

T H E A D V O C A T E

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O'CALLAHAN IN THE LOWER MILITARY COURTS

Predictably, the first tribunals to discuss the issues raised by O'Callahan v. Parker, 37 U.S.L.W. 4465 (U.S. 2 June 1969) have been the Boards of Review. No Board has yet to dismiss any charges on this jurisdictional ground.

In CM 420339, Taylor, 17 June 1969, the appellant was charged with, inter alia, forgery of a check. Apparently he found a blank check in the barracks, took it to an off-post civilian bank, and forged the owner's name. The Board of Review found the offense to be "service-connected" because the instrument operated to the legal prejudice of a member of the armed services. Moreover, the author-judge held that the O'Callahan rule does not apply in time of war, and the United States has been at war since the Gulf of Tonkin resolution. See United States v. Anderson, 17 USCMA 588, 38 CMR 386 (1968). One judge was absent from the panel, and the concurring judge dissociated himself from the war-peace distinction.

Two days after Taylor, the same Board of Review ruled that possession of marijuana ten miles off-post, off-duty and in civilian clothes in the company of three military members was

"service connected" because the "victim" of the offense was military [either the possessor himself or the Army], CM 419706, Konieczko, 19 June 1969. The Board held that "possession of marihuana by a soldier is but one step away from his use of it and his transfer of it to other soldiers . . ." Moreover, since one element of the offense is its service-discrediting aspect, the offense must a fortiori be service-connected. Interestingly, the Board failed to note that one of the offenses involved in O'Callahan itself was charged under Article 134, Uniform Code of Military Justice [assault with intent to commit rape]. Again, two judges declined to associate themselves with the view of the third who thought the war-peace distinction should be dispositive.

In CM 420214, Cox, 25 June 1969, the Board of Review ruled that possession of marihuana in one's car parked on-post was service-connected. The Board wrote that the commander has a legitimate interest in convicting soldiers found in possession of marihuana on a military post. The author-judge there did not discuss the war-peace distinction found in his two previous opinions.

Two Navy Board of Review cases have also added to the O'Callahan jurisprudence. In NCM 69-1277, Spears, 6 June 1969, a Navy Board of Review held that O'Callahan was not retroactive, in a short unreasoned opinion. And in NCM 69-1762, Reid, 11 June 1969, the Navy Board ruled that hallucinogenic drug offenses were always service-connected, since (1) they impaired the performance of duty, and (2) the Navy was obligated to provide the medical care they so often require.

There are other recent developments in this area. The Department of Justice has decided not to petition the United States Supreme Court for reconsideration in the O'Callahan case. Appellate government counsel have moved, in O'Callahan-type cases now pending before the United States Court of Military Appeals, for leave to file additional pleadings. This motion has been granted, but it is unclear whether further argument will be permitted.

EXTRA-JUDICIAL IDENTIFICATION UNDER WADE

The rule in Wade, Gilbert and Stovall, 388 U.S. 218 (1967) can be easily stated, but its application to specific facts is difficult. Simply put, an extra-judicial confrontation

conducted in the absence of counsel, or of an intelligent waiver, renders the identification inadmissible unless it can be demonstrated by clear and convincing evidence that a subsequent in-court identification is not tainted.

The problem with Wade and its companions, however, is its sweeping language. Both Wade and Gilbert concerned a post-indictment lineup in the absence of appointed counsel. The language in Wade, however, seems to include any pretrial confrontation between an accused and a witness after the investigation has reached the accusatory stage. Is the pre-post indictment [or pre-post charge in the military] distinction a valid one?

Illinois thinks it is, and applies Wade only to a post-indictment confrontation. People v. Palmer, 4 CrL 2372 (Sup. Ct. Ill. 25 January 1969). Maryland disagrees. Palmer v. State, 4 CrL 2372 (Md. Ct. Spec. App. 22 January 1969).

The United States Court of Appeals for the District of Columbia has recently set out several tests for determining when the in-court identification was tainted. Clemons v. United States, 4 CrL 2221 (D.C. Cir. 6 December 1968). First, did the witness have a "good opportunity" to observe the offender at the time of the crime? Second, did he demonstrate his clear recollection of the offender's features by some description after the crime and before the improper lineup? Third, did he testify firmly and positively that his in-court identification was not influenced by his tainted viewing of the subject?

Recently, the Board of Review, in CM 418783, Webster, CMR, 21 March 1969, held that an in-court identification of an accused charged with aggravated assault was based upon sources independent of a tainted pretrial lineup and that the victim's in-court identification was merely cumulative. This case was among the first military cases applying the Wade rule. The Board warned that it proposes to adhere closely to Wade and its progeny, and that if such an issue arises at trial it should first be disposed by the law officer prior to any in-court identification. "If the [military] Judge determines that the rights of the accused were infringed, either by impermissibly suggestive procedure or evidence, or that the assistance of counsel was improperly denied, the in-court identification of the accused should not be permitted. The witness . . . will not be permitted to identify the accused in open court."

