

THE ADVOCATE

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THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21d, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

CONTENTS

| | |
|---|----|
| A Federal Court Expunges a Conscientious Objector's Court-Martial Conviction for Disobedience | 45 |
| More on the Choice Between Military Judge and Military Jury | 52 |
| THE ADVOCATE -- Index | 56 |

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A FEDERAL COURT EXPUNGES A CONSCIENTIOUS OBJECTOR'S
COURT-MARTIAL CONVICTION FOR DISOBEDIENCE

A recent conscientious objector case which warrants special study is the 23 February 1972 Supreme Court decision concerning Joseph Parisi, Parisi v. Davidson, 405 U.S. 34 (1972), which represented the culmination of an interesting history of military and federal court litigation. The purpose of this article is to update the history of the Parisi case from the time of the Supreme Court decision to its inclusion in both federal and military courts.

A chronology of events leading up to the Supreme Court decision might provide a helpful basis for understanding that decision and its possible ramifications:

1. Joseph Parisi was inducted into the Army on 21 August 1968.
2. Parisi submitted an application for discharge as a conscientious objector on 22 May 1969, pursuant to AR 635-20.
3. On 14 November 1969, the Secretary of the Army disapproved the request for discharge.
4. On 28 November 1969, Parisi applied to the United States District Court for the Northern District of California for a writ of habeas corpus seeking discharge from the Army as a conscientious objector.
5. The Federal District Court enjoined assignments for Parisi involving any greater combat-related duties, but declined to consider the merits of his habeas corpus petition until the Army Board for the Correction of Military Records (an administrative step in military litigation) had acted. Parisi applied immediately to ABCMR for review of the Secretary of the Army's denial.

6. In December of 1969, after he received orders for Vietnam, Parisi moved in the Ninth Circuit Court of Appeals for an order staying his deployment outside of California. On 10 December 1969, his motion was denied.
7. On 9 January 1970, Parisi refused an order to board an aircraft for Vietnam, and he was charged under Article 90, Uniform Code of Military Justice.
8. On 2 March 1970, while his court-martial was pending, Parisi's application to ABCMR for review was denied.
9. On 31 March 1970 the Federal District Court stayed its consideration of the habeas corpus petition pending exhaustion of Parisi's military judicial remedies.
10. On 8 April 1970 Parisi was tried by general court-martial and convicted of disobedience of the order to board an aircraft.
11. On 3 December 1970, the Court of Appeals of the Ninth Circuit affirmed the District Court's decision to stay proceedings (Parisi v. Davidson, 435 F.2d 299 (9th Cir. 1970)).
12. On 23 February 1972 the Supreme Court reversed, holding, in pertinent part, that:
 - a. Parisi had exhausted his available administrative remedies (application to ABCMR was not considered a necessary administrative remedy) and his acquittal by court-martial would not provide an adequate remedy.

- b. Accordingly, neither questions of comity with the military courts nor exhaustion of military remedies required the Federal District Court to defer its consideration of the habeas corpus petition where the habeas corpus action related to a basis for discharge independent of that involved in the court-martial.

The case was remanded to the Federal District Court for consideration of the habeas corpus question.

On 9 March 1972, subsequent to the Supreme Court's decision, the Army Court of Military Review affirmed the findings of guilty in Parisi's general court-martial conviction. As will be seen later in this article, the Army Court of Military Review decision was never served on appellant Parisi and, thus, at no time did the Court of Military Appeals obtain jurisdiction of his court-martial appeal. From the 9 March 1972, the date of the Army Court of Military Review decision until the Federal District Court's Order dated 10 May 1972, there existed the unusual circumstance of a case pending simultaneously before a military appellate court and a federal district court, ostensibly on the same issue of law: whether improper denial of a conscientious objector application by the Secretary of the Army entitled appellant Parisi to relief. That relief could involve a military discharge in federal court, but only an acquittal in military court. On 21 April 1972, the case of United States v. Lenox, 21 USCMA 314, 45 CMR 88 (1972) seemed to indicate that an improper denial of a conscientious objector application would not be a defense to a military offense occurring subsequent to the incorrect denial, and that a military appellant should go to a federal district court to resolve the question of the validity of his military status as a conscientious objector. This is exactly what had been done in Parisi.

On 10 May 1972, the United States District Court for Northern District of California handed down an order, a copy of which is set out in full at the conclusion of this article. The gist of the order is, of course, that basis in fact determinations of Secretary of the Army denials of conscientious objector applications are alive and well and litigable in Federal District Courts.

