

courts have viewed similar conduct by an attorney as "reprehensible".⁴⁶ Commentary on military practice suggests that questions of court-member misconduct be taken directly to the judge or to the convening authority, rather than to the court member, to avoid ethical pitfalls.⁴⁷ If the attorney questions the members out of court, allegations of jury tampering or violation of members' oath might be raised.

When matter fitting an exception is before the members, military courts consider the evidence and determine the likely effect the matter had on the members. Once a prima facie case of non-privileged misconduct has been presented, the government can salvage the findings or sentence by a "*clear and positive* showing that the . . . [impropriety] *did not* and *could not* operate in any way to influence the court's decision."⁴⁸

⁴⁶ United States v. Brasco, 516 F.2d 816 (2nd Cir. 1975), cert. denied, 423 U.S. 860 (1975).

⁴⁷ Cook, *Ethics of Trial Advocates*, The Army Lawyer, Dec. 1977, at 1.

⁴⁸ United States v. Gaston, 45 C.M.R. 837, 838

V. Conclusion

This privilege is not intended to be a boon for either the prosecution or the defense. In theory, the members may err in favor of the accused or the government. The policy consideration favoring sanctity of the deliberation room applies in either event. In practice, the defense will normally raise the allegation of misconduct. In that case, the privilege requires the judge to conduct a delicate balancing of interests. On one side of the scale is the accused's interest in a fair trial. On the other side of the scale is the privilege protecting the sanctity of the deliberations. If an exception to the privilege is raised, the scale tips in favor of the accused, and the judge uses a scalpel to disclose only that misconduct. If an exception is not raised, the scale is not moved. The judge then uses a cleaver to cut off further inquiry. In all instances, the rule favors the sanctity of the deliberative process.

(A.C.M.R. 1972); United States v. Adamiak, 4 C.M.A. 412, 15 C.M.R. 412 (1954).

Present but Unarticulated Probable Cause To Apprehend*

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I. Introduction

In a recent unpublished decision, the Army Court of Military Review set aside a finding of guilty of wrongful possession of 519 tablets of phencyclidine (PCP). Appellant moved to suppress the drugs, which had been seized during a search of his person incident to his apprehension. Appellant claimed that the apprehension was supported by probable cause.

The facts of the case are as follows: Appellant was observed by two military policemen

sitting in his car in an on-post parking lot apparently reading. A punitive local regulation made it an offense so to loiter in a parking lot. Hence, appellant was subject to apprehension on that basis. The military police did not intend to apprehend appellant for a violation of the loitering regulation but did approach him to advise him of the rule. Upon reaching the car, the police saw a shovel which appeared to be mili-

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tary property in the back seat. They testified that they had no extrinsic evidence which connected the shovel to any criminal activity. Nonetheless, appellant was ordered out of the car and apprehended for misappropriation of the shovel. A search of appellant revealed the PCP tablets.

At trial, the Government argued, first, that probable cause existed to seize the shovel as misappropriated Government property, and therefore, to apprehend appellant, and, second, that the evidence seized was in plain view which, therefore, supported the apprehension. The judge ruled that the appearance of the shovel in the car provided probable cause to apprehend.

On appeal, appellant renewed his claim that his apprehension was unsupported by probable cause. The Government argued that, under the circumstances, the appearance of the shovel established probable cause to apprehend, and, in the alternative, that the police had probable cause to apprehend appellant based on the violation of the loitering regulation.

After considering the testimony, the Army Court of Military Review was not convinced that probable cause was established to apprehend appellant for misappropriation. The Court did not address the alternatively asserted probable cause theory. The Government elected neither to petition for reconsideration nor to certify the issue presented to the Court of Military Appeals.

II. The Rule

This article calls the attention of counsel for the Government to an insufficiently recognized aspect of probable cause litigation in military justice. That a police agent must have probable cause to apprehend is axiomatic. Generally, the apprehending agent will have a specific, articulable basis upon which probable cause may be found. However, counsel need not limit to the policeman's asserted theory the Government's probable cause analysis either at trial or on appeal before the Court of Military Review. Facts which support a finding of probable cause

to apprehend may be relied upon to uphold the validity of an apprehension, even where those facts were not relied upon or articulated by the apprehending agent. The only limitations on the application of this rule are the provable facts and counsel's preparation.

