may find themselves with the burden of establishing the relevancy of such evidence.⁴¹ The military rule has avoided a severe constitutional problem present in the federal rule by omitting the requirement that the judge resolve factual disputes in the evidence to determine admissibility.⁴²

The procedural requirements described in Mil. R. Evid. 412(c) only apply to evidence offered under Mil. R. Evid. 412(b). Because Mil. R. Evid. 412(a) presumes that reputation and opinion evidence will never be admissible, there is no procedure for the admission of such evidence. However, in an appropriate case, the defendant's right to present reputation or opinion evidence may be constitutionally protected.⁴³ In such a case it may be advisable for defense counsel to follow the procedural guidelines of Mil. R. Evid. 412(c), although the failure to do so should not result in the evidence's exclusion.

39. Mil. R. Evid. 412(c)(3). See also Mil. R. Evid. 401, 402 and 403; 6 Wigmore, Evidence in Trials at Common Law § 1864-65 (Chadbourn Rev. 1976).

40. See Salzburg and Redden, supra note 11, at 108.

41. Salzburg, Schinasi and Schlueter, supra note 11, at 208. However, constitutionally such a burden could not be so excessive as to operate as a per se exclusion. See Washington v. Texas, 388 U.S. 14 (1967).

42. Fed. R. Evid. 412(c)(2). This provision is thought to be violative of the sixth amendment's jury trial guarantee. Salzburg and Redden, supra note 11, at 105. Although that portion of the sixth amendment has not been held to apply to courts-martial, see O'Callahan v. Parker, 395 U.S. 258 (1969), the military accused has a corresponding right to have the facts determined by court-martial members. See United States v. Swain, 8 U.S.C.M.A. 387, 24 C.M.R. 197 (1957).

43. See notes 20-24 supra and accompanying text.

IV. United States v. Hollimon

The Army Court of Military Review issued its first interpretation of Mil. R. Evid. 412 in United States v. Hollimon.⁴⁴ In Hollimon the defense was prohibited, under Mil. R. Evid. 412(a), from presenting evidence regarding the alleged victim's reputation for unchastity.⁴⁵ On appeal, the appellant argued that Mil. R. Evid. 412(a) violates the sixth amendment because it does not provide for a relevancy determination prior to exclusion.⁴⁶ The Army Court rejected this argument, holding that because "Rule 412(a) was invoked to exclude only irrelevant evidence in this case, the appellant has not been deprived of any constitutional rights."⁴⁷ The court also held that "Rule 412 is no more than a specific application of the general principles of relevance in Rules 401 and 403."⁴⁸ The court's ruling that the accused's fifth and sixth amendment rights require that he "be permitted to introduce all relevant and admissible evidence" leaves room for the admission of relevant Mil. R. Evid. 412(a) evidence in an appropriate case.⁴⁹

Conclusion

The procedural effects of Mil. R. Evid. 412 may be more keenly felt by defense counsel than the substantive effects. Although Mil. R. Evid. 412 may not, constitutionally, operate to exclude relevant defense evidence, the rule will cause trial judges to scrutinize more closely the relevance of the evidence before admission. Additionally, defense counsel should be prepared to comply with the notice and proof requirements of

44. 12 M.J. 791 (ACMR 1982), pet. granted, 13 M.J. 242 (CMA 12 May. 1982).

45. The prohibited evidence was the testimony of four witnesses that the victim had a reputation for being a flirt, sexually "loose" and "easy," and that she was regarded as "sort of a whore." 12 M.J. at 792.

46. Id. This argument finds some support in Rule 412(a)'s lack of a procedure for the admission of "constitutionally required" evidence.

47. 12 M.J. at 793-794.

48. 12 M.J. at 793.

49. Id. The Court of Military Appeals has granted a petition challenging an evidentiary exclusion under Mil. R. Evid. 412(b). United States v. Colon-Angueira, pet. granted, 13 M.J. 117 (CMA 1982).

the rule to avoid waiver of the issue, and later charges of ineffectiveness. Counsel should not be discouraged by the literal meaning of the rule from advocating the admission of evidence considered relevant to their client's defense. Counsel should insure that the nature and relevance of the evidence are fully litigated to preserve the issue on appeal in the event of a denial. Generally, defense counsel should expect to confront, through Mil. R. Evid. 412, the hostile environment that surrounds the admission of victim-oriented evidence in virtually every American jurisdiction.

A COMPENDIUM OF POST-TRIAL CONSIDERATIONS
FOR TRIAL DEFENSE COUNSEL

by Captain Chuck R. Pardue*
and Edward J. Walinsky**

Although much of trial defense counsel's attention must be focused upon trial preparation, several important duties arise after trial.¹ These include such diverse actions as preparing legal memoranda in the form of briefs, rebuttals, and petitions for clemency, looking after the client's well-being while in confinement, and forwarding deferment requests in appropriate cases. The quality of counsel's post-trial advocacy may dramatically affect the client's potential for clemency or appellate relief.

I. Appellate Rights Forms

The appellate rights form has taken on new significance after the Court of Military Appeals' decision in United States v. Grostefon.² Not only is it a necessary means of ensuring that the client understands his right to appeal, but it now serves as an opportunity for trial defense counsel to direct the appellate court's attention to meritorious issues.

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1. United States v. Palenius, 2 M.J. 86 (CMA 1977). See paragraph D-2d, Appendix D, Dept. of Army Reg. 27-10, Legal Services - Military Justice (C.12 12 Dec. 73). See generally Shaw, Post-Trial Duties of Defense Counsel, The Army Lawyer, October 1974, 23-24. These duties may be reinterpreted by the Court of Military Appeals in United States v. Dupas, CM 440547, argued 17 Jun 82. See USCMA Watch, infra.

2. 12 M.J. 431 (CMA 1982).

Under Grostefon, appellate defense counsel are required to ensure that the Court is aware of all issues noted by the client.³ Moreover, the Court of Military Review must also specifically note its consideration of such issues, notwithstanding the statutory obligation of Article 66, Uniform Code of Military Justice,⁴ of the Court to independently review the record.

Even if a trial brief is not feasible, merely listing an issue which defense counsel believes to have merit will ensure its appellate consideration. Trial defense counsel must bear in mind, however, that appellate counsel are not obliged to submit lengthy briefs on these issues. If the issue is commonly raised or believed to be non-meritorious, a single headnote often suffices. This focuses the court's attention on the issue without the unnecessary expenditure of time. Thus, if the issue is novel or a "pet issue" defense counsel should submit an Article 38(c) brief. Be aware that appellate counsel may obtain waivers from clients when it is believed that presentation of the issue is fruitless or would otherwise detract from the brief. Regardless, Grostefon offers trial defense counsel an excellent opportunity to get an issue before the appellate courts. In raising issues on the appellate rights form, trial defense counsel should indicate the specific prejudice occasioned by the error, particularly when it relates to trial tactics or extra-record matters not readily apparent to those reading a cold record months after the trial. Of course, this is not a substitute for a brief filed under Article 38(c), UCMJ, which is always the preferred method of perceiving an issue raised at trial.

II. Appellate Powers of Attorney

Not only can counsel now ensure the Court of Military Review's consideration of certain issues, but they can facilitate a client's appeal to the Court of Military Appeals. In an appropriate case counsel can have a client submit a power of attorney authorizing the Defense Appellate Division to appeal the case to the Court of Military Appeals. This should be done only in cases where the defense counsel perceives a meritorious issue on appeal and where the accused is not going to the United States Disciplinary Barracks. Clients often move without giving appellate

3. See United States v. Rainey, No. 40507, ___ M.J. ___ (CMA 8 Jun 82) (Everett, C.J., dissenting at n. 1).

4. 20 U.S.C. § 866 (1976) [hereinafter UCMJ].

defense counsel notice of their new address. Without a power of attorney, an otherwise meritorious appeal may be foregone due to circumstances such as a lost change of address card. Although appeal is automatic to the Court of Military Review under Article 66, appeal to the Court of Military Appeals requires a signed petition by an accused. Thus, care should be taken to avoid obtaining a power from an accused who does not desire to petition the Court of Military Appeals. A sample power of attorney form is set forth at the conclusion of this article.

III. Deferment

In proper situations, consideration should be given to submitting a request for deferment of confinement to the convening authority as authorized by Article 57, UCMJ.⁵ In the application for deferment, the burden is clearly on the appellant to demonstrate that he or she will not flee to avoid the adjudged punishment, commit a serious crime, intimidate witnesses, or interfere with the judicial process.⁶

IV. Petition for Clemency

While the record of trial and the post-trial review are being written, defense counsel may prepare a petition for clemency.⁷ The same resources relied upon for the preparation of extenuation and mitigation evidence may also be used to support the clemency petition. Care should be taken to individualize and humanize the petition. Recommendations of clemency by the military judge or court members should specifically be brought to

5. See Paragraph 88f, Manual for Court-Martial, United States, 1969 (Revised edition); United States v. Brown, 6 M.J. 338 (CMA 1979).

6. See Beck v. Kuyk, 9 M.J. 714 (AFCMR 1980); United States v. Alicea-Baez, 7 M.J. 989 (ACMR 1979); Ross, Post-Trial Processing, The Army Lawyer, February 1982, 23-25 (covers the deferment issue from the perspective of the staff judge advocate); Serene, A Practical Approach to Requests for Deferment, 11 The Advocate 286 (a detailed analysis of the nuts and bolts of deferment).

7. The Court of Military Appeals has recently emphasized the importance of these and held that a failure to prepare a petition in an appropriate case may be held to be ineffective assistance of counsel. See United States v. Titsworth, 13 M.J. 147 (CMA 1982).

the attention of the convening authority. It may be appropriate to request an audience with the convening authority to personally plead your client's case. Some staff judge advocates insist that all matters to the convening authority be presented by the staff judge advocate and not other counsel, on the rationale that the staff judge advocate is the attorney for the convening authority.⁸ However, this policy ignores the unique duty of the convening authority to personally approve all findings and sentence. Since the convening authority has the discretionary power to give clemency, failing to appeal personally to that officer may waste a valuable opportunity to obtain significant relief for a client. As a matter of professional courtesy, however, requests for personal appearances before the convening authority should be coordinated with the Staff Judge Advocate. In special cases where the accused's parents have travelled far to the site of trial, you may try to arrange for them to visit personally with the convening authority to plead for clemency on behalf of their child.

The wide discretion possessed by convening authorities cannot be overemphasized. While the review of the staff judge advocate typically advises the convening authority of this power, it usually does so via "boilerplate." A convening authority can consider evidence otherwise inadmissible at trial, such as polygraph results, to reduce the findings of sentence.⁹ Such evidence can be combined effectively with extenuation and mitigation testimony. Counsel should take particular care to stress how a grant of clemency will benefit the command. One suggestion is to remind the convening authority that clemency power is a valuable prerogative of command, and that its exercise in an appropriate case enhances the impact of the commander as a leader. The petition has continuing importance. Although the Court of Military Review usually defers to the convening authority in determining a proper sentence, the petition for clemency remains part of the record and may serve as a basis for relief at the Court of Military Review.

8. See *Cooke v. Orser*, 12 M.J. 335, 339 (CMA 1982).

9. *United States v. Carr*, pet. granted, 13 M.J. 12 (CMA 1982); *United States v. Massey*, 5 USMA 514, 18 CMR 138 (1955).