The only question remaining to be determined was whether the Army Court of Military Review, which still had jurisdiction of its unserved 9 March 1972 decision, would honor the earlier Court of Military Appeals pronouncement in United States v. Goguen, 20 USCMA 367, 43 CMR 367 (1971) that the discharge of an appellant accomplished pursuant to a writ of habeas corpus issued by a federal district court requires the termination of court-martial proceedings pending against the appellant. The Army Court of Military Review, citing, inter alia, United States v. Goguen, supra (and undoubtedly persuaded by the strong wording of the U. S. District Court Order), withdrew and vacated their 9 March 1972 decision, set aside the findings and sentence, and ordered the charge dismissed. On 9 June 1972, the Secretary of the Army dismissed the charge, and ordered all the rights, privileges, and property of which Parisi had been deprived by virtue of the findings of guilty and the sentence be restored.

It would appear that Lenox and Goguen are very compatible cases: the former directing the professed in-service conscientious objector to federal district court when he has committed an offense subsequent in time to the Secretary of the Army's denial of his application, and the latter indicating that the military courts must accede to the federal district court's basis in fact determinations of improper Secretary of the Army denials by terminating military jurisdiction. Furthermore, although the issue was mooted by the Court of Military Review's action in Parisi, it would appear that the federal district court's order to expunge the court-martial conviction was, in effect a reversal of the conviction, and further, would seem to require the Secretary of the Army to act favorably upon Parisi's original action before the Army Board for Correction of Military Records.

The resolution of the Parisi case highlights the obligation of trial defense counsel to advise his client fully on all aspects of his case. Although civilian counsel represented Parisi in his federal court appeals, the case also spotlights the obligation of trial defense counsel to advise his client on the availability of the federal district court as a forum for the adjudication of alleged independent grounds for discharge even while court-martial charges for some offense are pending. Clearly, the recent decision of the Court of Military Appeals in United States v. Lenox, supra indicates that problems presented in conscientious objector cases probably must be litigated in federal court.

In light of the decision by the Supreme Court, this court should have entertained the petition when the order to show cause issued. Had this court done so, it would have found on this record that there was no basis in fact for the denial of the claim; accordingly, petitioner would have been entitled to discharge as a conscientious objector and release from the custody of the respondents prior to his trial by court martial for an offense which was directly related to his conscientious objector claim. Accordingly, appropriate relief is now to expunge petitioner's court martial conviction.

In accordance with the foregoing, it is hereby Ordered, Adjudged and Decreed that:

(1) Petitioner be forthwith released from the custody and control of the respondents and discharged from the Army as a conscientious objector under honorable conditions, the character of such discharge to be based on the Secretary of the Army's determination of petitioner's character of service prior to commission of the aforesaid offense.

(2) The Secretary of the Army shall cause petitioner's records to be corrected to expunge any record of conviction, and shall restore to petitioner all rights, privileges and property of which he was deprived by reason of such conviction.

DATED: May 10, 1972

LLOYD H. BURKE
United States District Judge

MORE ON THE CHOICE BETWEEN MILITARY JUDGE AND MILITARY JURY

Twice before, THE ADVOCATE has published information on the effects of choosing a military judge over a military jury with respect to acquittal rates and sentence differentials. See "Statistical Comparison of Military Judge-Military Jury Conviction Rates and Sentence Differentials," THE ADVOCATE, Vol. 3, No. 5, June & July, 1971; "Judge-Jury Differentials Increase in Contested Cases in Favor of the Accused," THE ADVOCATE, Vol. 3, No. 7, September-October, 1971. Tables 1 and 2 of this article update the information given previously. The percentage of general court-martial cases which were contested was rather uniform throughout all of the periods covered in each of these articles, varying from a low of 48 percent in the period 1 January 1970-30 June 1970, to a high of 54 percent in the period 1 January 1971-31 March 1971. There does appear to have been a noticeable increase in the percentage of contested cases which are tried before a military jury, some 26 percent of all contested cases during the period 1 October 1971-1 April 1972, as compared with prior periods when contested cases taken before military juries averaged less than 20 percent of all contested cases. During this latest period, it is noteworthy that the conviction rate for contested cases before court members jumped to a rate of 71 percent from a low of 65 percent in the prior period. This does not necessarily mean that the additional cases taken before military juries turned out more unfavorably to the accused than if they had been taken before a military judge alone, for the conviction rates by court members in contested cases in prior periods had already been no less than 71 percent, and in the two other periods previously reported upon, the conviction rate by court members in contested cases had been as high as 77 percent. It should be expected that the conviction rate in cases contested before military juries will rise as the percentage of contested cases taken before military juries rises, because the net increase probably represents a decision to take harder cases before military juries.

