

# T H E        A D V O C A T E

## A Monthly Newsletter for Military Defense Counsel

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### DEFERMENT OF SENTENCE TO CONFINEMENT PENDING APPEAL

New Article 57(d) of the Uniform Code of Military Justice, enacted as part of the Military Justice Act of 1968, permits the deferment of a sentence to confinement pending appeal. This is the military equivalent of the civilian bail pending appeal. See Fed. R. App. P. 9(b); Fed. R. Crim. P. 42. Properly used, the deferment of sentence can be a significant step toward the improvement of military justice.

Deferment is not a form of clemency. An accused is entitled, under proper circumstances, both to deferment and clemency; they are not mutually exclusive. See Paragraph 88f, Manual for Courts-Martial, United States, 1969 (rev. ed.). Deferment merely represents the postponement of a sentence to confinement. If it is later rescinded, or if the

sentence is ordered executed, the confinement time must be served. Although appellate authorities may in fact be reluctant to approve all or part of a sentence which has been deferred, the accused must understand that the entire sentence could be approved.

Thus, deferment is not always advisable. Appellate review may be lengthy and unproductive, and therefore the accused may choose to "do his time" immediately and be finished with it.

The Defense Appellate Division has filed with the Commanding General, Headquarters, Fort Leavenworth, Kansas, several applications for deferment of confinement, but these have been relatively unsuccessful and have all been in cases where the accused has already served between two and six months confinement. Clearly the most effective use of deferment can be made not at the appellate but at the trial level.

The Senate Report on the Military Justice Act of 1968 noted that "a convicted military prisoner must begin serving his sentence to confinement from the date it is adjudged, even though it ultimately may be reversed on appeal. If it is reversed by the Court of Military Appeals, the prisoner probably will have served the entire sentence by the time a decision is rendered. If reversal comes earlier, at the court of military review level, he will at least have served months of the sentence before reversal. This amendment will correct this situation by authorizing a means of release from confinement during appellate review." S. Rep. No. 1601, 90th Cong., 2d Sess., 13 (1968).

Since the avowed purpose of deferment is to make appellate review more meaningful, it should be clear that deferment is highly appropriate in those cases with a "likelihood of success" on appeal. "Likelihood of success" has been interpreted by federal courts to mean not "beyond a reasonable doubt" but containing a "substantial question of law." Cohen v. United States, 82 S.Ct. 518 (Douglas, Circuit Justice 1962); Fed. R. Crim. P. 46(a)(2) (appeal must not be frivolous or taken for delay).

Counsel should be aware, however, that current statistics show that the reversal rate of general court-martial convictions is about 1 1/2%. After trial, the probability of appellate relief should be assessed and the matter discussed completely with the accused.

Deferment will also be appropriate in those cases where the offense was committed in response to a situation such as absence due to financial or personal hardship. If the facts have not improved, the problem may be ameliorated by restoration to duty pending appeal. Deferment is appropriate when confinement is medically contraindicated for physical or mental reasons. Moreover, where there is no pretrial restraint, and suspension of confinement is likely, deferment until action of the convening authority may also be advisable.

Applications for deferment should be made as soon as possible after conviction -- perhaps the same day. The application must be in writing and should be signed by counsel and the accused. It should state the specific reasons why deferment would be in the best interest of the accused and the Army. If appropriate, discuss the accused's offense, his prior record and future plans. The application should also note that the accused (a) is not a danger to the community, (b) is unlikely to repeat this or any other offense, and (c) is unlikely to flee to avoid service of his sentence. See generally 18 U.S.C. § 3148 (1964) (Bail Reform Act of 1966). The application should also state whether return to duty or excess leave without pay is requested and why. Section V, Army Reg. 630-5. Documentary evidence may be appended to the application to show that the accused has a place to live and a job.

The application should be made to the convening authority or the officer exercising general court-martial jurisdiction over the accused. If the accused has already been transferred to the Disciplinary Barracks, the application should be made to the Commanding General, Headquarters, Fort Leavenworth. A court-martial is not empowered to defer

or recommend deferment of a sentence. The Manual provides that if deferment is ordered, there should be no other form of restriction or deprivation of liberty.

The application and correspondence granting or denying deferment should be appended to the record of trial. An appropriate place for counsel to note the pendency of an application for deferment would be the form on which the accused requests appellate defense counsel.