V. Post-Trial Processing

During the immediate post-trial period, counsel should insure that the command is properly caring for the prisoner-client. Often the personal effects are lost during incarceration. Although the commanding officer has a duty to care for the personal property of the prisoner, defense counsel should insure that in appropriate cases the prisoner is referred to the legal assistance office for general advice concerning family problems and to execute a power of attorney to have someone take care of his personal property secured by the command. This action can help reduce claims for lost personal effects as well as reduce unnecessary hardships on the prisoners. This is also the time to explain to the adjudged prisoners the status of their benefits and their dependents' benefits as a result of the court-martial. Adjudged forfeitures of pay and allowances do not commence until the convening authority takes action on the court-martial. Other benefits such as medical care for dependents and use of commissary and post exchange privileges continue until the prisoner is discharged from the service.¹⁰

As newly-incarcerated prisoners often experience severe depression, positive advice by defense counsel at an early stage can do much to enhance the rehabilitation potential of prisoners. For those prisoners sentenced to lengthy periods of incarceration, matters concerning parole, good time, and clemency possibilities at the Disciplinary Barracks are very important and should be explained.¹¹

10. See Dept. of Army Pam. 608-2, Your Personal Affairs, (20 Oct. 1972).

11. See Dept. of Army Reg. 190-47, The United States Army Correctional System (1 Oct. 78). For information about the Army Clemency Board, see Dept. of Army Reg. 15-130, Army Clemency Board (15 Apr. 79).

Counsel should emphasize that the client still is a soldier. While most clients are understandably disenchanted with the Army, they still are entitled to its services. They should be discouraged from relying solely on defense counsel, whether trial or appellate, as their only contact with the Army. Their problems must still be considered in the proper channels: defense counsel are not finance officers, legal assistance directories, or commanders. By impressing upon clients the necessity of using "the system" and referring clients to the proper agency, trial defense counsel can save themselves from later having to serve in effect as general guardian for the client and involving themselves in areas that are more competently performed by others. However, in aggravated situations a letter from an attorney can do much to grease the wheels of a sometimes uncaring bureaucracy.

IV. Rebuttal to Post-Trial Review

Although originally intended to insure that the convening authority received complete, correct advice before he took action on a case,¹² the rebuttal to the review of the staff judge advocate now has legal ramifications on appeal. In many opinions, the Court of Military Review has buttressed a waiver decision with the observation that such issues were not mentioned in the Goode rebuttal.

Counsel's initial concern remains the same. As noted above, the convening authority should receive every possible input from the defense. Any error in the staff judge advocate's review will be deemed waived unless noted in rebuttal.¹³ In addition, it requires little additional effort to expand a Goode rebuttal into a meaningful Article 38(c) brief, thus giving significant help to the client's appeal.¹⁴

12. United States v. Goode, 1 M.J. 2 (CMA 1975).

13. See e.g., United States v. Myhrberg, 2 M.J. 534 (ACMR 1976).

14. See Shaw, The Article 38(c) Brief: A Renewed Vitality, The Army Lawyer, June 1975.

The importance of the rebuttal is further emphasized by regulatory provisions indicating that both it and the review are considered by correctional authorities in their parole determinations.¹⁵

VII. Appeals

Aside from the brief orientation given in conjunction with the information on appellate rights, trial defense counsel may find it helpful to give the clients a time frame for their appeal. A case with no legal issues could go through the system as follows:

Trial

Day	60	convening authority action
Day	90	record received in DAD
Day	105	pleading (alleging no errors) filed
Day	110	government reply
Day	120	Court of Military Review decision
Day	150	client notified
Day	160	client's appeal docketed at Court of Military Appeals
Day	175	pleading filed
Day	185	government reply
Day	220	Court of Military Appeals denial of petition
Day	240	client notified

In other words, it usually takes an absolute minimum of eight months for the case to be completely processed from the date of trial. Of course, when errors are raised the process takes much longer. Clients should be informed of the time-consuming nature of the appeals process. It is recommended that both counsel and client remain aware of the necessity to keep in constant communication with appellate defense attorneys. Not only is it easier to obtain answers to specific questions, but it facilitates a good working relationship in all relevant matters.

15. Paragraph 2-8b of Dept. of Army Reg. 27-10 Legal Services - Military Justice (26 Nov. 1968) mandates that a copy the review be forwarded expeditiously to the officer commanding the installation where the individual is incarcerated. The review of the Staff Judge Advocate is specifically mentioned as bearing on clemency in Paragraph 6-14b of Dept. of Army Reg. 190-47, The United States Army Correctional System (1 Oct. 78).

Besides the mandatory appeal of Article 66, UCMJ, two other avenues of appellate relief may be appropriate. The first involves petitions under Article 69, UCMJ, for those cases not covered under mandatory appeal.¹⁶ In other situations, a petition for new trial may be appropriate.¹⁷

VIII. Conclusion

The responsibilities of Palenius are not as weighty as they may appear. Common sense remains the primary rule: counsel should attend to their client's needs until appellate counsel are assigned to the case. Then, counsel should continue to assist clients in matters in which they are uniquely qualified. Between trial and appeal, the client deserves just as much representation as one who is actually in court. By monitoring the case post-trial and routinely availing oneself of all opportunities to benefit the client, trial defense counsel can satisfy Palenius and provide quality representation to his convicted clients. Continuing hands-on representation during this critical time is a valuable opportunity for trial defense counsel to enhance the workings of the military justice system.

16. See generally Glidden, "Article 69 'Appeals' - The Little Understood Remedy," 10 The Advocate 170 (1978).

17. Information may be gained from Carrle, "New Trial Petitions Under Article 73, UCMJ," 13 The Advocate 2 (1981). A future issue of The Advocate will provide a compendium of information about post-trial relief totally unconnected with the military appellate process. Trial defense counsel should be familiar with this issue, as questions involving matters such as post-trial upgrading of discharges, and relief in federal courts often arise. See also Reardon and Carroll, After the Dust Settles: Other Modes of Relief, 10 The Advocate 274 (1978).

UNITED STATES)

v.)

APPELLATE POWER
OF ATTORNEY

_____)

_____)
_____)

Know All Men by These Presents:

That I, _____, the accused in the above styled case, do hereby make, constitute, and appoint the Chief, Defense Appellate Division, U.S. Army Legal Services Agency, and all who may be appointed by or substituted for him, as my true and lawful appellate attorney to accept service on my behalf of any decision or order of the U.S. Army Court of Military Review, and to petition for further relief from such decision or order to the United States Court of Military Appeals, granting and giving my appellate attorney full authority and power to perform any and all other acts necessary or incident to the execution of the powers herein expressly granted.

Date

Signature of Accused

Subscribed and sworn to before me this ____ day of _____,
19 ____ at _____.

Signature of Defense Counsel

Name, Grade, Branch of Service

Note: Use of this form is optional in cases in which the accused is placed on excess leave pending completion of appellate review. If possible, it should be attached to the form certifying that the accused has been advised of his appellate rights and included in the record of trial. If completed at a later date, it may be sent directly to the Chief, Defense Appellate Division.

THE USE OF LEARNED SCIENTIFIC TREATISES
UNDER FEDERAL RULE OF EVIDENCE 803(3)*

***By Edward Imwinkelried*

It is a commonplace observation that the prosecution has much greater access to forensic science resources than the defense. The end result is that the prosecution offers forensic evidence far more frequently than the defense.

In one study, researchers found that the number of cases in which only the prosecution offered scientific evidence was seven times greater than the number of cases in which only the defense offered scientific evidence.¹ Thus, the imbalance in forensic resources markedly favors the prosecution.

However, a new hearsay exception recognized by the Federal Rules of Evidence can help defense counsel redress this imbalance. That exception is the learned treatise doctrine, stated in Federal Rule of Evidence 803(18):

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of...medicine...or science..., established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."

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Editors Note: Mil. R. Evid. 803(18) is identical to Fed. R. Evid. 803(18).

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1. Recent Development, 64 Cornell L. Rev. 875, 884 n. 45 (1979).

Until recently, only a few jurisdictions such as Alabama, California, Iowa, and Wisconsin subscribed to this exception.² However, in the past few years, the congressional enactment of the federal rules and 20 jurisdictions' decision to follow suit have led to widespread adoption of the learned treatise exception.

The exception can be an important defense tool because in effect it enables the defense to multiply the number of defense calls and qualifies one scientific expert, and in turn that expert can authenticate and read to the jury the work of other scientists supporting the defense position. The purpose of this article is to acquaint the reader with the rules governing the use of learned treatises and thereby enable the reader to achieve this multiplication effect.

THE FOUNDATION FOR INTRODUCING A LEARNED TREATISE

The treatise used can take many forms. In the words of the statute, "published treatise, periodicals, or pamphlets" can qualify. Most of the decided cases involve true treatises--that is, text books.³ However, articles in technical journals also fall within the exception.⁴ The courts have admitted articles from such publications as the American Medical Association Journal, Clinics of North America, Journal of Industrial Medicine, New England Journal of Medicine, and Mayo Clinics.⁵ Charts and data compilations in texts can similarly be admitted.⁶

2. *Bowers v. Garfield*, 382 F.Supp. 503, 507 (E.D. Pa. 1974); E. Immwinkelried, P. Giannelli, F. Gilligan and F. Lederer, *Criminal Evidence* 159-161 (1979).

3. E. Immwinkelried, *Id.*, at 160.

4. *United States v. Sene X Eleemosynary Corp., Inc.*, 449 F.Supp. 970, 975 (S.D. Fla. 1979).

5. Comment, *Learned Treatises as Direct Evidence: The Alabama Experience*, 1967 Duke L.J. 1169, 1182 n.53.

6. See, e.g., *United States v. Mangan*, 575 F.2d 32, 48 (2d Cir. 1978).

What testimony must the sponsoring witness give to authenticate the text as a learned treatise? The witness should first qualify himself or herself as an expert in the field. To qualify as an expert, the witness should be either a practitioner in the field or a professional school teacher or librarian.⁷ The witness should add that he or she is familiar with the author's professional reputation.⁸ The witness should then briefly describe the author's background, painting the author's credentials as impressively as possible. It is true that unless the witness is one of the author's colleagues, the witness' testimony probably will be based on hearsay sources of information. However, at this juncture the witness is not testifying about the ultimate historical merits of the case; rather the witness is testifying about preliminary, foundational matters. Federal Evidence Rule 104(a) provides that the technical exclusionary rules such as hearsay do not apply to preliminary testimony.

As an expert in the field, the witness should have access to reliable hearsay information such as professional directories stating the background of professionals in that field. If the witness vouches for the reliability of his or her sources, the judge should overrule any hearsay objection to the witness' description of the author's background.

