

# THE ADVOCATE

## Newsletter for Military Defense Counsel

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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. 1-21f, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and officers therein, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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### Editors Note

From its inception, The Advocate has attempted to assist field defense counsel in defending their clients by providing the latest developments at the appellate level. It is recognized that this is only half of the defense picture. There are undoubtedly many field counsel who have developed trial techniques that have proved to be very effective in accomplishing the same end. Unfortunately, as of now, there is no feasible method of sharing these ideas with lawyers at other installations. Since it is disseminated to installations on a world-wide basis, The Advocate is an ideal vehicle for such purposes. Accordingly, we are initiating a program designed to allow you to share your ideas and techniques with your other counsel in the Corps.

If you have an approach to developing evidence for use at trial or a technique that has worked for you in handling your cases, we urge you to submit them to The Advocate and we will print as many as possible complete with credit to the contributor (if desired). Hopefully, we can use this device to further enhance the already fine quality of representation provided to our clients.

Letter should be directed to the Field Defense Representative, C/O The Advocate, Defense Appellate Division, Falls Church, Virginia 22041.

Similarly, should issues explored in The Advocate raise additional questions or appear to be relevant to an issue in one of your cases, please correspond with this office, and all efforts will be made to provide you with the needed assistance.

## Unlawful Pretrial Confinement

Subchapter II (Articles 7-14) of the Uniform Code of Military Justice generally addresses apprehension and restraint in the military. Specific authority to confine an individual charged with an offense is found in Article 10. This authority is not, however, wholly unbridled: No confinement may be ordered except "for probable cause" (Article 9 (d)); confinement is proper solely to insure the presence of the accused at trial (Article 13); confinement should be imposed only as circumstances may require" and "ordinarily" not where the charged offense is "normally tried by summary court-martial" (Article 10). Confinement may be ordered, in the case of an enlisted member, by any commissioned officer (or a warrant or noncommissioned officer designated by a commander) or, in the case of an officer or warrant officer, a commanding officer. (Article 9(b) and (c)). There is no codal requirement that the confining authority conduct any type of formal or informal hearing in the determination of probable cause or the necessity of confinement to assure the accused's presence for trial. There is a further limitation in Article 13 in that the pretrial confinee may not otherwise "be subjected to punishment or penalty."

Paragraphs 18, 20, 21, 22, and 125 of the Manual explain and expand the aforementioned Articles. Also relevant is AR 190-4, paragraph 1-3d, change 7, dated 3 August 1973, and interim changes dated 12 August 1974. The most notable of the above provisions are paragraph 20c, Manual supra, and paragraph 1-3d(1) of AR 190-4. These provisions expand the grounds for pretrial confinement to include those cases which involve "serious" charges.<sup>1</sup> These sources also reiterate that confinement is proper to insure the presence of the accused at trial.

Pretrial confinement is unlawful in two circumstances: Where there has been an impropriety in the decision to confine the accused; and, where the pretrial confinement amounts to punishment in violation of Article 13, Uniform Code of Military Justice.

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<sup>1</sup>/ Seriousness of the offense by looking to the type of offense as well as the punishment therefore. See DeChaplain v. Lovelace 23 USCMA 35, 48 CMR 506 (1974).

Impropriety in the decision to confine may result in unlawful pretrial confinement where the confining authority fails to base his decision to confine on the appropriate grounds. The fundamental purpose in confinement must be to insure the subject's presence for trial. Lacking that purpose, confinement has been said to be illegal. Article 13 Code, supra; DeChamplain v. Lovelace, supra; Wood v. McLucas, 22 USCMA 475, 47 CMR 643 (1973); United States v. Jennings, 19 USCMA 88, 41 CMR 88 (1969); United States v. Bayhand, 6 USCMA 762, 21 CMR 84 (1956). Seriousness of the offense is also a valid factor as it relates to the subject's likelihood of flight. Chaparro v. Resor, 412 F. 2d 443 (4th Cir. 1969); United States v. Jennings, supra; See paragraph 20c, Manual, supra, AR 190-4, paragraph 1-3d, Local regulations which allow pretrial confinement because of danger to the life or property of others have been approved as they have been construed as falling within the serious nature-of-offense criterion noted above. Chaparro v. Resor; United States v. Jennings, both supra. Where pretrial confinement is ordered for a reason other than those mentioned above, the confinement is unlawful.