When an issue concerning the legality of an apprehension is raised, facts supporting every available theory of probable cause should be advanced in support of the Government's burden to establish the lawfulness of the apprehension. In 1979, the Louisiana Supreme Court succinctly summarized the issue in *State ex rel. Palermo v. Hawsey*,¹ when, referring to its earlier decision in *State v. Wilkins*,² the court said that *Wilkins* holds "that an arrest for a crime for which probable cause to arrest does not exist can be justified by the probable cause to arrest for another offense."

III. Use of the Rule in State Practice

The rule has been applied in several states. In the Maryland case of *Sims v. State*,³ the defendant was arrested by a policeman for assault and battery, a misdemeanor in Maryland. However, that offense did not occur in the officer's presence. Thus, under the traditional common law view which prevailed in Maryland, the warrantless arrest for a misdemeanor would have been illegal. Nonetheless, the appeals court found that probable cause existed to support a warrantless arrest for the felony of assault with intent to murder. The opinion notes:

In assessing the validity of an arrest under the rule [which requires probable cause to arrest] the essential ingredient is that probable cause existed within the knowledge of the arresting officer and not that he necessarily construed that knowledge correctly. It is not the belief of the officer that deter-

¹377 So.2d 338, 340 (La. 1979).

²364 So.2d 934 (La. 1978).

³4. Md. App. 160, 242 A.2d 185 (Ct. Spec. App. 1968).

mines the validity of the arrest. . . . We think untenable the proposition that an arrest based on probable cause becomes unconstitutional because the crime is inaccurately described by an officer. . . .⁴

Oregon also recognizes this rule in the law of arrests. In *State v. Cloman*,⁵ the defendant was arrested for violation of an "after-hours" ordinance later declared unconstitutional.⁶ The Supreme Court of Oregon, however, found that probable cause existed for arresting defendant for another crime.

We hold that if the officers had probable cause to arrest, the arrest is not rendered illegal because the officers expressed another and improper cause for arrest.⁷

Courts in New York and California have likewise found arrests valid where the necessary probable cause was not based upon the same probable cause theory asserted by the arresting officer. In *People v. Smith*,⁸ a New York case, the police stopped a car for speeding. The defendant, the driver, produced a false identification, had no valid registration for the car, and was seen to handle in a furtive manner a paper bag protruding from under the front seat. The police seized the bag from the car, searched it, and found incriminating evidence. The subsequent arrest was not based upon any articulated theory of probable cause. The court said:

[e]ven if a police officer does not know at the time of arrest of any specific

crime which the defendant had committed or was committing, probable cause can nonetheless exist, and a determination that the arrest and search and seizure were lawful is not precluded. . . .⁹

A reasonable ground for belief that a crime has been or is being committed to constitute probable cause does not rest upon the subjective reaction of the police officer making the arrest. It depends, rather upon an objective appraisal of the facts and circumstances to determine the existence or nonexistence of probable cause.

. . . .

The validity of an arrest where the substantive requirements to support it are present, cannot be made to rest upon the recognition by the police officer of these requirements and an articulation and specification by him of the basis for the arrest, particularly where there also are present other valid grounds for a lawful arrest. Arrests should be tested and interpreted in a common sense and realistic fashion and not be formalistic and ritualistic requirements.¹⁰

A California appellate court, applying this rule in reviewing an arrest, said "the arresting officer is not required to cite the right code section in order to validate an arrest for an offense committed in the officer's presence."¹¹

⁴242 A.2d at 189.

⁵456 P.2d 67 (Ore. 1969).

⁶The *Cloman* litigation took place prior to the United States Supreme Court decision in *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). That decision definitely settled that an arrest could be valid even if based upon a statute subsequently declared unconstitutional.

⁷456 P.2d at 72.

⁸62 Misc.2d 473, 308 N.Y.S.2d 909 (Sup. Ct. 1970).

⁹The cases cited by the New York court in support of this proposition were *People v. Merola*, 30 A.D.2d 963, 294 N.Y.S.2d 301 (1968); *People v. Messina*, 21 A.D.2d 821, 251 N.Y.S.2d 592 (1964); *People v. Cassone*, 20 A.D.2d 118, 245 N.Y.S.2d 843 (1963), *aff'd.*, 14 N.Y.S.2d 798, 251 N.Y.S.2d 33, 22 N.E.2d 214 (1964), *cert. denied*, 379 U.S. 892, 85 S.Ct. 167, 13 L.Ed.2d 95.

¹⁰308 N.Y.S.2d at 913-15.

¹¹*People v. Colbert*, 6 Cal.App.3d 79, 84, 85 Cal. Rptr. 617, 620 (1970).