Action on application is discretionary with the officer empowered to grant deferment. The analysis of contents of Paragraph 88f of the Manual, supra, notes that "the nature of this authority is emphasized by characterizing it as sole and plenary. This was done in order to assure the greatest possible freedom of action on the part of the officer possessing this authority." It also makes a denial of deferment difficult if not impossible to appeal, although at least one habeas corpus petition is now pending on this issue in the Court of Military Appeals. (Dale v. Dillon, Misc. Docket 69-55 (COMA, argued 20 November 1969)). Apparently the only litigable issue is abuse of discretion. See Levy v. Resor, 17 USCMA 135, 37 CMR 399 (1967); Patterson v. United States, 75 S.Ct. 256 (Frankfurter, Circuit Justice 1954); United States v. Porter, 297 F. Supp. 1117 (D.C. Cir. 1969); United States v. Blyther, 407 F.2d 1279 (D.C. Cir. 1969)(per curiam).

Deferment is terminated upon the ordering of the sentence into execution. Thereafter, confinement may be approved and suspended, but not further deferred. Prior to execution, the deferment may be rescinded at any time. The Manual (Para. 88g) provides again that the power to rescind deferment is "sole and plenary," but the Uniform Code conspicuously omits the qualifying phrase "in his sole discretion" from the sentence authorizing rescission. Apparently the intent of the Manual is to deny a right to a hearing before deferment is rescinded, unlike Article 72(a) and (b) dealing with vacation of suspension. It is not clear what

remedy is available for abuse of discretion in rescission. Cf. Levy, supra; Patterson, supra; see generally Bitter v. United States, 389, U.S. 15 (1967) (per curiam); United States v. Fort, 409 F.2d 441 (D.C. Cir. 1969) (per curiam).

MILITARY JURISDICTION OVER MARIHUANA OFFENSES:  
A REJOINDER

The United States District Court for Rhode Island has permanently enjoined the military from prosecuting a serviceman for possession of marihuana, in a case which marks a civilian court's first response to the doctrine laid down by the Court of Military Appeals in United States v. Beeker, 18 USCMA 563, 40 CMR 275 (1969) (use of marihuana always service-connected).

In Moylan v. Laird, Civ. Act. No. 4179, (D.C. R.I. 20 October 1969), a marine lance corporal was arrested while AWOL following a San Juan, Puerto Rico, customs inspection which produced 42.5 ounces of marihuana. He was brought before a US Commissioner, pleaded not guilty, and returned to duty. He was charged with wrongful possession of marihuana under Article 134, Uniform Code of Military Justice, and the charges were referred to a general court-martial.

The district court ruled that the military lacked jurisdiction to try the plaintiff for wrongful possession, citing O'Callahan v. Parker, 395 U.S. 258 (1969). The court noted:

(1) [T]he alleged act of wrongfully possessing marihuana did not occur on a military post . . . but within the civilian community; (2) there was no particular military victim involved who was performing some military duty; (3) the situs of the crime . . . was certainly not an armed camp under military control, as are some of our far-flung outposts; (4) the civilian courts of Puerto Rico were not only open and functioning,

but the plaintiff himself was apprehended by civilian authorities, detained for at least one day . . . and subsequently arraigned before a civilian United States Commissioner. Moylan, supra, m/s op. at 12.

The court acknowledged that the use of marihuana, on or off-post, on or off-duty might have special military significance, and to that extent adopted Beeker's rationale. However, the court distinguished possession from use and opined that it tended to undermine military authority no more than any other crime. Finally, the court distinguished Beeker on its facts (on-post possession) but not in its dicta, and ruled "off base possession of marihuana within the peripheries of the civilian United States is not a matter over which the military jurisdiction extends." THE ADVOCATE has been informed that the Department of Justice will not perfect an appeal in this case.

#### DEALING WITH PRETRIAL PUNISHMENT

Although the Court of Military Appeals has ruled that pretrial punishment in violation of Article 13, Uniform Code of Military Justice amounts to a deprivation of military due process, United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969), such punishment is apparently continuing at many Army stockades. Thus, there should be an affirmative duty on the part of trial defense counsel to determine whether his client is being or has been subjected to such punishment. Inquiry should be made at the initial interview. If punishment in violation of Article 13 exists, the following approach is suggested:

1. Demand Compliance with Article 13. It would often seem advisable to communicate directly in writing with the confinement officer, specifying the nature of the violation and demanding either that it be ceased or that the client be released. If denied or ignored, renew the demand to the convening authority responsible for the operation of the stockade. It may be advisable, although by no means necessary, to communicate through the staff judge advocate.