Further, impropriety in the decision to confine may be found when the confining authority does not follow local regulations and customs in arriving at his decision to confine. Failure to state as a reason one of the proper grounds for pretrial confinement set out in a local regulation may serve as the basis for a finding of unlawful pretrial confinement. United States v. Gettz, 49 CMR 79 (ACMR 1974); See United States v. White, 17 USCMA 211, 39 CMR 9 (1969); United States v. Stinson, 43 CMR 595 (NCOMR 1970). Implicit in these holdings is the fact that, while the Code, Manual, and general regulations set out the broad limitations on the power to confine, local regulation may well restrict the proper grounds for pretrial confinement. Hence, in attacking the propriety of the decision to confine, it is essential to have a grasp of local regulations bearing on the subject because of guidelines as to proper grounds for confinement and because the local regulation may well have procedural safeguards not generally available that must be complied with. United States v. Gettz, supra. Further, local practice and custom is of great importance when determining whether an offense is "normally tried at summary court-martial" or is not otherwise considered serious.

Pretrial confinement is violative of Article 13, when an accused is confined with, and treated in the same manner as, sentenced prisoners. United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969); United States v. Bayhand, United States v. Jensen; both supra. The United States Court of Military Appeals in United States v. Bayhand, supra, set out a six-point test to aid in the determination of

whether pretrial confinement is tantamount to punishment.<sup>2</sup> If the application of this test indicates a sameness in treatment between a pretrial confinee and sentenced prisoners, then the pretrial confinement is unlawful. See United States v. Nelson, supra.

The pretrial confinee's right to be separately confined from sentenced prisoners may be waived at the time of confinement. United States v. Gettz, supra; United States v. Feely, 47 CMR 581, (NCOMR 1973). These waivers may, however, be shown to have been coerced and therefore ineffective. United States v. Reitz, 47 CMR 608 (NCOMR 1973); See United States v. Wisener, 46 CMR 1100 (CGCMR 1973). In order to show coercion, defense counsel must obviously present some cogent evidence showing the distinction between confinement with sentenced prisoners as opposed to less agreeable confinement conditions and lack of privileges for those pretrial confinees who refuse to sign the waiver.<sup>3</sup>

The recognized remedy at the trial level for unlawful pretrial confinement is consideration of such illegal confinement in the assessment of a sentence. United States v. Kimball, 50 CMR 337 (ACMR 1975). In Kimball, the trial judge found that the accused had been subjected to 80 days of unlawful pretrial confinement. In an attempt to cure the error, the military judge instructed the members of the court that the maximum punishment for the offenses charged was reduced by 80 days. The court held that this was not a "meaningful relief" for the unlawful pretrial confinement and stated:

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2/ From what has been said, it should be apparent that the crucial determination in this case is whether the circumstances and conditions surrounding the giving of the order show that the accused was being punished. In order to make that determination, several factors must be considered, and while they may not be all-inclusive, we believe the important ones can be accentuated by posing the following questions; (1) Was the accused compelled to work with sentenced prisoners? (2) Was he required to observe the same work schedules and duty hours? (3) Was the type of work assigned to him normally the same as that performed by persons serving sentences at hard labor? (4) Was he dressed so as to be distinguishable from those being punished? (5) Was it the policy of the stockade officers to have all prisoners governed by one set of instructions? (6) Was there any difference in the treatment accorded him from that given to sentenced prisoners? 21 CMR at 92.

3/ Confinement in a "solitary cell" by itself has been held to be insufficiently onerous or unusual to justify extraordinary relief, Lowe v. Laird, 18 USCMA 131, 39 CMR 131 (1969).

A reduction in the maximum authorized confinement for the offenses being tried would not normally be the equivalent of meaningful relief for illegal pretrial confinement. The maximum confinement authorized for an offense is seldom adjudged. Periods of illegal pretrial confinement would not normally exceed three months. See United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971). Thus, a day-for-day reduction in the authorized confinement would be meaningless in many cases. Likewise an instruction to the court members to first determine an appropriate period of confinement for the offense and then to deduct therefrom the period of illegal pretrial confinement prior to announcing the sentence is considered inappropriate. The decisions in this area do not support the proposition that illegal pretrial confinement should always be set off against confinement. An appropriate sentence for a particular offense may not include confinement.