The defense decision on forum should take into account the difference between the rate at which a military judge convicts and the rate at which a military jury convicts, for as long as one is less than the other, when all other things are equal, 1/ a case should be taken before the forum which has the lower conviction rate. It should also be noted that in the period covered by Table 2, when the percentage of cases tried before a military jury was highest, the overall conviction rate for all contested cases was the lowest of any period reported, as was the conviction rate in cases tried before a military judge alone. Although the percentage decreases in these categories were small, with the overall conviction rate dropping to a low of 82 percent from a high of 87 percent and the military judge conviction rate dropping to a low of 88 percent from a high of 92 percent, these changes may indicate a slow swing of the pendulum, with the triers of fact, including military judges, deciding close cases in favor of the accused rather than the government. Additionally, this result may be due to the diligent efforts of defense counsel.

TABLE 1

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Contested Cases)
1 April 1971 - 1 October 1971

| | Court Members | Military Judge Alone |
|-------------------------------|---------------|----------------------|
| Persons tried | 141 | 468 |
| Persons convicted | 92 (65%) | 422 (90%) |
| Punitive discharge adjudged** | 51 (55%) | 371 (88%) |
| Confinement adjudged** | 75 (82%) | 375 (89%) |

*Data compiled and based on all GCM records received in the US Army Judiciary during the period indicated. Figures do not include any cases that were tried prior to 1 August 1969, the effective date of the Military Justice Act of 1968.

**Percentages based on number convicted.

1/ E.g., things may not be equal at sentencing where military juries may give fewer punitive discharges, but longer sentences to confinement.

TABLE 2

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Contested Cases)
 1 October 1971 - 1 April 1972

| | Court Members | Military Judge Alone |
|-------------------------------|---------------|----------------------|
| Persons tried | 224 | 405 |
| Persons convicted | 160 (71%) | 357 (88%) |
| Punitive discharge adjudged** | 111 (69%) | 318 (89%) |
| Confinement adjudged** | 145 (91%) | 328 (92%) |

*See Legend under Table 1.

New information on the discharge rate and confinement rate in guilty plea cases is presented in Tables 3 and 4. These tables indicate, again all other things being equal, that a military jury adjudges punitive discharges at a lower rate than does a military judge, and that a military jury adjudges confinement at a lower rate than does a military judge. One possible explanation for the higher rate of punitive discharges awarded by military judges may be their familiarity with the policy which would have a case referred to a general court-martial only if a punitive discharge would be appropriate in the event of conviction. DA Pamphlet 27-5, Staff Judge Advocate Handbook, para. 10b 9(d) (page 18), July 1963.

Because even a pretrial agreement cannot stop a defendant from electing to be sentenced by a military jury, nothing can be lost by taking a guilty plea case before a military jury where the accused wishes to be retained in the service. It appears that statistically a soldier is more likely to obtain a second chance from other professional soldiers sitting on military juries than from professional judges.

TABLE 3

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Guilty Plea Cases)
1 April 1971 - 1 October 1971

| | Court Members | Military Judge Alone |
|-----------------------------|---------------|----------------------|
| Persons pleading guilty | 75 | 522 |
| Punitive discharge adjudged | 56 (75%) | 495 (95%) |
| Confinement adjudged | 62 (83%) | 495 (95%) |

*See Legend under Table 1

TABLE 4

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Guilty Plea Cases)
1 October 1971 - 1 April 1972

| | Court Members | Military Judge Alone |
|-----------------------------|---------------|----------------------|
| Persons pleading guilty | 100 | 503 |
| Punitive discharge adjudged | 78 (78%) | 468 (93%) |
| Confinement adjudged | 80 (80%) | 482 (96%) |

*See Legend under Table 1

ARNOLD I. MELNICK
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Chief, Defense Appellate Division

The Advocate

Index

This index covers the entire publication of THE ADVOCATE to date, i.e., from Vol. 1, No. 1 (March 1969) to Vol. 4, No. 3 (August 1972) inclusive. The index was constructed by using the outline in Tedrow, Digest--Annotated and Digested Opinions, U.S. Court of Military Appeals (1966). The page references herein give volume: number: page. Consecutive numbering of pages by volume did not begin until Vol. 3, but the issue number is still given to aid in reprint requests. An asterisk (*) beside the page references indicates a recent note only. This index was prepared by

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-A-

Absence Without Leave

AWOL and Its Defenses 2:2:1
Provideny-AWOL 3:3:71*
AWOL: Termination of Absence 2:2:22
3:1:23