2. Utilize the Military Judge. If preliminary negotiation fails, application should be made to the military judge for appropriate relief. This step may be necessary in order fully to protect the accused's interests and it appears clear that the military judge possesses sufficient power to deal with pretrial punishment through an appropriate order. In re Strichland, Misc. Docket 69-48, (Court of Military Appeals, 24 September 1969) (petition for writ of habeas corpus alleging illegal punishment denied since, inter alia, no relief was sought from either the convening authority or the military judge). Our view of this decision is that the military judge must now entertain an application for relief upon request. See THE ADVOCATE, August 1969.

3. Renew Motion at Trial. If all else fails, be prepared to litigate the issue at trial. Secure witnesses who can testify to the duration, extent and exact nature of pretrial punishment. Counsel should be especially alert to willful violations of Article 13. For example, in CM 421672, Granillo, (pending before COMR), the record of trial indicates that military confinement officials were aware of Article 13 violation yet they failed to take corrective action. It should be noted that merely instructing the court that it should consider the fact that the accused has already been partially punished may not always be an appropriate remedy. In United States v. Johnson, No. 21,974, USCMA, CMR (31 October 1969), the Court tested an Article 13 violation for prejudice and found none in a three-day violation. Had the period of time been longer, however, the Court implied that relief might have been available either as to findings or sentence. Conceivably this relief would be in the form of dismissal. United States v. Pringle, No. 22,471 (COMA granted 19 November 1969).

Effective appellate review of any issue requires a complete record. This is trial defense counsel's responsibility. Counsel should remember that pretrial punishment is a statutory violation, and should always be taken seriously.

WRITTEN WITNESS STATEMENTS TAKEN ON  
BEHALF OF THE DEFENSE

The simple and quick practice of taking written statements from witnesses interviewed by the defense can create a valuable addition to counsel's trial folder.

Prosecution witnesses interviewed by a courteous defense counsel who has created an atmosphere of sympathy for his client will often disclose previously unrevealed information favorable to the defense. If a written statement is not taken, counsel will not be adequately prepared if in-court testimony is at variance with previously disclosed information. If the witness denies making a particular statement to counsel when cross-examined, counsel will be bound by the denial unless he has proof of the inconsistent statement. See THE ADVOCATE, August 1969.

Statements taken from defense witnesses can be used for the following purposes: (1) impeachment after establishing surprise (See THE ADVOCATE, September 1969; Paragraph 153b, Manual for Courts-Martial, United States, 1969); (2) rehabilitation by prior consistent statements (see Paragraph 153a, Manual for Courts-Martial, United States, 1969); (3) refreshing memory or possibly past recollection recorded (see Paragraph 146a, Manual for Courts-Martial, United States, 1969); (4) support for a request for the personal appearance of a witness (see Paragraph 115a, Manual for Courts-Martial, United States, 1969); and (5) protection against post-trial claims of inadequacy of counsel in the case of witnesses suggested by the accused.

Occasionally, an individual who has been identified as being present at the scene will disclaim all knowledge. If counsel cannot otherwise convince the witness to talk, he should take the witness's statement to the effect that he knows nothing. Thus, if the witness later testifies for the prosecution, he can be impeached and cross-examined for bias.

The most convenient and inexpensive methods for taking statements are: (1) handwritten by the witness and signed by him; (2) handwritten by the witness and unsigned; (3) interviewer's handwritten transcription signed by the witness. Counsel should have the witness read the statement, make corrections, and initial all corrections made. The witness's initials will be convincing evidence that the witness did in fact read the statement before signing.

The contents of the statement will generally be dictated by the circumstances, but defense counsel should normally include time, date and place of the interview, information concerning identity of other witnesses, the witness's own account of the incident in his own language, and finally a notation that the statement is true and constitutes all the witness knows about the matter.

Defense counsel who are constantly aware of the various uses and potential value of written statements will be able more effectively to identify those situations in which a written statement should be taken. See generally 2 Busch, Law and Tactics in Jury Trials § 201 (encyclopedic edition 1959); 2 Am. Jur. Trials, § 75 (1964); 13 Am. Jur. Trials § 26 (1967).