We believe the proper result is achieved when the court is forthrightly advised of the nature of the illegal pretrial confinement, the seriousness of the Government's violation of the individual's fundamental rights, and the necessity that they give meaningful relief in their sentence for the Government's violation of Article 13 (and presumably an impropriety in the decision to confine). The determination of whether the sentence adjudged constituted an adequate remedy will be subject to further review by the convening authority as well as the appellate courts. 50 CMR at 340.

It is therefore recognized that instructions which impress upon the members of the court the full significance of the deprivation and prejudice to a person unlawfully confined are sufficient to obtain meaningful relief for an aggrieved accused at trial. See United States v. Feely; United States v. Reitz, both supra.

Adequate relief for unlawful pretrial confinement at the trial level where the trial is before a military judge alone is generally found where the military judge, prior to deliberating, states that he is taking into consideration the unlawful confinement of the accused. United States v. Gettz, supra.

Where there is an obvious failure to render an accused meaningful relief, appellate courts will take affirmative action as mentioned in United States v. Kimball, supra. See United States v. Burkes, 42 CMR 572 (ACMR 1970). An advocate may greatly assist his client by pointing these cases out to the military judge.

The most logical time to seek relief for unlawful pretrial confinement is at the time of its occurrence. Relief before trial may be sought in one or more of three forms: The Article 138 complaint; specific application to a local magistrate for a hearing to consider the legality of the confinement; and a petition for Extraordinary Relief to the United States Court of Military Appeals or the Court of Military Review.

The Article 138 complaint, in the not too distant past, was recognized as the primary remedy for an individual in unlawful pretrial confinement. Catlow v. Cooksey, supra. Where judicial remedies were sought, exhaustion of the 138 complaint process was required prior to the court's consideration of the case. Tuttle v. Commanding Officer, 21 USCMA 229, 45 CMR 3 (1972). The exhaustion of the 138 process is evidently no longer required as a prerequisite to application to judicial forums. See Porter v. Richardson, Misc. Docket No. 75-38 (8 September 1975); Phillippy v. McLucas, Misc. Docket No. 75-36 (8 September 1975). Relief by way of the Article 138 process is of dubious merit because, lacking a specific time limitation, it does not provide the necessary immediate relief from the unlawful confinement. Inordinate delay in processing the complaint could moot the issue.

The second method for seeking immediate relief during the period of unlawful pretrial confinement is application to a local military judge. The military judge may after referral convene an Article 39(A) (Uniform Code of Military Justice) session to inquire into the legality of the accused's pretrial confinement, and to issue orders to "effectuate his findings." Bouler v. Wood, 23 USCMA 589, 50 CMR 854, (1975); Porter v. Richardson, supra; Phillippy v. McLucas, supra; Milanes-Canamero v. Richardson, Misc. Docket No. 27-37 (September 8, 1975). See also AR 27-10 paragraph 16-4b. In Porter and Milanes-Canamero, both supra, the accused had been confined and the cases referred to trial (both on July 25, 1975). The Court found that the accused had the right to have the legality of their pretrial confinement considered by a neutral and detached magistrate.<sup>4</sup>

<sup>4</sup> The Court relied on Gerstein v. Pugh, 420 U.S. 103 (1975); DeChamplain v. Lovelace, 510 F. 2d 419 (8th Circuit 1975); DeChamplain v. Lovelace, 23 USCMA, 48 CMR 506 (1974); and Newsome v. McKenzie, 22 USCMA 92, 48 CMR 92 (1973), as the basis for the accused's right.

In Phillippy, supra, the case had not yet been referred to trial and the Court included an additional order to the convening authority to "forthwith" refer the case to trial if he so intended.