All-Writs Power

All-Writs Power in Court of Military Review 1:8:7
2:3:5
Extraordinary Remedies, COMA--October, 1970 Term 3:8:207*
Extraordinary Remedies 1:6:1
2:10:34
Extraordinary Relief--Release from Confinement
(The Miscellaneous Docket) 2:5:15
Extraordinary Remedies: Military Judge 1:8:7
Extraordinary Writ Power: Miscellaneous Docket 3:2:39
Extraordinary Writ Practice in the Military Courts 2:7:1

Amnesty, Condonation, Immunity and Pardon
Clemency and Parole Practices 4:1:10
Grants of Immunity 3:2:36

Arrest, Apprehension, Confinement, Custody, Parole
and Restriction

Arrest: Fingerprints 1:8:6*
Arrest: Probable Cause 2:7:20*
Arrest and Seizure: Probable Cause 3:3:70*
Confinement: Punitive Segregation 2:5:18*
Confinement: Release from Pretrial Confinement 2:5:19*
Declaratory Judgment and Parole Release 3:3:67*
Escape from Custody: Sufficiency of Evidence 2:8:23*
Pretrial Punishment: Administrative Segregation 2:2:26*
Pretrial Confinement in Violation of Article 13 2:1:14
Sufficiency: Escape from Custody 1:10:8

Assaults

Assault on a Noncommissioned Officer 2:6:15*
Assault on an Officer: Legal and Factual Sufficiency 2:8:18*
Assault with a Dangerous Weapon: Unloaded Rifle 2:5:17*

-B-

Boards of Review

Appeal and Review of the Special and Summary Court-Martial
Conviction 1:4:5
Appealing Denial of Deferment of Confinement 2:2:6
Post-trial Review 1:1:6*
Post-trial Review: Fatal Omissions 3:2:43
Record of Trial: Appeal 2:10:32

-C-

Charges and Specifications

Breach of Peace 2:2:22 - 3:1:21
Communicating a Threat 3:1:20
Failure to State an Offense: Dereliction of Duty 2:2:23*
Failure to State an Offense: Disrespect 2:2:23; 2:6:16; 3:3:72
Findings of Guilty by Exceptions and Substitutions 3:2:42*
Lesser Included Offenses 3:6:138*
Sufficiency to State an Offense 3:7:165*
Wrongful Altering of Public Records 3:6:140*
Sufficiency of Specification: Riot 2:1:11*

Confessions and Admissions

Admission of Co-Defendant's Statement 3:3:70*
Article 31, Miranda-Tempia 3:5:118*
Confessions: Repeated Interrogations 2:5:17*
Confessions: Right to Confrontation 1:9:10*
Confessions and Admissions: Voluntariness - Mental
Patient 3:1:18*
Contested Confession: Trial Tactics 1:4:10
Custodial Interrogation 3:5:123*
Voluntariness: Psychological Coercion 1:7:11*
Voluntariness 2:5:18*

Conscientious Objectors

A Federal Court Expunges a Conscientious Objector's
Court-Martial Conviction for Disobedience 4:3:45
Conscientious Objection 1:4:6; 1:5:8*
Conscientious Objection AR 635-20 1:10:8*
Conscientious Objectors: Judicial Review of
Administrative Decision 2:8:21; 2:9:21*

Counsel

Acting in Adverse Capacities, Appointment on Orders
as Amounting to a Presumption of Action 3:2:44*
Advising Client on Disciplinary Barracks as Part of
Post-trial Duties of Counsel 1:6:4
Army Lawyers in Federal Courts 2:6:1; 2:7:13
Defense Counsel: Inadequate Representation of
Accused 2:9:22*
Military Judge: Request for Individual Counsel 4:1:27*
Post-trial Duties of Defense Counsel 1:1:4; 1:4:5; 1:5:4;
1:6:4; 1:6:11;* 3:4:89
Professional Conflict of Interest: Are Divorce Suits
More Important than Criminal Trials? 3:5:116
Request for Appellate Defense Counsel 2:2:11
Trial Practice: Qualification of Counsel, Effective
Assistance 2:10:8

Courts of Military Appeals

Appeal and Review of the Special and Summary Court-
Martial Conviction 1:4:5
COMA - October, 1970 Term: Affirmative Defenses 3:8:193

Court of Military Appeals (cont)

Guilty Plea Procedure: Does COMA Stand Alone? 2-19:16
COMA Looks at Defense Counsel and the Guilty Plea 3:7:157
COMA - October, 1970 Term: Pretrial Practice 3:8:170
COMA - October, 1970 Term: Record of Trial and Appeal 3:8:202
COMA - October, 1970 Term: Sentence and Punishment 3:8:196*
COMA - October, 1970 Term: Trial Practice 3:8:174
Robbins Rehearing: A Warning 1:4:4