Next, the witness should state that he or she is familiar with the work in question.⁹ The witness should specifically state that the text is the most recent edition of the work. In many scientific fields, the state of the art is advancing constantly; texts written only a few years before can be outdated by the time of trial. The witness then should describe the text's degree of recognition within the scientific field.¹⁰

7. E. Imwinkelried, supra note 2, at 161.

8. Briggs v. Zotos International, Inc., 357 F.Supp. 89, 93 (E.D. Va. 1973).

9. Id.

10. Hemingway v. Oschsner Clinic, 608 F.2d 1040, 1047 (5th Cir. 1979).

The witness must be prepared to vouch that the text is "reliable,"¹¹ "authoritative,"¹² or "standard."¹³ It is ideal if the witness can testify that most of the professional schools in the field use the work as a textbook, that practitioners frequently use the work as a reference book, and that the text is widely cited in the technical journals. Before trial, ask your witness to check his or her guide to professional periodicals; the judge and jurors will be impressed if the witness can testify that scholarly journal articles cited the work 20 times in the past year.

A sponsoring witness' testimony is the safest technique for laying the foundation for the treatise's use. However, note that the statute sanctions other methods of laying the foundation.¹⁴ If you know that a prosecution expert is both knowledgeable and honest, Rule 803(18) permits you to use the "admission of the (opposing) witness" to lay the foundation. Moreover, the statute expressly states that you may authenticate the text "by judicial notice."¹⁵ You can use the judicial notice technique only with very well-known texts.¹⁶

11. *Intercontinental Bulktank Corp. v. M/S Shinto Maru*, 422 F.Supp. 982, 988 n.22 (D. Or. 1976).

12. *Maggipinto v. Reichman*, 607 F.2d 621, 622 (3d Cir. 1979).

13. *Generella v. Weinberger*, 388 F.Supp. 1086, 1090 (E.D. Pa. 1974).

14. *Johnson v. William C. Ellise & Sons Iron Works, Inc.*, 609 F.2d 820, 822 (5th Cir. 1980).

15. *Hemingway*, supra 10, at 1047.

16. *E. Imwinkelried*, supra note 2, at 161.

THE INTRODUCTION OF A LEARNED TREATISE

There is a major controversy over the proper method of introducing a learned treatise. The last sentence of Rule 803(18) reads: "If admitted, the statements may be read into evidence but may not be received as exhibits" (emphasis added). The question of statutory construction is this: Does the rule forbid the judge's formal receipt of the treatise into evidence, or does the rule forbid merely the jury's physical receipt of the treatise?

At first, many commentators made the easy assumption that the rule forbade formal receipt and, hence, that the judge could not formally admit the treatise as an exhibit. Many trial judges proceeded on the same assumption; they permitted the sponsoring witness to read from the text into evidence.

Although many judges opted for this view, some judges insisted that the proponent at least mark the text for identification as an exhibit. These judges reasoned that even if the text could not be formally admitted, "marking is merely the customary method of identification."¹⁷

More recently, other courts have adopted the view that the treatise must be marked and formally admitted "in the same fashion as any other substantive evidence...."¹⁸ In *Maggipinto*, Judge Bechtle reasoned persuasively:

"[T]he language of Rule 803(18) tells us that something more is required of the proponent of evidence than merely asking the witness whether [s]he agrees with a statement in a treatise. By its terms, the Rule requires the proponent to establish to the satisfaction of the Court that the treatise is 'reliable authority,' and that must be ruled upon favorably by the court before the statement may be read into evidence in the presence of the jury. This requirement is essential if the court is to have control over the admissibility and presentation of evidence.

17. Johnson, supra note 14, at 823 n.1.

18. *Maggipinto v. Reichman*, 481 F.Supp. 547, 550 (E.D. Pa. 1979).

Similarly, such formalities are absolutely essential in order to permit opposing counsel to make a 'timely' and 'specific' objection. The last sentence of Rule 803(18) states: 'If admitted, the statements may be read into evidence but may not be received as exhibits.' The phrase 'If admitted' makes it clear that learned treatise material should be offered in the same fashion as any other substantive evidence...."¹⁹

In light of this division of authority, a defense counsel contemplating introducing a learned treatise at trial should ask point-blank at the pretrial chambers conference how the judge wants the counsel to introduce the treatise. The counsel should cite 803(18) and specifically tell the judge that the counsel wants to introduce the passages in the treatise as substantive evidence.²⁰ If counsel does not ask and the appellate court concludes that the counsel did not use the proper procedure, the court may unfortunately conclude that the counsel used the treatises purely as impeachment and not as substantive proof.²¹

AFTER ITS INTRODUCTION

After the counsel has introduced the treatise, what are its permissible uses and what are the restrictions on its use?

Immediately after its introduction, the counsel can ask the witness to read the pertinent passage to the jury.²² After the witness reads the pertinent passage, ask the witness to define any technical terms in

19. Id.

20. Maggipinto, supra note 12, at 623-624.

21. Id.

22. Maggipinto, supra note 18; Sene X Eleemosynary Corp., Inc., supra note 4, at 975.

the passage. Then ask the witness to explain the passage in his or her own words. Finally, inquire whether the witness agrees with the passage and, if so, why. This sequence of questions maximizes the comprehensibility and impact of the passage.

The counsel can resist the prosecutor's request for a limiting instruction that the text is being admitted only for whatever light it shed on the sponsoring witness' credibility. The text is not being admitted as credibility evidence; Rule 803(18) sanctions the text's use as substantive evidence of the facts recited in the passages read. Hence, the defense counsel can rely on the text's passages as the basis for an entitlement to an instruction on an affirmative defense. A plaintiff or prosecutor introducing a learned treatise can rely on passages read from an introduced treatise to resist a motion for a directed verdict.²³ By parity of reasoning, a defense counsel may use passages from the introduced treatises as part of the factual predicate for the entitlement to an instruction on a defense.

Although Rule 803(18) permits the rather liberal use of the treatise, there is one key restriction on the use of the treatise: The trial judge may not send the treatise into the jury room during deliberation.²⁴ The rationale for this restriction is "to prevent a jury from rifling through a learned treatise and drawing improper inferences from technical language it might not be able properly to understand without expert guidance."²⁵ However, if the judge errs, the appellate court will not automatically reverse; rather, the court will apply the harmless error doctrine and test for prejudice.²⁶

23. Maggipinto, supra note 18, at 552.

24. Id. at 550

25. Mangan, supra note 6, at 48 n.19.

26. Gordy v. City of Canton, 543 F.2d 558, 564 (5th Cir. 1977).

The overwhelming majority of cases cited in this article are civil decisions. There are very few reported decisions dealing with the use of learned treatises in prosecutions. It is clear at this juncture that the learned treatise exception can be invoked as readily in a prosecution as in a civil action. The paucity of reported criminal cases reflects a disturbing failure on the part of the criminal bar to realize the full potential of Rule 803(18). It is especially important for defense counsel to begin realizing that potential. The balance of power and resources in the criminal system is still weighted heavily in the prosecution's favor.²⁷ Rule 803(18) is a useful tool that can help defense counsel redress that imbalance in the field of forensic science, but to date that tool has been sadly neglected.

27. Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1148 (1960).

SEARCH AND SEIZURE: A PRIMER

Part Ten: Standing

I. Introduction

Before an individual may challenge a search as illegal under the fourth amendment, he must establish standing: he must prove that his personal fourth amendment rights have been violated.¹ Absent such a showing, the individual cannot contest the legality of the search and evidence obtained through the search may be used against him at trial.

A. History of the Standing Doctrine

Prior to 1978, an individual had standing to challenge a search if he was either legitimately on the searched premises or charged with a crime of possession.² In 1978, however, the Supreme Court, in Rakas v. Illinois,³ revolutionized the doctrine of standing under the fourth amendment by merging it into the test established for substantive fourth amendment rights by Katz v. United States.⁴ The decision in Rakas expressly disclaimed the "legitimately on the premises" test⁵ and held that an individual had standing only if he had a "legitimate expectation of privacy" in the place searched.⁶ This "legitimate expectation of privacy" test adopted the language the Court had used earlier in defining the scope of substantive fourth amendment rights.⁷ Two years after

1. Note, Standing up for Fourth Amendment Rights: Salvucci, Rawlings and the Reasonable Expectation of Privacy, 31 Case W. Res. L. Rev. 656, 656 (1981).

2. These two tests for standing were established by the Supreme Court in United States v. Jones, 362 U.S. 257 (1960).

3. 439 U.S. 128 (1978).

4. 389 U.S. 347 (1967). See Rakas v. Illinois, 439 U.S. at 139.

5. 439 U.S. at 142.

6. 439 U.S. at 143.

7. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), where the Supreme Court established a privacy standard for the protection of fourth amendment rights.

Rakas, in United States v. Salvucci,⁸ the Court specifically eliminated automatic standing for individuals charged with crimes of possession. Salvucci conclusively established that the sole test for determining standing is whether the accused had a "legitimate expectation of privacy in the property searched."⁹ The concept of standing is therefore "invariably intertwined" with and "subsumed under substantive fourth amendment doctrine."¹⁰

B. The Standing Doctrine Under Current Law

In determining whether an individual has a legitimate expectation of privacy for standing purposes, courts now focus on two discrete questions: (1) whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy, and (2) whether the individual's subjective expectation of privacy is reasonable.¹¹ Accordingly, the current expectation of privacy test requires an analysis of the specific

8. 448 U.S. 83 (1980).

9. See Rawlings v. Kentucky, 448 U.S. 98 (1980). See also Mil. R. Evid. 311(a)(2), which codifies the standing test established by Rakas, Rawlings and Salvucci.

10. Rakas v. Illinois, 439 U.S. at 139. For a more detailed discussion on the evolution of the fourth amendment standing doctrine and its relation to substantive fourth amendment law, see Gutterman, Fourth Amendment Privacy and Standing: Wherever the Twain Shall Meet, 60 N.C.L. Rev. 1, 47 (1981); Mickenburg, Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back, 16 New/Eng. L. Rev. 197 (1980); Note, Standing up for fourth amendment Rights; Salvucci, Rawlings and the Reasonable Expectation of Privacy, 31 Case W. Res. L. Rev. 656 (1981).

11. See Smith v. Maryland, 442 U.S. 735, 740 (1979) where the Court uses the two step approach set forth in Katz v. United States, 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring) to determine whether an individual has a legitimate expectation of privacy that has been invaded by government action. See generally, Rakas v. Illinois, 439 U.S. 128, 143 n. 12 (1978) (legitimate expectation of privacy by definition means more than a subjective expectation of not being discovered); United States Ramaparam, 632 F.2d 1149 (4th Cir. 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 1739 (1981); United States v. Middleton, 10 M.J. 123 (CMA 1981).

facts of each case. In Rawlings v. Kentucky,¹² however, the Court noted certain factors which may evince an expectation of privacy: (1) whether the individual had possessory rights in the property searched or the item seized; (2) whether the individual had the right to exclude others from the area searched; and (3) whether the individual took normal precautions to maintain his privacy.¹³ While these factors are not determinative, they provide a useful touchstone for deciding whether a defendant has standing to suppress unlawfully seized evidence both in cases where the evidence was seized from the premises of another and where the government seeks to admit evidence against the defendant after having seized it from the person or custody of another.¹⁴

II. Standing Based on Possessory Interest in the Premises Searched¹⁵

The courts have consistently found that a person who owns or leases a residence and resides there has standing to contest a search of those premises.¹⁶ Similarly, an individual who does not have a traditional

12. 448 U.S. 98 (1980).

13. Id. at 104-105.

14. This primer will focus on those situations where an individual's privacy interest is subject to question. Since an individual clearly has standing to object to a search of his person and to a seizure of any items found on his person, these fact situations will not be discussed.