#### DISCOVERY OF THE CID READING FILE

In addition to the approaches suggested in THE ADVOCATE, September 1969 to obtain discovery of the CID "reading file," we call your attention to DA Pam. 27-173, Military Justice--Trial Procedure (Headquarters, DA, 1964). This publication opines that "it should not be necessary to show the item's 'admissibility in evidence' as a prerequisite to inspection" of "any item in the custody of military authorities." Military Justice--Trial Procedure, supra at 57. Discussing the release of the files of military criminal investigation reports specifically, the publication notes that an opinion of

The Judge Advocate General of the Army "would allow military defense counsel 'normally' to have 'unrestricted access to these reports' (when not made part of the Article 32 investigation)." Ibid.; see JAGJ 1951/5921 (12 August 1959); Compare Chapter 4, Army Reg. 195-10 (restricting release of CID reports of investigation). Query: Is there a difference for this purpose between a reading file and a report of investigation?

#### RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

COUNSEL -- LINEUPS: The right to effective assistance of counsel requires that the description of a suspect that is given to police be made available to counsel for an accused at a lineup. Spriggs v. Wilson, \_\_\_ F.2d \_\_\_ (D.C. Cir. 16 October 1969) (per curiam) (dictum).

CONFESSIONS -- RIGHT OF CONFRONTATION: Bruton v. United States, 391 U.S. 123 (1968), renders prejudicial the admission of a testifying codefendant's confession implicating the accused, if the codefendant repudiates that confession at trial. The repudiation, for all practical purposes, prevents the defendant from exercising his right to confrontation. Hammond v. State, \_\_\_ N.E.2d \_\_\_ (Ill. Ct. App. 8 October 1969), 6 Crim. L. Rep. 2072. Compare United States v. Gooding, 18 USCMA 188, 39 CMR 188 (1969).

CONFESSIONS -- RIGHT OF CONFRONTATION: The right to confrontation, as construed by Bruton v. United States, supra, means that unless a confessing codefendant is cross-examined at the time he makes his statement, the portion of his confession that implicates other defendants in a joint trial is not admissible even if the confessing defendant testifies at the trial. In re Hill, \_\_\_ P.2d \_\_\_, (Calif. Sup. Ct. 11 September 1969), Crim. L. Rep. 2073.

DISOBEDIENCE OF ORDERS -- LEGALITY OF ORDER: Order "to train" given to a basic trainee is invalid for the purpose of prosecution as being "far too

general and all-inclusive" to fall within the purview of Article 90, Uniform Code of Military Justice. Court of Military Review cited United States v. Bratcher, 19 USCMA 125, 39 CMR 125 (1969), and stated that the order did not direct accused to do, or cease to do a particular thing at once, but was merely an exhortation to perform all of his duties as a trainee and to comply with the directives of any and all superiors. These were obligations already imposed by reason of his status as a soldier. CM 420313, Oldaker, 23 September 1969. See also CM 420844, Gifford, (13 October 1969) (order "to commence to begin training" held invalid).

DISRESPECT -- LOSS OF ENTITLEMENT TO RESPECT: Stockade prisoner was charged with disrespect and assault on a commissioned officer, and failure to obey and disrespect to a noncommissioned officer. The latter three charges were dismissed by the Court of Military Review because of insufficient evidence. As to the first offense, the court held that the confinement officer (and also the first sergeant) by reason of their "gross improprieties" had divested themselves of the right to be respected. Both men had used provoking, abusive, and derogatory language towards the accused, the sergeant kicked a fence which struck the accused, and the confinement officer punched the accused in the stomach and kneed him in the groin while other custodial personnel held the accused whose arm was in a cast. The court, condemning the use of brute force which precipitated the offenses in question, stated that the men had divested themselves of "that cloak of authority, respect, and deference which is due them." CM 419746, Revels, (22 September 1969).

GENERAL REGULATION -- PUNITIVE EFFECT: First sentence of Paragraph 5b, MACV Directive 65-5, stating that total value of dollar instrument purchases with MPC will not exceed \$200.00 in any one month, does not apply punitively to

postal officer's purchases of United States postal money orders. Provision in question merely sets forth procedures for the merchandising of postal money orders. Court of Military Review relied on United States v. Baker, 18 USCMA 504, 40 CMR 216 (1969) (purchase of treasury checks) and CM 420561, Underwood, \_\_\_ CMR \_\_\_ (25 August 1969) (purchase of Chase Manhattan Bank money orders). [See THE ADVOCATE, September 1969]. The court quoted from Underwood to the effect that the provision in question was "no more than information provided to the postal clerk so that he will know how to properly limit the amount of money orders purchased by an individual." CM 420873, McEnany, (24 October 1969).