Courts-Martial

Appeal and Review of the Special and Summary Court-
Martial Conviction 1:4:5
COMA - October, 1970 Term: Court Personnel 3:8:186*
Resignation in Lieu of Court-Martial: Effect on
Court-Martial 2:9:26*

Crimes and Offenses

Abusive Language: Commissioned Officers Use of Word
with Racial Overtone 3:1:24*
COMA - October, 1970 Term: Substantive Offenses 3:8:187*
Communicating a Threat: Findings of Guilty by Exceptions
and Substitutions 3:1:21*
Communicating a Threat: Subject of Threat 2:8:20*
Glue Sniffing: Specification 1:3:9*
Improper Uniform: Specification 1:9:12*
Indecent Language: Failure to State an Offense 2:7:21*
On-Post Civilian-Type Crimes in the U.S. Supreme
Court 3:3:60
Registration: Motor Vehicles 2:2:26*
Substantive Offenses 2:10:23
Uncharged Misconduct: A Dissenting Voice 2:2:10

-D-

Desertion

Attempted Desertion 1:5:8*

-E-

Entrapment

Accused as Intermediary Between Two Government
Agents 3:7:166*
Integrity of the Law 2:5:20*
Rebuttal of Defense 2:5:21*

Evidence

Appellate Review of Evidentiary Contests in
Nonjury Trials 3:1:2
AWOL - Proof - Official Records, Hearsay 3:2:47*
Character Evidence 2:2:12
COMA - October, 1970 Term: Evidence 3:8:181*
Confessions 2:10:17
Corroboration by Independent Evidence 2:1:9*
Disclosure of Identity of Informers: Role of
Commanding Officer as Both "Magistrate" and
"Policeman" Inconsistent 3:2:40*
Discovery of the CID Reading File 1:9:9
Discovery: Identity of Informers 1:8:4
Expert Testimony on Expert Qualifications 3:7:166*
Extenuation and Mitigation 1:6:11*; 2:2:16
Extenuation and Mitigation in Nonjudicial
Punishment 2:1:6
Extenuation and Mitigation: Marihuana 1:3:6
Extenuation and Mitigation: Rebuttal by the
Prosecution 2:8:23*
Failure to Object at Trial 2:2:13
Forensic Pathology Services Available to Military
Counsel 2:5:8
Identification:
Effect of Prior Lineup 2:8:25*
Effect of Pretrial Confrontation 2:1:10*
Identification: One Man "Showup" in Hospital 2:9:23*
Identity of Informers: A Correction 1:8:4
Implicated Informer: Reliable or Unreliable? 2:8:2
In-Court Identification: Effect of Pretrial Con-
frontation 2:1:10*
Lineups 2:10:16
Matters in Extenuation and Mitigation 2:2:16
New Trial: Suppression of Evidence 1:9:13*
Nonjudicial Punishment: Extenuation and Miti-
gation 2:1:6
Objections 2:1:6
Photographic Identification 3:6:141*
Pretrial and Trial Discovery 1:7:1
Previous Convictions 2:10:19
Putting Demeanor in the Record 1:1:3

Evidence (cont)

Reputation of Accused: Permissible Impeachment 1:10:11*
Scientific Evidence of Intoxication 2:9:6
Sentinel Offense: Sufficiency of the Evidence 2:9:29*
Spontaneous Exclamations 3:6:143*
Sufficiency 2:10:19
Testimony in Extenuation and Mitigation 3:7:154
Uncharged Misconduct: Consideration of Merits in Trial
by Military Judge Alone 3:1:22*
Uncharged Misconduct: Plan or Design 2:7:25*
Unsworn Statement: Rebuttable by Prosecution 2:6:18*
Use of Article 32 Testimony at Trial 1:4:10*
Use of "Cards" by CID at Trial 1:5:7
Variance of Proof: Larceny 1:5:8*
Written Witness Statements 1:9:8

-I-

Insanity

Counsel at Psychiatric Examination 2:2:25*
Mental Responsibility: Defense Requested Psychiatrist 2:7:22*
Mental Responsibility: Hearsay Disclosure of Psychiatric
Opinion 3:1:25*
Narcotics Addiction 1:9:12*
Preparing the Insanity Plea: The Defense Counsel's
Dilemma 3:2:29