The policy which supports the application of the rule was well stated by the Supreme Court of New Jersey:

The question then is whether it should matter that the arresting officer selected one of the known bases of arrest rather than another, and that, hypothetically for our immediate discussion, the basis selected is later adjudged to be inadequate. There are cases involving civil actions for false arrest in which the officer has been held in the single ground he used at the time of arrest . . .¹² We need not say whether we would subscribe to that view in a civil suit, for here other values are involved. As we have said, the issue is whether an adjudged criminal shall be set free at the expense of the individual's right to be protected from criminal attack. It would be a windfall to the criminal, and serve no laudable end, to suppress evidence of his guilt upon the fortuitous ground that the arresting officer, who knew of several bases for the arrest, selected one a judge later found inadequate. *Commonwealth v. Lawton*, 348 Mass. 129, 202 N.E.2d 824, 826 (Sup.Jud.Ct. 1964).¹³

This brief recitation of state law highlights past judicial opinion on the subject and does not survey all state jurisdictions exhaustively. It should suffice, however, as a general basis upon which to justify a trial counsel's efforts to present facts supporting alternate theories of probable cause to apprehend and to argue such theories.

¹²The cases and other authorities cited by the New Jersey court were *Donovan v. Guy*, 347 Mich. 457, 80 N.W.2d 190 (Sup. Ct. 1956); *Gildon v. Finnegan*, 213 Wis. 539, 252 N.W. 369 (Sup. Ct. 1934); Annotation, 64 A.L.R. 653 (1929).

¹³*State v. Zito*, 54 N.J. 206, 213, 254 A.2d 769, 772 (1969).

IV. Use of the Rule in Federal Practice

In the federal realm, a majority of the circuits of the United States Courts of Appeals have applied a similar rule, permitting admission of evidence when probable cause for apprehension objectively exists, regardless of the subjective opinion of the arresting police officer.¹⁴

A 1965 opinion of the Eighth Circuit fully addressed the policy rationale behind the rule. In

¹⁴*E.g.*, *Klinger v. United States*, 409 F.2d 299 (8th Cir.), cert. denied, 396 U.S. 859, 90 S. Ct. 127, 24 L.Ed.2d 110 (1969) ("Because probable cause for an arrest is determined by objective facts, it is immaterial that [the police officer] . . . testified that he did not think that he had "enough facts" upon which to [make an arrest on the ground approved by the appeals court]. His subjective opinion is not material."); *Chaney v. Wainwright*, 460 F.2d 1263 (5th Cir. 1972) ("Because probable cause for arrest for a related offense existed at the time of the arrest, the search incident to the arrest was valid even though the arresting officer did not accurately name the offense for which probable cause existed."); *Ramirez v. Rodriguez*, 467 F.2d 822 (10th Cir. 1972), cert. denied, 410 U.S. 987, 93 S.Ct. 1518, 36 L.Ed.2d 185 (1973). ("If probable cause exists, the actual words used by the arresting officer [even if they describe an offense for which probable cause does not exist] will not vitiate an otherwise valid arrest and search."); *United States v. Smith*, 468 F.2d 381 (3d Cir. 1972) (An officer's misstatement of an unsuitable ground for arrest [made without a warrant] neither voids the arrest nor a search incident thereto, because a police officer in chase should not be required to immediately say with particularity the exact grounds on which he is exercising his authority); *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (" . . . the validity of an arrest is to be judged by whether the arresting officers actually had probable cause for the arrest rather than by whether the officers gave the arrested person the right reason."); *United States v. Joyner*, 492 F.2d 655 (D.C. Cir. 1974) (Court found that in both Florida and the District of Columbia "an arrest will be upheld if probable cause exists to support arrest for an offense that is not denominated as the reason for the arrest by the arresting officer."); *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975), cert. denied, 423 U.S. 1062, 96 S.Ct. 803, 46 L.Ed.2d 655 (1976) ("[t]he fact that the police labeled the offense for which petitioner was arrested as misdemeanor assault [which was an unlawful basis for his arrest] is not dispositive of the issue of the legality of the arrest.")

See also 2 LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.1 nn. 136-39 (1978).