IMPROPER UNIFORM -- SPECIFICATION: Specification alleging wrongful appearance on board station dressed only in a towel does not state the offense of wearing an improper uniform under Article 134, Uniform Code of Military Justice. For that offense, a Navy Court of Military Review held that the charge must state that an improper uniform was worn and delineate in what respect it was improper. The charge alleged does not show indecent exposure, or any special circumstances to the prejudice of good order and discipline or conduct bringing discredit on the armed forces. NCM \_\_\_, Lovall, (22 September 1969), 6 Crim. L. Rep. 2110.

INSANITY -- NARCOTICS ADDICTION: Evidence of narcotics addiction is "clearly probative" on the issue of insanity if addiction is a symptom of an underlying mental illness, or if the addiction process itself involves 'any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.' (McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962)). Heard v. United States, \_\_\_ F.2d \_\_\_ (D.C. Cir. 28 October 1969) (dictum).

MULTIPLICITY -- ASSAULT AND THREAT: Accused pointed loaded machine gun at victim; as accused was wrestled to the floor by another soldier,

he threatened to kill the victim. Court of Military Review relied on rule that offenses occurring at same time merge for punishment purposes where essentially one act is committed, and held that aggravated assault and communication of a threat a few seconds thereafter are multiplicitous for punishment purposes. CM 421377, Metcalf, (27 October 1969).

NEW TRIAL -- SUPPRESSION OF EVIDENCE: Two accused were convicted of robbery and conspiracy to rob. The prosecution suppressed evidence tending to reduce the degree of one co-accused's involvement in the robbery. A new trial was ordered for that accused although the suppressed evidence would probably not produce a different verdict, was more relevant to punishment than guilt, and would be used primarily to impeach the credibility of the accomplice. Polisi v. United States, \_\_\_ F.2d \_\_\_ (2d Cir. 25 September 1969).

SEARCH AND SEIZURE -- AUTHORIZATION BY COMMANDING OFFICER: Authorization of search by executive officer of accused's company was without authority where he had not been specifically delegated the authority to permit searches and where the company commander was attending a meeting fifty to a hundred yards from the orderly room (where the executive officer was located). The court found no "temporary absence" of the commander which would justify assumption of command by the executive officer in accordance with Paragraph 15a, Army Reg. 600-20, 31 January 1967. CM 419742, Gionet, (10 October 1969).

SEARCH AND SEIZURE -- PROBABLE CAUSE: Apprehension of soldier in possession of marihuana off-post is insufficient as a matter of law to provide the requisite probable cause for a search of his on-post possessions. CM 420234, Ferrel, (10 September 1969).

SEARCH AND SEIZURE -- SCOPE OF SEARCH: When police are investigating possible criminal behavior in circumstances where probable cause is not present,

there can be a search for weapons for the protection of the officer where he has reason to believe he is dealing with an armed and dangerous individual. Terry v. Ohio, 392 U.S. 1 (1968). The Court of Military Review, assuming that justification for such a search existed, found that the search in question was beyond the scope of such justification. The police, after stopping the accused for reckless driving, seized and searched a brown paper bag about twelve inches long and seven and a half inches wide which was lying on the floor near the front seat of the accused's vehicle (and which was subsequently found to contain marihuana). The court held that the occupants of the vehicle had dismounted, were subject to the immediate control of the police, and did not appear hostile. Neither the size nor shape of the package was suggestive of a lethal instrument, nor did the policeman examine it for that reason. The removal of the package was for a purely exploratory purpose; the police thought it might contain a "six pack" of beer. CM 419573, Martinez, (10 September 1969).

#### RANDOM NOTES

\*\*\*Counsel who seek a good, concise and useful handbook of criminal procedure and trial tactics are referred to Federal Defender's Program, Handbook on Criminal Procedure in the United States District Court (West 1967). While the book is aimed primarily at federal practice, it contains many valuable aids and practical tips for military defense counsel as well.

\*\*\*The Editors of THE ADVOCATE wish to know how effective our distribution efforts are. Our primary goal is that every military defense counsel have access to THE ADVOCATE every month. We solicit comments as to the method of distribution so that we may adapt if necessary.



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