In Bouler, supra, the Court commended the military judge who, after referral of the case, convened a 39a session at the request of the accused solely to consider the legality of pre-trial confinement. The military judge found that the confinement was illegal but, doubting his authority to order the accused's release, stopped short of ordering same. The Court, although finding that the case had been mooted by the convening authority's release of the petitioner from confinement, stated:

We cannot dispose of this matter, however, without commending the trial judge,..., for exercising his authority as a judge in a heretofore unexplored area of military law. His concern and foresight, recognizing the necessity for the judicial process while at the same time the possible limits to the exercise of his powers, can only serve as a model for other judges. The United States Supreme Court has recently made clear that the judiciary can no longer stand idly by where individuals are incarcerated without a hearing prior to trial. Gerstein v. Pugh, 420 U.S. 103 (1975). See also DeChamplain v. Lovelace, 510 F. 2d 419 (8th Cir. 1975), judgement vacated as moot, 43 U.S.L.W. 3733 (U.S. June 3, 1975). M/S op. at 3.

This avenue of immediate relief seems the most promising in the near future. Presently pending before COMA is Courtney v. Williams, Misc. Docket No. 75-64 (November 3, 1975). It is highly likely that if the Court is going to hold that an accused has a right to a hearing as envisioned in Gerstein v. Pugh; and DeChamplian v. Lovelace, both supra, it will do so in Courtney, supra.

On this same issue, it should be noted that the Military Magistrate Program, (Chapter 16, AR 27-10) provides for a system to monitor pretrial confinement in all jurisdictions, with confinement facilities. The aforementioned cases indicate that, prior to referral, the military judge has no power to intervene. Hence, prior to referral, counsel should utilize the local military magistrate. The magistrate program contemplates

that a magistrate will automatically review all relevant facts and personally interview each accused in pretrial confinement within seven days after confinement of the accused. The cases will be reviewed "not less than every two weeks." If the magistrate determines that the accused should be released from pretrial confinement he will notify the unit commander who is required to immediately release the accused. The system however, suffers from several deficiencies: The magistrate is limited to considering only the fact of confinement and is not allowed to question the sufficiency of probable cause; the initial decision to confine still resides with someone other than a neutral and detached individual; the system is a review procedure only and is by no means a means to avoid unlawful pretrial confinement. Further, this review will in most cases, be conducted prior to appointment of counsel.

The final method of securing immediate relief is application to the Court of Military Appeals or Court of Review for extraordinary relief. In the recent past, there was a reluctance on the part of the Court of Military Appeals to overturn or reverse a commander's order to confine. See Horner v. Resor, 19 USCMA 285, 41 CMR 285 (1970); Klein v. Resor, 19 USCMA 288, 41 CMR 288 (1970); Smith v. Coburn, 19 USCMA 291, 41 CMR 291 (1970). Opinions even reflected a willingness to resolve the issue of legality in favor of the commander who ordered confinement (See United States v. Nixon, 21 USCMA 480, 45 CMR 254 (1972)).

Presently, the COMA is exhibiting a willingness to exercise its extraordinary powers, seemingly to affect the requirement of a due process hearing on or near the time of initiation of pretrial confinement. See Bouler v. Wood; Porter v. Richardson; Phillippy v. McLucas; Milanes-Canamero v. Richardson, all supra. The Court is equally willing to order the actual release of a petitioner where confinement is unlawful due to a violation of the Code or Army Regulations. See Kelly v. United States, 23 USCMA 567, 50 CMR 786 (1975); Thomas v. United States, 23 USCMA 570, 50 CMR 789 (1975). It is, therefore, apparent that when an accused is in unlawful pretrial confinement, extraordinary relief is available. Given the leanings on the part of the Court of Military Appeals (re: the possible future requirement of due process hearing prior to or at the beginning of pretrial confinement), this route may become secondary in the near future. Extraordinary relief will always be a necessary alternative in order to assure continued compliance with codal provisions and regulations addressing pretrial confinement.