15. The Court in Rawlings v. Kentucky, 448 U.S. 98 (1980), made clear that mere legal possession of a seized item does not confer standing for fourth amendment purposes. The individual challenging the seizure of the item must have an expectation of privacy in the area searched.

16. Alderman v. United States, 394 U.S. 165 (1969); United States v. Hansen, 652 F.2d 1374 (10th Cir. 1981); United States v. Lacey, 502 F.Supp. 1021 (D. Vt. 1980).

property interest in the area searched, but whose dominion over the area is coextensive with that of the owner, has standing to challenge a government invasion of that area.¹⁷

The courts have also found that an individual inhabiting a residence temporarily has a legitimate expectation of privacy.¹⁸ The privacy expectations of a temporary visitor are distinguishable from those held by a mere "casual visitor"¹⁹ who has no expectation of privacy for fourth amendment purposes.²⁰ The cases, however, do not provide any definitive guidelines for ascertaining when an individual is a temporary rather than a casual visitor. For example, in United States v. Bell,²¹ the defendant was the sole occupant of a one-room apartment searched by police. Although he was present merely "by invitation," the court held that he had standing to contest a search of the apartment.²² Accordingly, if a client had

17. United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979), cert. denied, 444 U.S. 955 (1979) (person driving automobile owned by another had standing when he had permission to use it and had the right to exclude others); United States v. Burnett, 493 F. Supp. 948 (N.D.N.Y. 1980), aff'd, 652 F.2d 55 (2d Cir. 1981); United States v. Kesteloot, 6 M.J. 706 (NCFR 1978), aff'd, 8 M.J. 209 (CMA 1980). But see United States v. Glasgow, 658 F.2d 1036 (5th Cir. 1981) (person who drove van periodically had no standing).

18. United States v. Robertson, 606 F.2d 853 (9th Cir. 1979) (defendant had standing when spent night in room, stored belongings there and was present when police arrived); United States v. Bell, 488 F. Supp. 371 (D.D.C. 1980); United States v. Gomez, 498 F. Supp. 992 (S.D.N.Y. 1979), aff'd on other grounds, 633 F.2d 999 (2d Cir. 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 1695 (1981) (defendant watching apartment during tenant's absence had standing).

19. United States v. Meyer, 656 F.2d 979, 981 (5th Cir. 1981); United States v. Vicknair, 610 F.2d 372 (5th Cir. 1980), cert. denied, 449 U.S. 823 (1980).

20. "This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." Rakas v. Illinois, 439 U.S. at 142 n.11 (1978).

21. 488 F. Supp. 371 (D.D.C. 1980).

22. Id. at 373. See also United States v. Gould, ___ M.J. ___ (ACMR 12 April 1982) (accused who visited fellow servicemember in barracks and had stayed overnight on occasion had limited expectation of privacy in barracks room, but that expectation did not extend to interior of dresser).

been visiting a home that was searched and evidence obtained during the search is offered against the client, counsel should vigorously assert any facts which indicate that the visit was more than "casual."²³

The only time a guest is clearly precluded from asserting a legitimate expectation of privacy in an area is when the guest is a passenger in an automobile and is attempting to challenge a search of the vehicle.²⁴ This individual, however, is not completely without relief. Although a passenger does not have privacy expectations in the vehicle itself, the Army Court of Military Review, in United States v. Duckworth,²⁵ found that a passenger did have standing to contest the detention of a vehicle as an illegal seizure of his person. Determining that the vehicle had been illegally detained and thus the passenger illegally seized, the court granted a motion to suppress evidence discovered during a search of the vehicle, finding that the evidence was fruit²⁶ of the illegal seizure and therefore inadmissible against the passenger.²⁷

23. The case of United States v. Bell, 488 F. Supp. 371 (D.D.C. 1980), suggests that whatever rule may ostensibly be used to determine standing a test similar to the "legitimately on the premises" test established by Jones v. United States, 362 U.S. 257 (1960), may actually be applied in certain situations. Under this test anyone legitimately on the premises during a search has standing to challenge the legality of the search.

24. Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Cardone, 524 F. Supp. 45 (1981); United States v. Duckworth, 9 M.J. 861 (ACMR 1980).

25. 9 M.J. 861 (ACMR 1980).

26. See Wong Sun v. United States, 371 U.S. 471 (1963).

27. Id. at 865.

III. Standing when Item Seized From Third Party

It is axiomatic that an individual cannot assert a violation of another person's fourth amendment rights.²⁸ Moreover, a person generally has no legitimate expectation of privacy in items or information he voluntarily turns over to a third party.²⁹ By entrusting an item to another, an individual assumes the risk that the item may be turned over to the authorities. His expectation of privacy is thus fatally compromised.³⁰

28. Alderman v. United States, 394 U.S. 165 (1969). The principle that fourth amendment rights may not be vicariously asserted holds true even when the probable cause to search an accused's home is based upon evidence obtained in a prior illegal search of a third party's home. Although the accused clearly has standing to challenge the search of his premises, he cannot litigate the legality of the first search. See e.g., United States v. Hansen, 652 F.2d 1374 (10th Cir. 1981).

29. Smith v. Maryland, 442 U.S. at 734-44 (1979). See also United States v. Payner, 447 U.S. 727 (1980); United States v. Williams, 639 F.2d 1311 (5th Cir. 1981), cert. granted, ___ U.S. ___, 102 S.Ct. 565 (1981); United States v. DeLeon, 641 F.2d 330 (5th Cir. 1981) (no expectation of privacy in plastic bag possessed by co-conspirators); United States v. Mountain States Telephone & Telegraph Co., 516 F. Supp. 225 (D. Wyo. 1981).

30. Thus, for example, in United States v. Miller, 13 M.J. 75 (CMA 1982), the Court of Military Appeals found an accused had no standing to contest a search of his field jacket when he had left it in a friend's car. See also Smith v. Maryland, 442 U.S. 735 (1979); United States v. Sanford, 12 M.J. 170 (CMA 1981).

This general rule is subject to certain exceptions. If an individual has entrusted an item to another, the court may still find he has retained a sufficient expectation of privacy for fourth amendment purposes if he has taken precautions to preserve the confidentiality of the property.³¹ In United States v. Sanford,³² the accused gave Owens a leather pouch to "hold for him" as he was being taken to see his battery commander. A sergeant from Sanford's battery made Owens surrender the pouch. An inspection of the pouch revealed marijuana. The court held that Sanford had no standing to contest the search, but its analysis of the legitimate expectation of privacy doctrine sets forth two alternative arguments by which an accused may establish standing to suppress evidence that he entrusted to, and which was seized from, a third party.

A. Expectation of Privacy in Third Party's Custody of Item

In Sanford the court held first that the accused would have had standing to contest the seizure of the pouch if he could have shown that sufficient precautions were taken when the pouch was given to Owens to ensure that Owens would not give it to anyone else. Sanford could not sustain this burden.³³

31. Rawlings v. Kentucky, 448 U.S. 98 (1980).

32. 12 M.J. 170 (CMA 1981).

33. 12 M.J. at 174. This was because he had simply thrust the pouch upon Owens without making any arrangements regarding the terms of Owens' custody. The Court characterized Sanford's actions as creating no more than a precipitous bailment. Sanford had no means of insuring that the pouch would not be seized by a third party. Moreover, the transfer of the pouch in plain view of a government official made any expectation of privacy on Sanford's part purely subjective. The Court did not discuss what additional factors would have altered its conclusion.

Other cases in this area also fail to identify what is sufficient to sustain an expectation of privacy in another person's custody of an item. Only those arrangements held to be insufficient have been explored. In Rawlings v. Kentucky,³⁴ for example, an accused tried to assert standing to contest the seizure of drugs he had "dumped" into a woman's purse.³⁵ The accused had never sought or received access to the purse prior to this sudden bailment.³⁶ The Court, finding that the accused had no expectation of privacy in the purse, emphasized the precipitous nature of the bailment and the accused's inability to exclude others from access to the purse.³⁷ Similarly, in Sanford the Court of Military Appeals emphasized that Sanford's "gratuitous request for Owens to keep his property was no more than a precipitous bailment incapable of providing any realistic expectation . . . [of] privacy."³⁸ While neither Rawlings nor Sanford explicitly identifies the type of entrustment sufficient to support a legitimate expectation of privacy, the language used by the courts implicitly suggests that as a bailment becomes more formal and limited, an individual is more likely to be able to show he maintained a privacy expectation in an item entrusted to another.

34. 448 U.S. 90 (1980).

35. 448 U.S. at 105.

36. Id.

37. Id.

38. 12 M.J. at 174.

B. Expectation of Privacy Sustained By Nature of Item

Although Sanford had no standing to challenge the seizure of the pouch, the court held in the alternative that Sanford could challenge the search of the pouch if he could show a legitimate expectation of privacy in the contents of the pouch. The court recognized that some items by their very nature manifest the owner's expectation that they will not be opened without his consent.³⁹ This expectation is not abrogated simply by a transfer of physical possession. In Sanford's case, the court held that the inherent confidentiality of the pouch was compromised since the pouch was unlocked when Sanford gave it to Owen.⁴⁰

Sanford is best explained by its particular facts. While an item may by itself evince an expectation of privacy, that expectation may be undermined by other factors. In Sanford the court's decision reveals that the accused disclaimed ownership of the pouch.⁴¹ This fact, coupled with the precipitous nature of Owens' custody, subsumed any privacy expectations Sanford may have had in the pouch itself.

39. Conversely, some items by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13 (1979). Standing was not an issue in *Arkansas v. Sanders*, but as an observation regarding privacy expectations the Court's comment is relevant to the present discussion.

40. But see *United States v. Zohfeld*, CM 439833 (ACMR 2 Sept 1981). In *Zohfeld*, the accused stored stolen goods in his neighbor's home. The CID searched the neighbor's home and found some stolen items, plus luggage belonging to the accused. The CID opened the luggage, discovering more stolen goods. The court held that the items found in the luggage should not have been admitted into evidence.

41. By disclaiming any ownership interest in the pouch, Sanford abandoned any expectation of privacy he might have had. For cases holding that when an individual abandons property he loses his expectation of privacy see *United States v. Diggs*, 649 F.2d 731 (9th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 516 (1981); *United States v. Veatch*, 647 F.2d 995 (9th Cir. 1981); *United States v. Kendall*, 655 F.2d 199 (9th Cir. 1981); *United States v. Kozak*, 9 M.J. 929 (ACMR 1980), pet. granted, 10 M.J. 198 (CMA 1980).

IV. The Law of Standing in the Special Military Context

A. Privacy Expectations in Military Quarters

In the military setting an individual's privacy is continually subject to reasonable intrusions by the government, as exemplified by cases concerning the expectation of privacy a servicemember has in his barracks room.