McNeely v. United States,¹⁵ a police officer approached a car parked late at night at a closed gas station. The car and its two occupants immediately drove off at high speed, and failed to stop in response to the policeman's signals. One occupant was seen throwing out a bag of tools. When the car was finally stopped, both occupants were arrested on a littering charge because of the discarded tool bag. The contents of the bag were recovered and, by comparison of the contents with evidence found on McNeely's person, a connection was proven between McNeely and a burglary. The Court of Appeals upheld the arrest for littering as the basis of the search of McNeely. The opinion went on to note that probable cause to arrest was established by McNeely's other actions that night and said:

... we cannot hold that the arresting officer to make a valid arrest must immediately state the actual and correct grounds for arresting appellants when he had probable cause for making such an arrest. Such a requirement could be dangerous to the arresting officer and would be an additional unnecessary burden on enforcement officials. The law cannot expect a patrolman, un-schooled in the technicalities of criminal and constitutional law, following the heat of a chase, to always be able to immediately state with particularity the exact grounds on which he is exercising his authority. We believe that if the officer had probable cause to arrest and otherwise validly performed the arrest, he is not under the circumstances of this case required to immediately recognize and accurately broadcast the exact grounds for this action or suffer the arrest to come under constitutional criticism. Therefore, since Patrolman Walton had probable cause to believe the occupants of the car were engaged in felonious activity,

¹⁵ 353 F.2d 913 (8th Cir. 1965).

the arrest of McNeely was valid regardless of the initially stated ground for arrest.¹⁶

The rule that an apprehension may be validated by an existing yet unarticulated probable cause theory essentially posits a purely objective standard for determining whether probable cause to apprehend exists. The subjective considerations of the apprehending police agent are immaterial. Support for this view is found in the Supreme Court's 1968 opinion in *Terry v. Ohio*.¹⁷

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate.¹⁸

The only limitation on the rule is that the apprehension must not be a pretext or a ruse designed to cover an otherwise unlawful search for incriminating evidence. However, as long as some valid theory of probable cause existed at the time of the arrest, the claim of a ruse or pretextual arrest should be rebuttable upon the facts.¹⁹

¹⁶ 353 F.2d at 918.

¹⁷ 392 U.S. 1, 88 S.Ct. 1869, 20 L.Ed.2d 889 (1968).

¹⁸ 392 U.S. at 21-22. See also *Director Gen. or R.R. v. Kastenbaum*, 263 U.S. 25, 27-28, 44 S. Ct. 52, 68 L.Ed. 146 (1923) *Cook, Probable Cause to Arrest*, 24 Vand.L. Rev. 317, 322-24 (1971).

¹⁹ See *United States ex. rel. LaBelle v. LaVallee*, 517 F.2d at 754 n.5, discussed also in note 14, *supra*. If a police officer is acting out of personal animosity or bias, and the accused can establish the existence of such a

V. The Status of the Rule in Military Law

The rule that facts which support a finding of probable cause to apprehend may be relied upon to uphold the validity of an apprehension even where those facts were not relied upon or articulated by the apprehending agent has never been adopted in military practice. As a consequence, confusion remains as to the use of subjective versus objective factors in testing apprehensions.

However, military practitioners should be aware that the Court of Military Appeals has demonstrated a vigilant watch on sham apprehensions. In a case where probable cause existed for an apprehension for a minor offense but other evidence overwhelmingly demonstrated that the apprehension was actually a pretext for a generalized search, the Court of Military Appeals set aside the conviction and dismissed the charge.²⁰

There is authority in military law for the notion that establishing probable cause to apprehend requires consideration of a subjective element, the apprehending agent's view of his own actions.²¹ However, the cases so holding do not

vendetta-type situation, then a court may be less likely to find or approve of an alternate theory of probable cause upon which to validate the apprehension because of the bad faith of the police.

²⁰United States v. Santo, 20 C.M.A. 294, 43 C.M.R. 134 (1974).

²¹See, e.g., United States v. Powell, 7 M.J. 435 (C.M.A. 1979) (the probable cause equation includes consideration of the police officer's training and experience); United States v. Atkins, 22 C.M.A. 244, 46 C.M.R. 244 (1973), reversing 46 C.M.R. 672 (A.C.M.R. 1972) (wherein the Army court found probable cause to apprehend notwithstanding the apprehending agent's testimony that he did not think he had probable cause without considering an unwarned admission by the accused. The Court of Military Appeals' conclusion that "the record establishes" a fact upon which the court relies to find a lack of probable cause to apprehend is arguably *ultra vires*, see Article 67(d), U.C.M.J.); United States v. Mitchell, 43 C.M.R. 490 (A.C.M.R. 1970) (the issue was the reasonableness of a mistake of fact as to the identity of a suspect whom the police had probable cause to apprehend and not as to the existence of a criminal *res* or *delict* upon which to base the apprehension); and United States v. Young, 44

posit a clear requirement that the subjective aspect of a policeman's probable-cause-to-apprehend decision be examined and control the outcome of the subsequent judicial inquiry. Indeed, in a case like *United States v. Powell*,²² reference to the policeman's training and experience should properly be viewed as a separate objective element and not as a subjective consideration. For example, a well trained, highly experienced narcotics enforcement officer may "know" from experience that certain furtive actions between two known suspects constitute a drug transaction, *i.e.*, a subjective belief. However, when a court is evaluating probable cause, the officer's experience and training are objective facts which the court may consider to give credence to his observations because he knows what otherwise innocuous appearing actions are normally associated with drug dealing.