Instructions

Allen Charge Disapproved 1:6:10*
Assault with Intent to Commit Murder 3:1:22*
COMA - October, 1970 Term: Findings Instructions 3:8:195*
Credibility of Witnesses: Conscientious Objector Beliefs:
Vis-a-Vis Order to Participate in Riot Training 3:2:42*
Findings and Instructions 2:10:26
Informer's Credibility 3:5:120*
Uncharged Misconduct (Instructions) 1:8:7*
Written Instructions on Sentence Voting Procedures 1:7:10

Insubordinate Conduct

Disrespect: Failure to State an Offense 2:2:23;* 2:6:16*
3:3:72*
Loss of Entitlement to Respect 1:9:11*

Intoxicants and Intoxication

Communicating a Threat: Effect of Intoxication 2:8:19*
The Alcohol & Drug Abuse Prevention: Control Plan
of 2 September 1971 3:7:144

-J-

Judge Advocates General

Judge Advocate Review 1:1:5

Jurisdiction

COMA - October, 1970 Term 3:8:168*
Comments on O'Callahan v. Parker 1:4:8; 1:5:1; 1:6:7
Failure to Re-refer Amended AWOL Charge 3:3:72*
Judge's Power to Rule on Constitutionality of
Article 93 (Miscellaneous Docket) 3:1:16
Jurisdiction over Civilians 1:6:10*
Military Jurisdiction over Marihuana Offenses:
A Rejoinder 1:9:5
Military Property 1;10:10*
O'Callahan in the Lower Military Courts 1:5:1
Prejudicial Joinder of Offenses 1:10:1
Retroactivity of O'Callahan v. Parker 4:2:43*
Service Connection: O'Callahan v. Parker 1:7:11;*
2:10:2*
Some Comments on O'Callahan v. Parker 1:4:8

-L-

Larceny and Wrongful Appropriation

Cross-examining Larceny Victim 2:2:22*
Variance of Proof 1:5:8*

-M-

Marihuana

Confronting Lay Opinion on Marihuana Identification
1:3:3
Cross-examination of the Marihuana Expert 1:3:1
Extenuation and Mitigation: Marihuana 1:3:6
Military Jurisdiction and Marihuana Offenses:
A Rejoinder 1:9:5
Multiplicity in Marihuana Prosecution 1:4:3
Marihuana Traces Problem: Military Developments 2:6:10
Possession of Marihuana: Sufficiency of the Evidence
2:9:25*
Prejudice to Good Order and Discipline 2:6:16*

Military Due Process

CMR: All-Writs Power 1:8:7;* 2:3:5
Extrajudicial Identification Under Wade 1:5:2
Extraordinary Relief (The Miscellaneous Docket) 2:7:16
Habeas Corpus: Conscientious Objectors 3:1:19*
Insanity: Counsel at Psychiatric Examination 2:2:11*
Judge Ferguson: Guardian of Individual Rights 4:1:1
Lineups: Right to Counsel 1:1:6; 1:9:10; 2:9:24*
Photographic ID: Right to Counsel 2:5:22; 4:2:40*
Post-trial Interview: Counsel 1:6:11*
Preliminary Gratuitous Advice 1:5:7
Right to Counsel 1:2:8; 2:10:8*
Right to Counsel: Confessions 1:2:8*
Speedy Trial 1:1:6; 1:1:7*
Speedy Trial Prejudice In Absence of Restriction 1:8:8*
Speedy Trial: Specific Prejudice 2:6:17*
Speedy Trial: Unavailability of Military Judge 2:2:28*
Warning Accused of his Rights Under Article 38(b) 1:2:3
Warning Required Before Request for ID Card 1:6:11*
Whatever Happened to Speedy Trial? 2:9:1
Writ of Mandamus, Habeas Corpus Relief (The Miscellaneous Docket) 2:9:20

Miscellaneous

Survey of Cases of Court of Appeals of District of Columbia 1:2:9

Morning Reports and Service Records

Don't Give Up on the Bowman Error 3:6:125
Dropped from Rolls 1:10:11*
Lack of Authentication 2:8:25*
Should They Be Accorded a Presumption of Regularity 3:6:129
Tainted Morning Reports 3:7:162*

Multiplicity

Assault and Threat 1:9:12*
Communicating a Threat and Assault 1:3:9*
Drug Offenses 3:7:164*
Multiplicity 2:6:9
Multiplicity in Marijuana Prosecution 1:4:3