As an initial proposition, an individual's expectation of privacy in his quarters is subject to the physical configuration of the barracks. A servicemember has no expectation of privacy in an area which is subject to the scrutiny of passersby.⁴² Moreover, an individual's expectation of

42. See United States v. Lewis, 11 M.J. 188 (CMA 1981) (no legitimate expectation of privacy in barracks room when passersby could view contents of room through window); United States v. Davis, 6 M.J. 874 (ACMR 1979), pet. denied, 8 M.J. 234 (CMA 1980) (no expectation of privacy in room adjoining accused's room, thus no expectation of privacy from one standing in that room viewing accused's room); United States v. Webb, 4 M.J. 613 (NCOMR 1977) (no reasonable expectation of privacy in cubicle in NCO quarters divided from other cubicles by lockers but not separated by barriers from open passageway). A servicemember also typically has no standing to contest the search of common areas. United States v. Peters, 11 M.J. 901 (AFCMR 1981); United States v. Bailey, 3 M.J. 799 (ACMR 1977), pet. denied, 4 M.J. 149 (CMA 1977). See also United States v. McCullough, 11 M.J. 599 (AFCMR 1981) (no standing to challenge search of train compartments common to all).

privacy may be altered by the policies of his command. If a company has a rule requiring the doors to rooms be left open, a serviceman's expectation of privacy in the room is limited.⁴³ While barracks are the equivalent of a servicemember's home,⁴⁴ they are still government property and to the extent a military policy legitimately opens the barracks to public view an individual's expectation of privacy is lessened.⁴⁵ The power of the government to limit expectations of privacy is most closely examined in cases dealing with searches and seizures during military inspections.

In United States v. Middleton,⁴⁶ the Court of Military Appeals considered whether a servicemember retains any expectation of privacy during an inspection. The court concluded that "no servicemember whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection."⁴⁹ Even if the servicemember did believe that his property would be immune from inspection, "society would not be willing to honor that expectation."⁴⁸ Accordingly, during a legitimate health and welfare inspection,⁴⁹ the area of the inspection becomes "public" as to the commanding officer.⁵⁰

43. United States v. Cunningham, 11 M.J. 242 (CMA 1981) (policy requiring doors left open to room places occupants on notice that no reasonable expectation of privacy exists); United States v. Lewis, 11 M.J. 188 (CMA 1981).

44. United States v. Hines, 5 M.J. 916 (ACMR 1978), pet. denied, 6 M.J. 250 (CMA 1979).

45. United States v. Simmons, 22 USQMA 288, 46 CMR 288 (1973); United States v. Hines, 5 M.J. 916 (ACMR 1978), pet. denied, 6 M.J. 250 (CMA 1979).

46. 10 M.J. 123 (CMA 1981).

47. Id. at 128.

48. Id.

49. The Court of Military Appeals premised its analysis upon the assumption that the traditional military inspection is a reasonable intrusion which a servicemember expects and which society tolerates. If the inspection is not reasonable the intrusion is no longer justified. 10 M.J. at 128 n. 10.

50. Id. at 128.

Middleton does not hold that once a valid health and welfare inspection has begun a servicemember loses all reasonable expectations of privacy in the barracks,⁵¹ but that the boundaries of the privacy expectation are delineated by the scope of the inspection. Thus in Middleton, the accused retained an expectation of privacy in his locker since the commander had not required his personnel to open their lockers for the inspection.⁵²

In United States v. Brown⁵³ the Court of Military Appeals affirmed its holding in Middleton. The court emphasized, however, that the scope of the inspection is not defined solely in terms of the area searched but also in terms of the purpose of the search. In Brown, a health and welfare inspection was conducted for the purpose of checking equipment and uncovering explosives or similar contraband. During the inspection the inspecting officer removed a folded piece of paper from the pocket of the accused's jacket and scrutinized it. As a result of this action, the officer seized certain bonds from the accused, which were later discovered to be stolen. The court held that the accused had standing to contest the initial search since the purpose of the inspection would not properly lead to the removal of the paper from the jacket pocket.⁵⁴

51. See United States v. Brown, 12 M.J. 420 (CMA 1982) where the Court of Military Appeals stated that its holding in Middleton should not be interpreted so broadly.

52. 10 M.J. at 132.

53. 12 M.J. 420 (CMA 1982).

54. See also United States v. Van Hoose, 11 M.J. 878 (AFQMR 1981) (information found as result of unfolding napkin on defendant's desk during health and welfare inspection violated defendant's reasonable expectation of privacy).

Construed together, the holdings of Middleton and Brown indicate that during an inspection the servicemember loses his expectation of privacy with regard to that property which is reasonably within the purpose of the inspection and which is within the area to be inspected.

B. Privacy Expectations in Government Issued Property

The servicemember's privacy expectation is not limited by governmental interests only with respect to inspections of his quarters. The government also retains an interest in property issued for the soldier's use. While a soldier may claim a reasonable expectation of privacy in equipment issued solely for his personal use,⁵⁵ a servicemember appears to have no legitimate expectation of privacy in property issued for use in the performance of official duties.⁵⁶ For example, in United States v. McClelland⁵⁷ the Army Court of Military Review held that a servicemember had no expectation of privacy in a briefcase issued for official use. Additionally, the Court of Military Appeals in United States v. Weshenfelder⁵⁸ held that a servicemember did not possess an expectation of privacy in an unlocked government desk. In each of these cases, however, the accused did not attempt to secure the item from possible inspection.⁵⁹ Consequently, whether the decisions are based upon the fact the property was issued for official use or upon the failure of the

55. United States v. Bowles, 7 M.J. 735 (AFCMR 1979), pet. denied, 8 M.J. 177 (CMA 1979) (reasonable expectation of privacy in flight bag issued for individual use). See also United States v. Simmons, 22 USCMA 288, 46 CMR 288 (1973) (dicta).

56. United States v. Weshenfelder, 20 USCMA 416, 43 CMR 256 (1977); United States v. McClelland, 49 CMR 557 (ACMR 1974), pet. denied, 49 CMR 889 (CMA 1975); United States v. Taylor, 5 M.J. 669 (ACMR 1978), aff'd, 8 M.J. 98 (CMA 1979) (no standing to challenge search of typewriter well in unit mailroom).

57. 49 CMR 557 (ACMR 1974), pet. denied, 49 CMR 889 (CMA 1975).

58. 20 USCMA 416, 43 CMR 256 (1977).

59. In United States v. McClelland, 49 CMR 557 (ACMR 1974), pet. denied, 49 CMR 889 (CMA 1975), the evidence demonstrated that the defendant's co-workers often looked through the briefcase.

individuals to take precautions to preserve their privacy interests remains unclear. Defense counsel should be aware of this ambiguity and argue that an expectation of privacy exists even in property issued for official use when a defendant has taken steps to assert exclusive control over the property.

V. Conclusion

The legitimate expectation of privacy test is easily defined but it does not provide a clear analytic framework for determining whether an accused has standing to contest a search. In both the military and civilian context, an accused's ability to establish standing to contest the legality of a search is dependent upon showing facts which evince the accused's intent to retain his privacy in either the place searched or the items seized. Although the cases may be categorized to identify situations where an accused typically succeeds in making this showing, defense counsel must still engage in a case-by-case analysis to insure that his client has acted consistently with his privacy expectations.

SIDE BAR

A Compilation of Suggested Defense Strategies

Perjured Testimony

In United States v. Logan, ___ M.J. ___ (ACMR 13 April 1982), the findings of guilty to housebreaking, assault with intent to commit rape and indecent exposure were set aside where the trial counsel used false and misleading testimony at trial. The key issue in the case was the credibility of the accused and the prosecutrix, the accused claiming that the act of intercourse had been consensual. The accused testified that they had smoked marijuana in her room before they had intercourse. She testified that she had not smoked marijuana with the accused and, furthermore, that she had never smoked marijuana. The victim's roommate testified during defense cross-examination that the victim smoked marijuana often, and had smoked it on the evening of the incident. During a recess, the prosecutrix admitted to the trial counsel that she had smoked marijuana, but not with the accused. Rather than notify the military judge of this matter, the trial counsel elicited from another roommate that she had never seen the victim use marijuana. The trial counsel referred to this testimony during his closing argument in order to buttress the credibility of the alleged victim. While the judge deliberated on findings, the trial counsel informed the defense counsel of the false testimony. The defense counsel did not notify the military judge of this matter, although he later submitted a post-trial petition for rehearing to the convening authority.

The trial counsel should have corrected the perjured testimony or notified the military judge. Instead, he perpetuated the false impression that the victim had never smoked marijuana through the cross-examination of the second roommate and used this testimony in support of the victim's credibility during final argument. This conduct violated the trial counsel's fundamental duty to "seek justice, not merely to convict." ABA Standards for Criminal Justice, the Prosecution Function § 1.1(c) [hereinafter ABA Standards]. See also ABA Standards § 5.60. In the final analysis, the trial counsel perpetuated evidence which he knew to be false. See ABA Code of Professional Responsibility, DR 7-102(A)(6).

It was the trial counsel's action in perpetuating the falsehood that led the Court not to apply the waiver doctrine, and to set aside the findings of guilty. However, the Court warned that waiver could be applied where a defense counsel, having notice of false testimony, is deliberately inactive. As an officer of the court, the defense counsel has an independent duty to immediately notify the military judge of the perjured testimony. ABA Code of Professional Responsibility, DR 7-102(B)(2).

Both tactically and ethically, it is in the best interests of the trial defense counsel immediately to notify the military judge when it is brought to his or her attention that perjured testimony has been presented in court by the prosecution.

Drug Field Tests

The reliability of drug field tests is the subject of much debate. Defense counsel should strongly oppose any attempt by the government to introduce the results of a field test to prove the identity of a substance. Dept. of Army Field Manual 19-20, Law Enforcement Investigations (April 1977), states that "field tests are extremely reliable as a negative test (no drug present). The reliability as positive tests varies in degree between the different tests and this changes from time to time as cutting agents which interfere with the tests (that is, five false positives) are sometimes added or sold in illicit drug traffic." Also, "[i]t should be emphasized that many non-controlled substances give color reactions similar to those given by controlled substances." Id. at 414-15.

In a recent U.S. Army Legal Services Agency seminar conducted by a CID special agent, it was observed that freeze dried iced tea would show positive for hashish under a Becton-Dickenson field test.

The Navy Court of Review, in United States v. Lafontant, NMCMR 80-2843 (31 December 1981) (unpub.), found the results of a drug field test for LSD not to be admissible as a chemical test. At the trial, the defense counsel had strongly opposed the introduction of such evidence, and presented stipulated testimony from a professor of chemistry, who was a recognized authority in the field of drug identification, as to the lack of reliability of the Becton-Dickenson test as a positive test for identifying a substance as LSD.

Drug Simulations

Defense counsel frequently face the situation in a drug case where the undercover agent purports to "simulate" the use of an illegal drug, usually marijuana, in the course of an investigation of an accused. The applicable regulation is para. 2-15, CID Reg. 195-8, Criminal Investigation-Drug Suppression Program, 1 December 1978, which prohibits the use of illegal substances by special agents while in a covert status except when under "extreme conditions of physical duress." The regulation also allows simulation when "in the agent's judgment failure to do so would place them in great jeopardy of physical harm or would lead to their identification as CID special agents." (Emphasis added). The regulation also requires the prompt reporting of each act of simulation and an inquiry initiated by the USACIDC unit commander. This regulation is currently under revision and will apparently be expanded to include military police investigators.

Excluding Prior State Convictions

Counsel often attempt to exclude prior convictions from use in sentencing by arguing that:

- (1) the prior conviction was not properly authenticated,
- (2) the prior conviction was not final, or
- (3) the prior conviction is defective.