It should also be noted that the rule allowing judicial inquiry into objective facts which were present but not articulated as a basis for an apprehension differs from the standard applied in determinations concerning the existence of probable cause to search.²³ Significantly, the Court of Military Appeals did not cite its 1971 decision in *United States v. Alston*,²⁴ which was a search case, as dispositive authority in its 1973 opinion in *United States v. Atkins*,²⁵ a case involving apprehension. This was so despite the close factual similarities between the two cases. This suggests that the court recognizes the distinction between the tests for probable cause to apprehend and probable cause to search and that only cases involving a

C.M.R. 670 (A.F.C.M.R. 1971), *pet. denied*, 44 C.M.R. 940 (1972) (the language is *dicta* because the court found probable cause was established by the objective facts).

²²7 M.J. 435 (C.M.A. 1979) (summarized briefly in note 21, *supra*).

²³*Cf.* United States v. Alston, 20 C.M.A. 581, 44 C.M.R. 11 (1971); United States v. Owens, 48 C.M.R. 636 (A.F.C.M.R. 1974).

²⁴20 C.M.A. 581, 44 C.M.R. 11 (1971).

²⁵22 C.M.A. 244, 46 C.M.R. 244 (1973).

search issue require application of the subjective test.

The use of different standards is reasonable, considering the neutral and detached role required of an official who authorizes a search, as opposed to the risks and responsibilities of a policeman on his beat who must make a quick decision to apprehend without the leisure to explore every remote source of subjective uncertainty which might be suggested by hindsight or cross-examination.

VI. Conclusion

As stated above, the Court of Military Appeals seems to recognize a difference in the standard for measuring probable cause in the litigation of search and apprehension issues. However, it has never expressly adopted a purely objective test for probable cause to apprehend.

In the absence of express recognition of the rule allowing probable cause to apprehend to be established by facts which provide a present but unarticulated basis for the apprehension, counsel should take care to litigate this issue fully when relying on such alternate theories. However, even in the absence of controlling

military precedent, Army trial counsel should be able to persuade trial judges to look with favor upon a purely objective standard both because of its favorable policy considerations and in light of the increased flexibility it offers a trial judge.²⁶ In addition, a complete factual record will be a valuable asset on appeal for demonstrating the existence of probable cause to apprehend.

Trial counsel should be alert to employ the rule which invokes the existence of a present but unarticulated basis for probable cause to apprehend to establish the validity of an apprehension even though such a theory was not considered by the apprehending agent. By doing so, the quality of both trial and appellate litigation in the military justice system will be improved.

²⁶The validity of an apprehension is generally raised in the context of an attempt to suppress evidence seized during a search conducted pursuant to apprehension. Because of this, the requirement of Rule 311(d)(4), Military Rules of Evidence, that the essential factual basis of the judge's ruling be stated on the record, is eased by providing alternate theories. Because the judge need not divulge his legal reasoning, his factual findings could cover several theories of probable cause to apprehend. Thus, even if the trial judge is right for the wrong reasons, his ruling may be upheld on appeal.

Legal Assistance Items

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Consumer Affairs—Truth in Lending Act

Ford Motor Credit Company (FMCC) provided forms and approved the credit of purchasers of vehicles prior to the dealers executing the sales contracts. FMCC was designated as an assignee of the contract. Plaintiffs argued that the failure to identify FMCC as a creditor violated the Act. The Supreme Court held that FMCC was a "creditor" within the definition of the Truth in Lending Act and Regulation Z.

The dealers were considered arrangers of credit while FMCC was considered the extender of credit. Although FMCC was not identified as a creditor, notice that it was an assignee was sufficient to meet the requirements of the Truth in Lending Act and Regulation Z. The Court stated that to add more would not meaningfully benefit the consumer. *Ford Motor Credit Co. v. Cenance*, ___ Sup. Ct. ___, 49 U.S.L.W. 3892, 68 L.Ed. 2d 744 (1981).