Mutiny

Concerted Intent to Override Authority 2:5:21*

-N-

Narcotics and Poisons

Alcohol and Drug Abuse Prevention: Control Plan
of 2 September 1971 3:7:144
Amnesty Program Can't Hide the Facts 3:7:161
Cross-examination of the Dangerous Drug Expert 2:5:1
"Dropsy" Testimony: Narcotics Seizure 2:9:18
Effect of Leary v. United States on Military 1:4:1
Insanity: Narcotics Addictions 1:9:12*
LSD: Maximum Punishment 1:10:10*
More on AR 600-32: A Possible Loophole in Barbiturate
Cases 3:6:133
Narcotics Addiction: Insanity 1:9:12*
New Drug Regulation 1:3:8
Presenting the Watson Defense to Narcotics Offenses 3:4:74
Presumptions 1:2:8*
Punishment for Being Addict 2:7:23*
Some Suggested Approaches in Defending the Drug
Addict 4:2:35

Neglect and Dereliction of Duty

Failure to State an Offense: Dereliction of Duty 2:2:23*

New Trial Rehearing and Revision Proceedings

Suppression of Evidence: New Trial 1:9:13*

-O-

Orders

Disobedience 1:2:9*
Disobedience: Legality of Order 1:9:10*
Financial Inability to Comply with Orders :
Necessity for Instruction 2:9:23*
Willful Disobedience: Restriction 1:10:12*

Pleas and Motions

Amnesia and the Guilty Plea 3:1:12
COMA Looks at Defense Counsel and the Guilty Plea 3:7:157
Defense Counsel and the Guilty Plea 3:6:135

Pleas and Motions (cont)

Guilty Pleas as Waivers 3:2:26
Guilty Pleas: Inconsistent Matters 4:1:25*
Guilty Plea Procedure: Does COMA Stand Alone? 2:9:16
Military Guilty Plea Procedure: A Problem 1:7:7
Not Guilty Pleas 2:2:16
Plea Bargaining 2:1:1
The Pseudo-Not Guilty Plea 2:7:9
Stipulation: Failure to State an Offense--Bad Checks
3:3:69
Stipulation and Speedy Trial Motions 3:7:148

-R-

Rape and Carnal Knowledge

Death Penalty for Rape: Is it Still Authorized? 3:1:15
Honest and Reasonable Mistake of Fact About Consent is
Now a Defense to Rape 3:4:86

Record of Trial

Appeal 2:10:32
Authentication of Record 1:1:7
COMA - October, 1970 Term: Record of Trial and
Appeal 3:8:202*
Make a Record for Appeal 2:2:18
Non-Verbatim Record 3:2:45*
Recording Machine Malfunction 3:3:68*
Trial by Judge Alone: Danger? 3:3:61

Riot, Breach of Peace, Disorderly Conduct

Failure to State an Offense: Breach of Peace 2:2:22*
Riot: Terrorization of General Public 2:2:27*

-S-

Search and Seizure

Abandoned Property 3:5:122*
Authorization by Commanding Officer 1:9:13; 2:1:11; 2:7:23*
Body Cavities 1:3:9*
College Dorm v. GI Barracks 3:6:142*
Consent of Accused 2:1:12; 2:2:27; 2:9:27*
Detention and Frisk 3:5:120*

Search and Seizure (cont)

Disqualification of Commander 3:5:122*
Incident to Pretrial Confinement 2:7:24*
Inventories 3:5:118*
Limitations on Consent and Searches 3:6:141*
Marihuana 3:2:46*
Military Magistrate: Commanding Officer or Military
Judge? 1:6:8
Motor Vehicles 3:2:45*
Probable Cause 1:9:13; 2:1:12; 2:6:16; 2:8:26; 3:3:70;
4:1:26*
Probable Cause, Arrest and Automobiles 4:2:41*
Probable Cause: Handwriting Exemplar 3:5:121*
Scope of Search 1:9:13; 2:2:28*
Search and Seizure 1:2:8*
Search Incident to Apprehension 4:1:26*
Search Warrants 4:2:30
Seizure - Evidence 2:10:15
Specificity 1:7:10*
Stop and Frisk 3:1:16*
Unlawful Search: Public Restrooms 3:7:167*
Warrantless In-Custody Seizure of Accused's Shoes
as Evidence 3:7:165*
Wiretapping in the Army 2:7:6

Self-Incrimination

Self-Incrimination 1:3:9*

Sentence and Punishment

Appealing Denial of Deferment of Confinement 2:2:6
Argument on Sentence Before Judge Alone 1:10
Article 39(a) Session After Announcement of Sentence 3:5:117*
COMA - October, 1970 Term 3:8:196*
Court Members: Predisposition as to Sentence 2:8:21*
Credit for Good Behavior - Sentencing (The Miscellaneous
Docket) 2:8:18
Deportation Following Court-Martial Conviction 2:2:14
Excess Leave Without Pay 2:6:9
Forfeitures: Comparison With a Fine 2:8:24*
General Provisions for all Prisoners 1:6:5
LSD: Maximum Punishment 1:10:10*
Multiplicious Charges for Sentencing Purposes 3:3:69*