It should be noted that pre-Wade standards of inherent unfairness still apply to the lineup. If, based upon the totality of the circumstances, the lineup was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, the in-court identification will not be permitted. Rutherford v. Deegan, 4 CrL 2350 (2d Cir. 14 January 1969). The fairness of a pretrial lineup depends upon a number of factors, including the age, racial and other physical characteristics of the participants, body movements, gestures or verbal statements which may be required. The identification may be tainted if the witnesses are allowed to view the lineup together and discuss among themselves their conclusions, or if they are allowed to see the defendant in police custody before the lineup. Pearson v. United States, 389 F.2d 684 (5th Cir. 1968). All of these provide fruitful areas of cross-examination for the trial defense counsel.

APPELLATE PROCEDURE IN THE ARMY

The duties of a defense counsel do not end with findings and sentence. Counsel are also required to continue to represent the accused after trial, primarily to advise him fully of his appellate rights. (See United States v. Darring, 9 USCMA 651, 26 CMR 431 (1958)). Counsel often are not clear about what happens to a general court-martial record on appeal; consequently, convicted soldiers often arrive at the disciplinary barracks without a good understanding of military appellate procedure. In an effort to alleviate this problem, we present a précis of the process in the Army as it applies to general courts-martial. [For a description of extraordinary review of special courts-martial, see Vol. 1, No. 4, THE ADVOCATE. We emphasize that review of non-discharge special courts-martial by The Judge Advocate General is extraordinary, and that such review is not part of the appellate process in the Army.]

After the general court-martial convening authority takes his action, the record of trial is forwarded to the Records Control and Analysis Branch, US Army Judiciary. [The Judiciary is a Class II installation under The Judge Advocate General that may be divided for appellate review into five parts: Boards of Review, Records Control and Analysis, Examination, Defense and Government Appellate, and Clerk of Court.]

Upon receipt, the record of trial is administratively processed. If the case does not qualify for automatic review by a Board of Review, it is assigned to the Examination Branch. See Articles 66(b), 69, Uniform Code of Military Justice.

If error is discerned by the Examination Branch, the case may be referred to a Board of Review, regardless of the sentence imposed. There is, however, no further review to the Court of Military Appeals, unless The Judge Advocate General certifies the case for further review. See United States v. Fenstermaker, 17 USCMA 578, 38 CMR 376 (1968).

If a case is referred to a Board of Review, either as of right, or through the Examination Branch, and if the appellant has requested appointed counsel, a copy of the record is sent to the Defense Appellate Division. There the case is assigned to appellate counsel for study of the entire record of trial (See United States v. Fagnan, 12 USCMA 192, 30 CMR 192 (1961) as to what constitutes the entire record). Counsel may take one of three courses of action:

1. Submit the case to the Board on the merits (pro forma).
2. Submit the case to the Board on the merits with the addition of a clemency pleading.
3. Assign error, either by headnote or brief.

If the appellant does not request appointed counsel, and does not retain civilian counsel, the case is submitted to the Board of Review without counsel. The Board may, in its discretion, request that counsel be appointed nonetheless.

Appellate counsel have, by current Board of Review Rules, fifteen days from the receipt of the case within which to file pleadings with the Board of Review. In practice, however, most cases are continued because more time is required in the preparation of pleadings. [The current average processing time for cases in the Defense Appellate Division is 47.07 days for NG plea cases and 20.16 days for G plea cases.] The first enlargement of thirty days is routine; after that, good cause must be shown.

When errors are assigned, appellate government counsel are also appointed, and generally the same time limits apply

to the government at this stage. Consequently, when a case is long or involves complex legal issues, trial defense counsel can expect that there will usually be a delay of at least three months before issue is joined before the Board of Review.

Once issue is joined, oral argument may be requested by either side (usually by defense). Approximately ten percent of all cases in which errors of law have been raised are argued orally.

If any part of the findings of guilty are affirmed by the Board of Review in mandatory review cases, the appellant has a right to petition to the United States Court of Military Appeals for a grant of review. There is also a continuing right to appointed counsel at this level. Petitions for review are personally signed by the appellant at his place of confinement (or elsewhere) and must be filed within thirty days after service of the Board's opinion. Normally the petition is forwarded to the Defense Appellate Division for filing. Supporting assignments of error and briefs are filed by appellate counsel with the petition within thirty days after receipt of appellant's petition. Government counsel have fifteen days to respond to a petition for review. Rarely are enlargements of time sought by either side. Appellate powers of the Court are limited to review of matters of law. The Court has no power to take action as to sentence.

The United States Court of Military Appeals usually decides within thirty days of receipt of the government's pleading, whether to grant review. Thereafter, appellate defense counsel prepare a final brief on the granted issue, also due within thirty days. Government counsel have twenty days to reply.

Arguments are heard by the United States Court of Military Appeals one week out of each month during the regular October-June term.

Obviously, appellate review is a long process. Trial defense counsel have closer personal contacts with accused than do appellate counsel. Counsel should insure that convicted servicemen are prepared for the long duration of the appellate process and the delays necessary thereto. In addition, a defense counsel's obligation extends to informing a convicted client fully of the appellate process so that his client is in a position to make intelligent decisions concerning his case. (See Darring, supra.)

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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