When an accused is in pretrial confinement, defense counsel, in the appropriate cases, should press for a hearing before a local military judge. At that hearing, the counsel should attempt to elicit facts relevant to probable cause, the necessity of confinement, and the reason the accused was actually confined. If the grounds are insufficient to show lawful pretrial confinement, the military judge should be urged to order immediate release. An error on the part of the military judge, either in wrongly determining that grounds for confinement exist or his failure to order immediate relief where unlawful pretrial confinement is shown, may be the subject of a petition for extraordinary relief or raised as a basis for sentence relief at trial and later appellate review.<sup>6</sup>

### Special Findings: The Overlooked Tool

At the present time a large number of courts-martial, including contested cases, are being tried before a military judge alone. Once the decision is reached to proceed with this type of forum, serious consideration should be given to exercising the right to request that the military judge make special findings of fact in addition to his general finding on the merits or in ruling on a motion. Numerous benefits inure, both at the trial and appellate level, when the military judge is requested to find the facts specially.

A request for special findings in the form of specific questions will inform the judge as to what the defense believes is the crucial evidence and testimony in the case. Furthermore, if a written request for such findings is presented (with case citations) prior to trial, it will afford defense counsel an opportunity to outline his case even before opening argument. However, these advantages are only minor compared to the fact that a request for special findings places the military judge on notice that he will have to set forth in writing, or on the record, the specific reasons for his verdict or ruling on a motion. Thus, his thought processes will necessarily be brought to light and can be examined. Furthermore, the response to a special findings request will reveal if the military judge mistakenly relied on excluded evidence or perhaps misunderstood important testimony. In short, the entry of such findings dispells any doubt as to which witnesses were believed, what

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<sup>6/</sup> The Court of Military Appeals has recently granted a petition and requested briefs on both the issue of illegal confinement and failure of the military judge to hold a hearing to determine the necessity and legality of the confinement. United States v. Peters, SPCM 1145, Docket No. 31, 215, granted 3 December 1975. Presumably the ultimate resolution of this case and the Courtney extraordinary writ should provide firmer, more established guidelines in this area. Analysis of this decision will follow in a later issue of The Advocate.

evidence the judge relied upon, what the judge believed the law to be, and, most importantly in some cases, whether the accused himself was a credible witness. On appeal these findings obviate the need for speculation on many issues. Also, the special findings prevent the government from arguing a completely different legal theory on appeal from that applied by the judge at trial. See United States v. Raymo, 23 USCMA 408, 50 CMR 290 (1975).

Article 51(d), Uniform Code of Military Justice, gives the accused the right to special findings upon request in a trial by military judge alone. The Manual further describes the duties of counsel and the judge with regard to such findings in paragraph 74 i:

The military judge sitting alone decides the guilt or innocence of the accused. He shall make general findings. . .and may make such special finding as he deems appropriate. Upon request, however, special findings shall be made of factual matters reasonably in issue. The special findings will usually include findings as to the elements of the offenses of which the accused may be found guilty, findings on the question of mental responsibility if raised by the evidence, and findings on special defenses reasonably in issue. A request for special findings must be made prior to the announcement of general findings by the military judge and must specify the matter to be determined. Only one set of special findings may be requested by a party in any case. The military judge may require that a request for special findings be submitted in writing. (Emphasis added).

The Manual provides that special findings can be announced in open court along with the general findings. Otherwise the trial judge may attach his special findings (or memorandum opinion) to the record within a reasonable time after sentencing and before authentication. Good practice would further dictate that, whenever possible, requests for special findings be in writing and served on the judge in advance. They should also be signed by counsel with a request that a copy of the findings be served on counsel upon completion so that he may be afforded the opportunity to request clarification or further specificity before finalization of the review and action.

Perhaps because the extremely effective tactic of requesting special findings has been greatly underutilized, the appellate courts have only spoken to the procedure on rare occasion. However, in United States v. Falin, 43 CMR 702 (ACMR 1971), the Court of Military Review found prejudicial error when a military judge refused to make special findings concerning a jurisdictional motion. In holding that upon request such findings must be made, on motions, the court noted that the legislative history of the Uniform Code of Military Justice suggests that current federal practice was intended to be incorporated into military law. Thus, federal cases on special findings may also be utilized. See e.g. United States v. Ginzburg, 338 F.2d (3rd Cir. 1964); Benchwick v. United States 297 F.2d 330 (9th Cir. 1961). Since Falin provides for such findings on motions and defenses, they should be requested when substantial issues such as the following are litigated at trial:

1. SPEEDY TRIAL (does Burton apply/what delay charged to defense and why?)
2. CONFESSIONS (Miranda/Tempia facts; voluntariness)
3. SEARCH & SEIZURE (operative facts/legal basis)
4. ENTRAPMENT (predisposition/credibility of agents and accused)
5. MISTRIAL (factual and legal basis for denial)
6. JURISDICTION (recruiter fraud - was accused's version of enlistment believed?)
7. COMMAND INFLUENCE (finding of facts essential on appeal)
8. ILLEGAL PRETRIAL CONFINEMENT (factors supporting necessity of continued confinement)
9. SPECIFIC INTENT OFFENSES (circumstantial evidence upon which finding of intent based)

This list is not intended to be all-inclusive. It only sets forth examples of areas where special findings can be particularly helpful.

It must be stressed that merely requesting that special findings be entered is not enough to preserve this important right. In United States v. Baker, 47 CMR 506 (ACMR 1973), the court found no prejudice when the military judge omitted an

important finding when only such a general request for special findings was submitted. Therefore, it is essential that the request be tailored to each individual case asking specific questions intended to reveal the judge's interpretation of the evidence, credibility of conflicting witnesses and understanding of the law to be applied. On legal issues such as a jurisdictional or speedy trial question, it would be extremely helpful to request that the military judge explain his rationale in distinguishing the cases upon which you rely. Then the government is hampered in presenting a different theory on appeal. Furthermore, careful drafting of a written request for special findings can result in responses which can be utilized to impeach the general findings of guilty before the Court of Military Review which has independent fact weighing power concerning guilt and innocence, See United States v. Pople, 45 CMR 872 (NCMR 1971).

Review of the records of well contested complicated trials before military judge alone indicates that this important right is not being employed in many situations when it could be most useful. In addition to the advantages relating to a better developed and more precise record on appeal, there is an all important benefit accruing to the accused at trial. Any device which requires the finder of fact to explicitly outline the route by which he arrived at a decision will, by necessity, force more careful deliberation. Thus, in a close case, the request for special findings may have the effect of making any doubts as to guilt appear more reasonable. In light of the many benefits inherent to this procedure, both at trial and on appeal, increased utilization of requests for special findings is essential to improving the representation we provide our clients.

Check List  
of  
Post Trial Review Errors

The United States Court of Military Appeal's recent decision in United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975), has provided trial defense counsel the opportunity to assure that his client receives a full and fair post trial review by the convening authority. The exact scope of that opportunity has yet to be defined. Goode suggests, however, that the defense counsel must correct or challenge, "any matter he deems erroneous, inadequate, or misleading, or on which he otherwise wishes to comment." United States v. Goode, 23 USCMA at 370, 50 CMR at 4. In United States v. Austin, SPCM 4868 (ACMR 9 June 1973), the Court of Military Review limited the application of the waiver rule established by Goode to the inclusion in the review of "adverse matters from outside the record." See also United

States v. Richardson, CM 433662 (ACMR 25 November 1975).

Until the parameters of the Goode rule are more firmly established, it will be incumbent upon defense counsel to challenge every error or inaccuracy in the post trial review which detracts from the fairness of the review. To assist in this process, the checklist which follows has been developed. It is designed to cover most of the errors commonly encountered in post trial reviews within recent years.

While Goode imposes yet another burden on defense counsel, it also provides trial defense counsel the opportunity to play a major role in determining the content of the post trial review. In a subsequent article, suggestions will be made as to how trial defense counsel can take an aggressive role in the formulation of the review.

#### Preliminary Matters

1. Is the record properly authenticated and does the date of authentication precede the date of the past trial review?
2. Did any witness testify pursuant to a pretrial agreement, grant of immunity, or a grant of any type of clemency by the convening authority, a subordinate commander, the staff judge advocate, or trial counsel?
3. Did the staff judge advocate or convening authority testify as to any matter?
4. Did the officer who prepared the review have any prior participation in the proceeding or a related proceeding?
5. Has the convening authority made any "policy statements" indicative of a fixed attitude toward the treatment of the sentences of a specified class of offenders?