Sentence and Punishment (cont)

Partial Forfeitures Myth and the DoD Pay Manual 3:5:100
Post-trial Consideration of Juvenile Offenses 3:3:67*
Prior Convictions - 1969 Manual 1:10:11*
Prisoners With a Punitive Discharge 1:6:6
Prisoners Without a Punitive Discharge 1:6:6
Punishment For Being An Addict 2:7:23*
Recommendation for Retention: Lost Opportunity 2:9:13
Records on Nonjudicial Punishment 2:5:23*
Section B, Table of Maximum Punishments and Tainted
Prior Convictions 2:6:137
Sentence and Punishment 2:10:27
Sentence Reduction After Action by Convening Authority 4:1:17
Statistical Comparison of Military Judge - Military Jury
Conviction Rates and Sentence Differentials 3:5:114
Tailoring the Sentencing Worksheet 1:8:6*
Transfers of Convicted Servicemen 2:7:10
Uncharged Misconduct 1:3:9*
Uncharged Misconduct: Improper Consideration by Military
Judge 2:6:18*
Unsworn Statement by Accused 2:9:28; 3:2:40*
Written Instructions on Sentence Voting Procedure 1:7:10

Sentinels and Lookouts

Sentinel Offenses: Sufficiency of the Evidence 2:9:29*

Staff Judge Advocate

Court Personnel 2:10:21
Disqualification of the Post-trial Reviewer 2:8:6

Statutes and Regulations

General Regulation - Punitive Effect 1:8:7; 1:9:11*
Lawful General Regulation 1:7:11*
More on AR 600-32 - A Possible Loophole in Barbiturate
Cases 3:6:133
Senator Proposes Sweeping Amendments to Uniform Code 2:6:12
Views on Drug Abuse Regulation (AR 600-32) 3:1:6

-T-

Trial and Procedure

Affirmative Defenses: Quasi-Entrapment by Government
Agents Bars Conviction 4:2:40*
Argument on Sentence Before Judge Alone 2:1:3

Trial and Procedure (cont)

Article 38(c) Brief: A Forgotten Defense Tool 2:8:13
COMA - October, 1970 Term: Affirmative Defenses 3:8:193*
COMA - October, 1970 Term: Trial Practice 3:8:174*
Commenting on Accused's Failure to Testify 1:6:10*
Comparison of Acquittal Rules in the Military and
Civilian Courts 2:8:11
Cross-Examination 1:1:6; 1:2:9*
Cross-Examination of the Dangerous Drug Expert 2:5:1
Cross-Examination of the Forensic Chemist 3:3:48
Cross-Examination: Marihuana Expert 1:3:1
Cross-Examining an Accomplice 2:2:19
Cross-Examining Larceny Victim 2:2:22*
Confronting Lay Opinion on Marihuana Identification 1:3:3
Dealing with Pretrial Punishment 1:9:6
Defense Problems in Death Cases 2:5:11
Depositions: Unavailability of Witnesses 2:8:22*
Depositions: Waiver of Establishing Unavailability
of Deponent; Sufficiency; Resisting Apprehension 3:3:68*
Direct Examination of Witnesses 3:1:10
Discovery: Investigative Agencies 3:2:41*
Discovery: Police Investigation Report 2:7:20
Effect of Acquittal of Co-Conspirators on Prosecution
of Conspiracy 3:3:58
Evidentiary Objections 2:1:6
Failure to Object at Trial: Effect at COMA 2:2:13
Fair Trial: Prosecution Argument 1:10:9; 2:1:9; 2:2:23*
Fair Trial: Questioning of Trial Judge 2:2:24*
Forensic Pathology Services Available to Military
Counsel 2:5:8
General Insanity Voir Dire Examination 1:8:4
How to Impeach a Witness with Prior Inconsistent
Statement 1:6:9
If Client Denies Making Pretrial Statement 1:2:6
Impeaching Your Own Witness: How to Show Surprise 1:7:9
Impeachment: Promise of Immunity 2:1:10*
In-Court Identification: Effect of Pretrial Confronta-
tion 2:1:10*
Interlocutory Appeal of Denial of Pretrial Discovery
Request 2:8:16
Judge-Jury Differentials Increase in Contested Cases
in Favor of Accused 3:7:159
More on the Choice Between Military Judge and Military
Jury 4:3:52