In a recent court-martial, United States v. Mallery, CM 441974, a state record of conviction was successfully challenged at trial on the ground that it was insufficient on its face in the sense that it did not identify the offense with sufficient specificity, as required by state law. The record reflected that the accused was convicted of attempted burglary, but the specific subsection of the state code was not noted. Since this offense could range from attempted burglary of a coin-operated machine, a misdemeanor under state law, to the attempted burglary of a building, a felony, it was impossible to determine specifically what the accused was convicted of by examining the face of the record.

Conditional Guilty Pleas

In previous issues of The Advocate we have encouraged defense counsel to attempt to preserve issues for appeal which would normally be waived by a guilty plea through the use of conditional guilty pleas, see Vitaris, The Guilty Plea's Impact on Appellate Review, 13 The Advocate 236, 245-46 (1981); "Side Bar," 12 The Advocate 39-40 (1980); "Side Bar," 11 The Advocate 93-94 (1979). Since then, however, the Army Court of Military

Review has disapproved of the use of the conditional guilty plea, holding that a guilty plea based on such an understanding is improvident. United States v. Mallett, ___ M.J. ___ (ACMR 22 March 1982); United States v. Higa, 12 M.J. 1008 (ACMR 1982). See also United States v. Peters, 11 M.J. 875 (NMCMR 1981). Consequently, the Criminal Law Division has advised the various SJA's through TWX message (Conditional Pretrial Agreements, 6 April 1982) that "it appears to be inappropriate for SJA's to recommend approval of pretrial agreements containing such language or which otherwise attempt to circumvent MRE 311(1)."

In United States v. Schaffer, 12 M.J. 425, 428 n. 6 (CMA 1982), decided the same day as Mallett, the Court of Military Appeals cited The Advocate's guidance with approval, and observed that there is some military precedent for the use of the conditional guilty plea. Id., citing United States v. Williams, 41 CMR 426 (ACMR 1969). The TWX message from the Criminal Law Division does not address Schaffer. In light of Schaffer, defense counsel should continue to attempt to negotiate conditional guilty pleas in appropriate circumstances, and argue that Mallett, Higa, and Peters, have not been followed by the Court of Military Appeals.

Furthermore, in Trial Judiciary Memorandum 82-12, 26 March 1982, the Chief Trial Judge of the Army Judiciary warned that Chief Judge Everett's acknowledgement in Schaffer that some civilian jurisdictions allow pre-trial agreements which preserve some motions for appeal should not be used as a basis for action, since such a provision is "not currently authorized in court-martial practice." Citing United States v. Mallett, ___ M.J. ___ (ACMR 22 March 1982).

Recently, COMA has given another indication that conditional guilty pleas may be countenanced in certain situations. In United States v. Bethke, 13 M.J. 71 (CMA 1982), due to error committed by the military judge, the record of trial was returned for a limited hearing on a suppression motion, while the appellant was allowed to persist in his guilty plea.

As a result, counsel may anticipate substantial resistance from both the SJA's and military judges, when such a pretrial agreement is attempted; but nevertheless, should persist in such efforts. Alternatively, counsel should make use of confessional stipulations to preserve pretrial motions.

The Court of Military Appeals also has addressed favorably the use of negotiated stipulations of fact. 12 M.J. at 428 n.6, citing "Side Bar," 12 The Advocate 165-66 (1980); "Side Bar," 12 The Advocate 87 (1980). The use

of confessional stipulations in conjunction with a plea of not guilty and a pretrial agreement has been approved. See United States v. Barden, 9 M.J. 621 (ACMR 1980).

Use of Hypnotically-Enhanced Evidence

Although the admissibility of testimony enhanced by hypnosis in a court-martial has not been addressed by either the Army Court of Military Review or the United States Court of Appeals* defense counsel should be aware that the CID has promulgated a regulation governing the use of hypnosis in interviewing witnesses and victims. (Appendix Q, CID Reg. 195-1, Criminal Investigation-CID Operations (C.2, 1 January 1980)). The CID considers hypnosis a helpful tool to assist a willing witness or victim in recalling details which they could not otherwise remember. However, because hypnosis is expensive, time consuming, and may result in disqualification of the witness, it is unlikely that approval will be given for hypnosis interviews except in instances where the witness has seen or heard critical details which are essential to the solution of a case. The CID regional commander is the approval authority for requests to conduct interviews under hypnosis.

Once approved, the interview is conducted by mental health professionals (psychiatrists, clinical psychologists, or psychiatric social workers) who hold membership in the American Society of Clinical Hypnosis (ASCH), the Society of Clinical and Experimental Hypnosis (SCEH), or the International Society of Hypnosis (ISH). The interview is video-taped, and the regulation cautions that great care must be taken in asking non-leading questions so as to avoid "confabulation," the tendency every individual has to "fill in gaps" in memory with suggested responses. A CID agent may be present and ask questions during the interview, but the regulation requires that he not possess detailed knowledge of the case.

The use of hypnosis interviews is important to trial defense counsel in two distinct ways. First, trial defense counsel should be aware that the use of a hypnosis interview may act to disqualify the individual from testifying at trial. Compare People v. Shirley, 30 Crim. L. Rep. (BNA) 2485 (Cal. Sup. Ct. 1982) with Collins v. Supreme Court, 31 Crim.L.

* The admissibility of "hypnotically refreshed testimony" may be decided by the Army Court of Military Review in United States v. Harrington, CM 442125, which is presently before the Court on appeal.

Rep.(BNA) 2155 (Ariz. Sup. Ct. 1982) and Chapman v. State, 30 Crim. L. Rep.(BNA) 2335 (Wyo. Sup. Ct. 1982). Therefore, counsel must insure that the testimony of any government witness who has undergone a hypnosis interview is received only over his strenuous objection.

On the other hand, trial defense counsel may in certain highly unusual circumstances wish to suggest the use of a hypnosis interview if he or she believes that such an interview might result in exculpatory testimony and no other investigative technique has produced the desired evidence. The likelihood that such a request would be honored appears remote because all requests are closely coordinated by the staff judge advocate, and the individual with whom the hypnosis interview is desired will often be needed by the government as a witness at trial. Given the possibility for subsequent disqualification of that potential witness, trial counsel will undoubtedly be somewhat hesitant to recommend approval of the defense request. However, because the law is so unsettled in this area, the denial of the request itself, if properly preserved by timely objection at trial, may create a viable issue on appeal if military appellate courts determine that testimony which has been enhanced through hypnosis is admissible at trial.

DAD Policy Concerning Allegations of Inadequacy of Trial Defense Counsel.

The subject of "inadequacy of counsel" is one that can sometimes polarize appellate and trial defense counsels. The following memorandum, which has been issued to every counsel in the defense appellate division, is included here, to provide counsel in the field better insight as to the division's policy concerning such allegations.

"1. The following guidelines are to be employed by all DAD attorneys before raising the issue of inadequacy of trial defense counsel:

a. Allegations of inadequacy of trial defense counsel (TDC) will be fully investigated. See ABA Standards for Criminal Justice: The Defense Function, Standard 4-8.6 (2d ed. 1980); United States v. Crooks, 4 M.J. 563 (ACMR 1977). Counsel must elicit from the appellant specific facts as to the manner and extent of any alleged inadequacy. Communications with the appellant should specifically address the particular delict of TDC and should show, where appropriate, wherein lies the harm. For example, if appellant indicates that his TDC told him not to take the stand, exactly how would appellant's testimony have contributed to the defense theory; or if TDC failed to call witnesses requested by the appellant, who were they and what would have been their testimony. Also ascertain if the client knows why TDC took that particular course of action.

b. The appellant will be advised that allegations of inadequate representation will, to the extent necessary to defend against the ineffectiveness allegation, probably result in a waiver of the attorney-client privilege with his TDC (see ABA Code of Professional Responsibility, DR 4-101(c)(4)); that the TDC will be contacted and allowed to respond prior to appellate counsel's decision to raise the matter as an error; that if the issue is raised, the government will probably contact and obtain TDC's version of the matter; and finally, that inadequacy is seldom a "winning error."

c. Upon receipt of written allegations of inadequacy, the action attorney will review the allegations with the branch chief and, where matters which might constitute a valid claim exist, i.e., not clearly frivolous, will forward a copy to the TDC for comment. JALS Form Letter 865, subject: Allegation of Inadequate Representation, (page 0-6, DAD Desk Book), will be used. As a matter of professional courtesy and to lessen the "shock" of receipt of the letter, appellate counsel may wish to telephonically alert TDC.

(1) In cases of representation at trial by more than one counsel, comments/corroborations should be elicited from each attorney even though his or her conduct may not be challenged by the appellant. Quite often, military TDC can provide enlightening comments on the trial tactics and behavior of civilian DC.

(2) Correspondence to civilian defense counsel practicing overseas (non-APO mail) will be distinctly marked as airmail correspondence. See para. B-6b(3), page B-9, DAD Desk Book.

d. If TDC fails to reply within 20 days, follow-up action will be taken, to include telephone calls, certified letters, etc., as appropriate. Chief, DAD, will be advised if TDC does not reply or otherwise refuses to cooperate. If appropriate, Chief, TDS will be advised by XO or Chief of DAD of nonresponsiveness by TDC. As a last resort, appellate counsel should consider seeking the court's assistance. United States v. Crooks, *supra*. The obligation of TDC to make his file available and to respond to inquiries from DAD counsel and the relationship between GAD counsel and TDC is currently pending in United States v. Dupas, CM 440507, issues specified, No. 43197 (CMA 3 June 1982).

e. If the client's allegations are frivolous or unfounded, i.e., no factual or legal support, the action attorney will so advise the client. If the client persists in his theory, and does not withdraw the allegation, counsel should, after consulting with his/her branch chief, file a Grostefon brief. United States v. Grostefon, 12 M.J. 431 (1982).

f. Where the allegations of inadequacy are rebutted, but a legitimate dispute remains, the client and TDC will be so advised, and consistent with Part VIII of the ABA Defense Function Standards, supra, appellate counsel will prepare pleadings to be filed for the Court's decision.

g. The affidavits of the client and the TDC will normally be filed with the pleadings.

h. Any claim of inadequacy will be coordinated with the Executive Officer and Chief of DAD prior to filing the pleadings."

* * * * *

A recent record of trial received in the Defense Appellate Division contained an allegation by the trial defense counsel that an Army psychiatrist had received a letter (which was reportedly sent to all Army psychiatrists worldwide) directing him not to find that an individual lacked the "substantial" capacity to appreciate the criminality of his acts or to conform his conduct to the requirements of the law unless 70% of the individual's capacity was impaired by a mental disease or defect. The implication of such a standard would cast doubt upon the validity of many sanity board conclusions and defense counsel may wish to explore the issue with government psychiatrists at the trial level. A follow-up report will be published; any defense attorney with further information concerning this matter should contact the Side Bar Editor at Autovon 289-2248.

* * * * *

Signing Your Client's Rights Away?

