CONFESSIONS: USE OF "CARDS" BY CID WITNESSES AT TRIAL

The warnings required of an official interrogator by the Miranda-Tempia line of cases is fairly complex, and witnesses used by the prosecution to establish a foundation for the admission into evidence of a confession often are hard put to remember exactly how the warning was given. They frequently resort to a printed card containing the requisite warning which the interrogator blithely reads to the court. Such a performance should be opposed by defense counsel.

The card is seldom even marked as an exhibit, let alone admitted into evidence. Thus its only possible use would be to refresh the memory of the witness. But when one's memory is refreshed, he must first state that he needs such refreshing, inspect the document, and then testify to what was said in his own words. Reading from the card is not proper where the object is to refresh the memory of the witness. See United States v. Carrier, 7 USCMA 633, 23 CMR 97 (1957); United States v. Bergen, 6 USCMA 601, 20 CMR 317 (1956). The lesson for defense counsel is simple: Either the card should be properly admitted into evidence as an exception to, or as outside of, the hearsay rule, or it should be properly used to refresh the memory of the witness. There should be an objection whenever any other approach is used.

PRELIMINARY GRATUITOUS ADVICE

Care should be exercised by counsel to ascertain exactly what advice an interrogator furnished an accused, if any, prior to giving the required Article 31 warning and advice as to counsel. Several recent records of trial raise the spectre that preliminary misleading advice is being employed by interrogators, i.e., "In a minute I'm going to advise you of your rights to counsel, but first you must understand that you can be counseled by anyone you desire--your first sergeant, your platoon leader, your company or battalion commander, the chaplain, the IG, an officer in the JA office, or even a relative." Thereafter follows the required Article 31 warning and advice as to counsel. Perhaps this practice dictated recent elections by accused to consult with a chaplain and with a battalion commander instead of a lawyer? If it is ascertained that such advice was rendered by some "friendly agent", it should be developed fully in the record.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

CONSCIENTIOUS OBJECTION -- Accused was denied assistance or a CO form so that he could file as a conscientious objector. The next day he refused to go to Vietnam, as ordered. The order was unlawful because (1) AR 635-20 requires that a soldier be held in an overseas replacement station for seven days after CO application, and (2) the order was founded on the unlawful act of the government. CM 420173, Blake, 16 June 1969.

ATTEMPTED DESERTION -- Appellant appeared before battalion commander, in civilian clothes and presented his ID card and a letter saying that he was dissociating himself from the Army. Thereafter, he refused to wear uniform or to work. The evidence was insufficient to sustain conviction of attempted desertion. CM 418947, Hoit, 5 June 1969.

VARIANCE OF PROOF--LARCENY -- Appellant charged with stealing truck marked 30-107. Korean National appeared as government witness and testified that he dismantled a truck marked A-335. A truck marked A-335 was indeed missing. This variance permitted the court to convict appellant of either transaction. Government should be forced to elect, or the instruction should be so framed as to force the court to elect. CM 420299, Hulse, 18 June 1969.

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