A recent unpublished opinion contains a warning for counsel in the field who may be asked to sign a receipt form for the post-trial review which contains a waiver clause. Writing the opinion for the court in United States v. Trees, CM 442339 (ACMR 28 June 1982) (unpub.), Judge Hanft stated:

When a copy of the post-trial review was served on the trial defense counsel, that officer signed an acknowledgment of receipt which contained the words, "Any error which I do not comment upon will be waived." As we previously pointed out in a case wherein the action was taken by this same jurisdiction, United States v. Jernigan, SPCM 16014 (ACMR 27 Jan. 1982) (unpub.), such was an incorrect statement of the law, for failure to comment "will normally be deemed a waiver of any error in the review." United States v. Goode, 1 M.J. 3, 6 (CMA

1975) (emphasis added). As the concept of waiver seems to have taken on a new life, trial defense counsel would be well-advised to line out such incorrect statements of the law lest they sign away the rights of their clients.

Counsel should consider lining out the offending waiver clause when signing the receipt form, or take the time to set forth all perceived errors in a rebuttal to the post-trial review.

USCMA WATCH

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

INTRODUCTION

On 17 June 1982 the Court of Military Appeals heard argument on a motion to compel discovery in the case of United States v. Dupas, ACMR 440507, argument and briefs ordered on motion, ___ M.J. ___ (CMA 3 June 1982). The argument addressed the relationship between trial defense counsel and government appellate counsel when adequacy of trial defense counsel is an issue on appeal. The extent to which a trial defense counsel must cooperate with appellate defense counsel, and the limits on his level of cooperation with government counsel were the primary subjects before the court.

In other cases of note, the government certified the question of whether a staff judge advocate and convening authority should be disqualified from review and action where a prosecution witness was given clemency in exchange for his testimony, in light of Mil. R. Evid. 607, which allows a party to impeach his own witness. United States v. Flowers, ACMR 440061, certif. for rev. filed (CMA 14 April 1982). The government also certified the question whether the rule requiring dismissal of a conspiracy charge after a sole co-conspirator has been acquitted should be retained when civilian jurisdictions appear to be abandoning it. United States v. Garcia, ACMR 16493, certif. for rev. filed (CMA 19 May 1982).

SUMMARY DISPOSITIONS

In United States v. Hancock, ACMR 16313, pet. granted with summary reversal, ___ M.J. ___ (CMA 28 April 1982) the court dismissed as multiplicitous a charge of AWOL which the court found "initiated the escape from custody alleged in the Specification of Charge I."

Assault with a dangerous weapon was ruled multiplicitious with rape in United States v. Culmer, ACRM 440492, pet. granted with summary reversal, ___ M.J. ___ (CMA 24 May 1982).

GRANTED ISSUES

JURISDICTION: Appellate Review

The Army Court of Military Review currently consists of four panels of three judges each. Each panel independently reviews the cases assigned to it under Article 66, UCMJ, and is bound in precedent only by the decision of the Army Court sitting en banc and of the Court of Military Appeals. In United States v. Vines, ACRM 15488, pet. granted, ___ M.J. ___ (CMA 28 April 1982) the court agreed to decide whether the referral of a case to a specific panel for review is a jurisdictional limit that will render void its inadvertent review by the wrong panel.

JURISDICTION: Level of Court

In United States v. Glover, ACRM 440953, pet. granted, ___ M.J. ___ (CMA 9 June 1982) the court will decide whether the level of court designated by the orders convening it controls over the order referring charges to trial by a higher level of court. In this case the charges were referred for trial by general court-martial but the convening order creating the court that heard the case convened the court as a special court-martial. The sentence adjudged exceeded the jurisdictional limit of a special court-martial.

JURISDICTION: Status of Forces Agreement

The extent to which the United States Army's power to court-martial a soldier may be curtailed by a trial in foreign state will be examined by the Court of Military Appeals in United States v. Miller, 12 M.J. 836 (ACMR 1982). Miller was arrested for the murder of a Korean national in June 1979. Pursuant to the Korean Status of Forces Agreement, the Korean

authorities tried, convicted and sentenced the appellant in a Korean trial court. While the appellant's case was on appeal in the Korean court system, martial law was declared and after a delay of eleven months a Korean appellate court held that it was without power to adjudicate appellant's case further and dismissed the case. The basis of the Korean Court's decision was a provision in the Korean Status of Forces Agreement [SOFA] which provided that jurisdiction over all United States Military personnel reverted to the United States in the event of a declaration of martial law.

The question which the United States Court of Military Appeals must determine is whether another provision in the Korean SOFA barring retrial by either the sending or receiving state after a trial by the other state (Paragraph 8, Article XXII, Korean SOFA) is applicable in this case. The government argued and the Army Court of Military Review found that the Korean appellate court decision voided all prior court proceedings in the Korean Court system and therefore paragraph 8, Article XXII did not apply. 12 M.J. at 840. Paragraph 8, Article XXII appears in almost identical form in most of the Status of Forces Agreements presently in force. E.g. United States v. Stokes, 12 M.J. 229 (CMA 1982); United States v. Cadenhead, 14 USCMA 271, 34 CMR 51 (1963).

POST-TRIAL REVIEW: Action on Remand

A defense counsel has the right to rebut a staff judge advocate's review of a court-martial and advice on sentence. United States v. Goode, 1 M.J. 3 (CMA 1975). In United States v. Dowell, 12 M.J. 768 (ACMR 1982), pet. granted, ___ M.J. ___ (CMA 28 May 1982) the court will decide whether the same right accrues to the trial defense counsel when a case is remanded after appeal for a rehearing on sentence or sentence reassessment, and the staff judge advocate advises the convening authority that the sentence be reassessed to avoid a rehearing.

CERTIFIED ISSUES

POST-TRIAL REVIEW: Disqualification of Convening Authority

In United States v. Siena-Albino, 23 USCMA 63, 48 CMR 534 (1974), the Court of Military Appeals held that (1) a convening authority is disqualified to review and act upon a record if he has knowledge of a subordinate commander's grant of clemency to a prosecution witness,

although such knowledge does not arise until after trial; and (2) a staff judge advocate is disqualified to review a record if a grant of clemency is negotiated by trial counsel, absent evidence that the agreement was negotiated without the blessing of the staff judge advocate. In United States v. Flowers, 13 M.J. 571 (ACMR 1982), certif. for rev. filed, M.J. ____ (CMA 1982), the court will reconsider these rules. The government argues that the repudiation of the evidentiary "voucher" rule under Mil. R. Evid. 607 (allowing counsel to impeach his own witness) invalidates the "voucher" aspects of Sierra-Albino. The defense counters that the issue relates to predisposition and prosecutorial function rather than "voucher."

CONSPIRACY: Acquittal of co-conspirator

The general rule that the acquittal of all other alleged co-conspirators mandates the acquittal of the remaining co-conspirator has been certified in the cases of United States v. Steward, CM 441587, certif. for rev. filed 13 May 1982, and United States v. Garcia, SPCM 16493, certif. for rev. filed 19 May 1982. The government argues that the military approach is outmoded, and not consistent with the concert of individualized trials. The defense responded that stare decisis compels the continuation of the present rule absent compelling circumstances.

REPORTED ARGUMENTS

APPELLATE REVIEW: Adequacy of Remedy

To what extent can the Court of Military Appeals review a remedy granted by the Army Court of Military Review after that court reassessed the sentence based on an error of law? That was the issue in United States v. Lenoir, CM 440430 pet. granted, 11 M.J. 408 (CMA 1981), argued 11 May 1982. The defense successfully argued at the Army Court of Military Review that a court member displayed an inelastic attitude towards sentencing and should not have sat on the sentencing portion of appellant's case after a plea of guilty had been accepted. Contrary to the defense position, however, the court reassessed the sentence instead of authorizing a rehearing. While the government contested the validity of Army Court of Military Review's decision on the merits, the judges of the Court of Military Appeals questioned their ability to overturn this facet of the decision.

EVIDENCE: Hearsay

INSTRUCTIONS: Court members

Two diverse questions concerned the court in United States v. Gaeta, SPCM 14387, pet. granted, 11 M.J. 343 (CMA 1981), argued 13 May 1982. The appellant initially contested the Army Court of Military Review's failure to hold inadmissible hearsay testimony prejudicial. The government replied that ACMR was wrong in holding it inadmissible and that it nevertheless was non-prejudicial. The second issue concerned the trial judge's failure to give a conspiracy instruction mandated by United States v. Pinkerton, 328 U.S. 640 (1946). In Pinkerton the Supreme Court held that in order to convict a conspirator of an offense committed by a co-conspirator, solely on the basis of their participation in the conspiracy, such an instruction must be given. In the instant case, appellant was arguably guilty as an aider and abettor, but the Army Court of Military Review affirmed under Pinkerton, implicitly rejecting the only theory instructed upon at trial. Appellant defense counsel argued for total dismissal of this contested charge with a rehearing with proper instructions as an alternative. The government disagreed, claiming proper instructions as well as actual guilt under either theory. Judge Fletcher expressed concern over whether a separate Pinkerton instruction is necessary, inasmuch as there is no standard instruction in the military. Counsel should, therefore, formulate an instruction to be used in appropriate situations.

TRIAL: Duties of counsel

In United States v. Menoken, SPCM 15412, pet. granted, 11 M.J. 347 (CMA 1981), argued 12 May 1982, a very narrow question of a military judge's abuse of discretion in denying a defense request for a three-day continuance to re-interview a potential defense witness bloomed, during oral argument, into a wide-ranging exploration of the trial and post-trial obligations of defense counsel as well as the obligations of appellate defense and government counsel.

At trial, following government rebuttal to the accused's mistake of fact testimony, the trial defense counsel sought a continuance in order to discuss the accused's assertions with a witness (an NCO) who was then stationed half a world away. When the request was denied, the trial defense counsel did not make an offer of proof, attack the military judge's actions in his rebuttal to the post-trial review, or submit an

Article 38(c), UCMJ, brief. Oral argument before the COMA was not scheduled until nearly a year after the issue was granted, yet neither government appellate counsel nor defense appellate counsel re-interviewed the witness to determine if he would provide the defense which the accused asserted at trial. Repeated questions by the court focused attention on the lack of development of the appellant's factual assertions at trial and on appeal. The court may reinforce the duties of trial advocates to fully develop the factual basis for a question on appeal. Both appellate counsel argued that they were bound by the narrow legal issue specified by the court and defense counsel argued that further factual assertions were irrelevant, a position seemingly adopted by Judge Fletcher.

EVIDENCE: Tainted Confession

In United States v. Wynn, 11 M.J. 536 (ACMR 1981), pet. granted, 11 M.J. 461 (CMA 1981), argued 13 May 1982, the Court of Military Appeals will consider the degree to which a second confession, obtained 19 days after an illegal apprehension and first confession, was tainted by the primary illegality. The Army Court of Military Review held the apprehension illegal and ruled that the first confession was inadmissible, but felt that the taint from that illegally admitted evidence was attenuated by the 19 intervening days, and the co-accused's confession.

Appellant argued that attenuation is determined by the totality of the circumstances, not merely the single factor of time. In this case, the same agent called the accused in to "go over the rough spots in his first confession" and thus the police conduct was really a continuation of the first confession and was nothing more than a fishing expedition.

The government argued that the police mistake in this case was made in good faith, that the exclusionary rule should not be applied to such situations, and that, by the time of the second interrogation, they had probable cause because of the co-accused's confession. The court appeared to find the government's argument non-persuasive and questioned counsel whether the United States v. Nargi, 2 M.J. 96 (CMA 1977) "cat out of bag" doctrine creates a presumption of taint, the alleviation of which must be determined by the trial court.

RIGHT TO COUNSEL: Adequacy, Counsel's Work Product, Government Appellate Division's Representation of Counsel

United States v. Dupas, ACMR 440507, arguments and briefs ordered on motion, M.J. (CMA 2 Apr 1982) concerned the alleged inadequacy of trial defense counsel. Appellate defense counsel contacted the trial defense counsel and requested that the trial defense counsel answer interrogatories concerning the allegations and provide the appellate defense counsel with the trial case file. The trial defense counsel did not respond to the request and the appellate defense counsel filed a motion with the Army Court of Military Review to compel a response from the trial defense counsel. Government appellate counsel opposed the defense motion and advised the Army Court of Military Review the GAD counsel stood in an attorney-client relationship with the trial defense counsel as against the defense motion to compel discovery. GAD counsel may also have advised the trial defense counsel not to respond to the defense interrogatories. An affidavit from the trial defense counsel which was partially responsive to the accused's allegations was submitted as a Government Appellate Exhibit. The Army Court of Military Review denied the defense motion to compel discovery and decided the issue of ineffective assistance of counsel adversely to the accused. In response to a defense motion to the Court of Military of Appeals to compel discovery regarding the nature and circumstances of the GAD counsel's contact and relationship with the trial defense counsel, the Court of Military of Appeals specified the following questions: (1) Whether this Court may properly direct discovery concerning communications between government appellate counsel and trial defense counsel? (2) What relationship, if any, exists between appellate government counsel and trial defense counsel whose effectiveness has been questioned by an accused on appeal? (3) To what extent may a trial defense counsel deny access to his file to appellate defense counsel who is challenging on appeal the effective assistance of counsel at trial?

Government and Defense Appellate counsel submitted briefs on the above specified questions and the United States Army Trial Defense Service submitted an amicus brief addressing the third specified question.

The questions from the Court indicated that the judges were most troubled by the appearance of a relationship between government appellate counsel and trial defense counsel which was adverse to the accused. The court also appeared to be concerned with what it perceived to be government interference in the three-way relationship among the accused and his

trial and appellate counsel and questioned the authority of government counsel to interpose himself into that relationship. Counsel for the government argued that when ineffective assistance of the trial defense counsel is alleged, it is often necessary for government appellate counsel to contact the trial defense counsel to obtain information to rebut the allegations. The government also argued that the trial defense counsel's case file was protected from discovery as it was the attorney's work product.

The court noted that the practice in civilian proceedings in which the effectiveness of counsel is raised in a habeas corpus action is to direct a hearing in which evidence is received on the matter. Questions were asked of counsel regarding the feasibility of a similar type of hearing to resolve such allegations in the course of military appeals. See United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967). The Court also observed that the general rule is that a client has an interest in the case file maintained by his attorney and that the attorney is required to turn his client's file over to a successor attorney.

PROVIDENCY: Maximum Sentence

INSTRUCTIONS: Maximum Sentence

Are threats communicated during an aggravated assault a separate offense? In United States v. Baker, ACOMR 440082, pet. granted, 11 M.J. 473 (CMA 1981), argued 23 June 1982, the court will decide if the "single impulse" test of United States v. Kleinhans, 14 USCMA 496, 34 CMR 276 (1964), incorporated into the Manual at para. 76a5(b) should be applied where an accused assaults and threatens a victim trying to obtain a ride. The government believed that the standard Manual test (para. 76a5) from Blockburger v. United States, 284 U.S. 299 (1932), should be applied, and as each offense required proof of a different element, they were not multiplicitous. Defense relied on the unified object of the threats and assault to establish the single impulse, and cited United States v. Leader, 13 M.J. 36 (CMA 1982) (summary disposition) as authority. The government contended that a summary disposition was not precedential authority. The Court questioned this, and asked what a summary disposition was in that case.

If the offenses are multiplicitous, is appellant's plea improvident? Appellant's negotiated plea for 20 months was based on the incorrect maximum of 6 1/2 years. Appellant argued that an agreement for 26% of the maximum (20 months of 6 1/2 years) is substantially different that

one for 48% (20 months of 3 1/2 years). United States v. Harden, 1 M.J. 258 (CMA 1976). Judge Cook wondered if the true comparison should consider the reduction of a charged indecent assault to assault and battery (5 years vs. 6 months) as well as the difference between 6 1/2 years and 3 1/2 years. The government agreed, and also argued that United States v. Hunt, 10 M.J. 222 (CMA 1981), shows appellant's plea to be provident, as the sentence limitation was substantial no matter which maximum considered (8, 6 1/2 or 3 1/2 years). It also argued that appellant would have dealt for 20 months out of 3 1/2 years. Appellate defense counsel questioned how anyone could know what an accused would do in light of a different maximum possible period of confinement. Defense also compared the substantial limitation in Hunt (9 months out of a possible legal maximum of 3 1/2 years, 21%) to that in this case (48%).

Judge Fletcher asked the defense if any case had overruled United States v. Wheeler, 17 USCMA 274, 38 CMR 72 (CMA 1967), as to a military judge's duty to properly instruct on sentence, which was answered in the negative. Discussion then focused on the appropriate remedy if the plea was provident despite a misapprehension as to maximum punishment. It was agreed that some form of sentence relief would be required due to the erroneous instructions on sentencing.

CASE NOTES

Synopses of Selected Military, Federal and State Court Decisions

COURTS OF MILITARY REVIEW DECISIONS

COURT MEMBERS: Challenge for Cause

United States v. Meadows, SPCM 15959 (ACMR 11 May 1982) (ADC: CPT CARRLE).

On voir dire the court members indicated a predisposition to adjudge a punitive discharge. They did so, however, after the trial defense counsel had disclosed matters aggravating the offense, i.e., a previous conviction by special court-martial. The court held that challenges for cause of those members who were disposed to adjudge a discharge were properly denied. The members are "not required to remain neutral after hearing evidence in aggravation."

EVIDENCE: Relevance; Unfair Prejudice

United States v. Wirth, NMCM 81 1021 (NMCMR 21 April 1982) (ADC: LT DELMAR, USN).

Wirth was convicted of three counts of indecent acts with a child. The government in its case in chief introduced evidence of post-event symptoms manifested by one of the children. The court held that such evidence was relevant as circumstantial evidence that an assault had taken place and was not more prejudicial than probative. Two defense witnesses testified that Wirth was not sexually aroused by small children. In rebuttal, the government presented a statement by the accused that he enjoyed having his wife dress like a little girl while they made love. The court ruled that this evidence was relevant to motive and intent and properly rebutted the evidence presented by the defense.

FEDERAL COURT DECISIONS

EVIDENCE: Marital Privilege

United States v. Neal, 532 F.Supp 942 (D. Colo. 1982).

Neal had a conversation with his wife on the telephone. An FBI agent listened to and taped the conversation without Neal's knowledge but with the consent of his wife. The court held that the FBI agent could not testify to the contents of the conversation, nor could the tape be admitted to the jury. However, Mrs. Neal could testify since her right to refuse was personal to her. No "presence-of-a-third-party" exception for the marital

communications privilege allowed admission of the agent's testimony or the tapes where the defendant invoking the confidential communications privilege did not know of the third party's presence.

EVIDENCE: Uncharged Misconduct

United States v. Qamar, 671 F.2d 732 (2d Cir. 1982).

The court categorically rejected defense arguments that evidence of uncharged threats against prosecution witnesses were governed by special rules and should be admitted only in exceptional circumstances. The balancing test of Fed. R. Evid. 403 is applied as with all other cases of uncharged misconduct. In this case, a conflict between the testimony of Qamar and the threatened witness made that witness's credibility a central issue. Under these circumstances, the threats were admissible to explain why the witness spoke "in an almost inaudible voice, . . . quickly . . . [and] display[ed] on the stand some tendencies to want to get . . . the questioning over with." Id. at 736.

WITNESSES: Compulsory Process

United States v. Armijo-Martinez, 669 F.2d 1131 (6th Cir. 1982).

The defendants were charged with transporting 18 illegal aliens into the United States. The government offered voluntary departure to 14 of them and paid their travel expenses to Mexico before the defendants' attorneys were able to interview them. The court dismissed the charges, holding that where the defendants' rights to compulsory process as to these potential witnesses was obviated by the government's action, only a "very low threshold" showing of prejudice was required by the defense.

STATE COURT DECISIONS

ARGUMENT: Sentencing

Prado v. State, 626 S.W.2d 775 (Tex. Crim. App. 1982).

The prosecuting attorney made a sentencing argument to the jury during which he referred to the jury, himself and "everybody else in the community" as a group. He then said, "there are over a million people that stand between him and the penitentiary. They'd want him to go there if they knew what he did." The court rejected the government's contention that this was merely telling the jury that they were the conscience of the community and concluded that the prosecutor was attempting to speak for the community, asking the jury to lend the community "an ear . . . rather than a voice."

Overwhelming evidence of guilt made this harmless error, and the case was affirmed.

EVIDENCE: Polygraphs

State v. Hoffman, 316 N.W.2d 143 (Wis. Ct. App. 1982).

The defense attempted to ask a prosecution witness if he had offered to take a polygraph examination. An objection to this testimony was sustained. The court decided that, "although a polygraph test result might itself be inadmissible, an offer to take a polygraph examination is relevant to . . . credibility." Id. at 160. The defense's failure to make an offer of proof as to the witness's responses, however, precluded relief.

NOTICE

Readers who desire copies of unpublished military decisions in case notes may obtain them by writing Case Notes Editor, The Advocate, Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, VA 22041.

ON THE RECORD

or

Quotable Quotes from Actual Records of Trial Received in DAD

(DC questioning accused during extenuation and mitigation)

Q. What was your father's occupation? What was he doing?

A. He was a Baddalition Command Sergeant Major.

Q. I beg your pardon?

A. A Baptition Command Sergeant Major

Q. A Battalion . . . ?

A. A Battalion Sergeant Major.

* * *

MJ: Does the defense have an opening statement?

DC: Yes, Your Honor, the defense would make a brief opening statement.
Entrapment. Thank you, your honor.

* * *

(Trial counsel questioning government witness)

Q. What, if anything, unusual occurred that evening.

A. Well, approximately seven — correction, 1730, I received a phone call from an unknown person, at the time, claiming that he wanted to commit murder, suicide, and go AWOL.

Q. Was he upset?

A. Yes, sir.

* * *

(DC questioning accused during extenuation and mitigation)

Q. And why did you take the tank?

A. I don't know why, sir, except to run over my car. That's the only reasonable answer that I can come up with.

* * *

(DC closing argument)

The law enforcement agents that eventually seized [the contraband] were not properly involved with [the accused's] trousers."

* * *

(Defense counsel examining accused during extenuation and mitigation)

DC: What does your mother do [for a living]?

ACC: She is a housekeeper for a big chicken -- well its Foster Farms.

DC: It's a chicken outfit?

ACC: Yes, sir.

* * *

Q. Now what else was with the Sucrets can?

A. A gold cigarette case and a little bottle of hair food.

* * *

(During a providence inquiry)

MJ: Wait a minute, just say yes or no.

ACC: Yes or no.