#### Synopsis of the Record

6. Is any item of personal duties omitted or erroneously stated, particularly;

- the character and length of pretrial restraint
- awards and decorations
- character of the accused's service

#### Summary of the Evidence

7. Does the summary of the evidence adequately and accurately reflect the accused's theory of defense, the evidence supporting that theory and prosecution evidence favorable to the defense?

8. Is the accused's testimony on the merits accurately summarized?

Discussion

9. In a contested case, does the review properly set forth the elements of the offense and does it relate the facts to those elements?
10. Does the review discuss the elements of an offense of which the accused was acquitted?
11. If the accused was found guilty of a lesser included offense than the offense charged, does the review set forth the elements of the lesser included offense rather than the serious offense?
12. Are any defenses raised by the accused discussed and are legal guidelines provided to assess the merits of these defenses?
13. Does the review discuss all defense motions?
14. Does the review properly advise that evidence of the accused's character offered on the merits shows the "probability of his innocence"?
15. If any witness testified pursuant to a pretrial agreement, grant of immunity, or other grant of clemency, is the convening authority so advised in the review?
16. Does the review suggest that the convening authority is bound by the court's findings as to the credibility of witnesses or other factual issues?
17. Is the convening authority consistently advised that he must be convinced of guilt beyond a reasonable doubt?
18. Does the staff judge advocate give reasons to support his opinions on the sufficiency of the evidence or on the merits of other contested issues?
19. Are the staff judge advocate's opinions supported by the evidence?
20. Does the review correctly reflect the accused's plea and is it consistent throughout the review?
21. In a guilty plea case, does the review indicate that the judge had difficulty in obtaining a provident plea?

### Clemency

22. Does the review state the correct maximum punishment?
23. If the military judge ruled that any of the charges and specifications were multiplicious, does the review so state?
24. Is all evidence and testimony favorable to the accused fully summarized in the review?
25. Does the review properly reflect the accused's attitude toward rehabilitation and retention in the Army?
26. If the appellant submitted any clemency letters or petitions after trial are they appended to and discussed in the review?
27. Does the review suggest that a previous Article 15 or court martial conviction was properly considered, when in fact such records were not admissible at trial?
28. Does the review offer any aggravation evidence declared inadmissible at trial or never offered at trial because it was deemed inadmissible?
29. Are any prior juvenile, civilian, or military arrests or convictions which were not introduced at trial discussed?
30. Does the review refer to any post trial misconduct?
31. Does the post trial interview summary contain any opinion as to the accused's attitude which requires rebuttal?

### Recommendations As To Sentence

32. Did the military judge, a court member, trial counsel, accused's unit commander, or an intermediate commander recommend any form of clemency including: referral to court not authorized to adjudge bad conduct discharge, suspension of bad conduct discharge, administrative elimination, or disapproval of the discharge? If so, does the review mention the recommendation and summarize it fairly?
33. Does the review properly advise the convening authority of his powers to sentence and does it refrain from suggesting an inflexible policy consideration as to sentence?
34. In a guilty plea case, does the recommendation as to sentence conform to the pretrial agreement. If not, is any departure fully discussed and justified?

### Miscellaneous

35. Does the review contain any indication of racial bias?
36. In your review of the record of trial, have you discovered any legal errors or irregularities not brought out at trial?

### Clarifying the Void Enlistment/Induction Issue

On 1 August 1975, the United States Court of Military Appeals decided United States v. Russo; 23 USCMA 511, 50 CMR 649 (1975), and United States v. Burden, 23 USCMA 510, 50 CMR 649 (1975). These cases, along with United States v. Barrett, 23 USCMA 474, 50 CMR 493 (1975) provide trial defense counsel with definitive authority on the issue of lack of jurisdiction due to a void enlistment or induction. While the Court's pronouncements clarified an area of the law thought by some to be confusing, much of the uncertainty has been due to the failure of military judges to accept on face value, the Court of Military Appeals' holdings in United States v. Catlow, 23 USCMA 142, 48 CMR 758 (1974), and United States v. Brown, 23 USCMA 162, 48 CMR 778 (1974). Now, however, trial defense counsel, armed with these legal precedents, can be confident when making motions to dismiss for lack of jurisdiction due to void enlistments/inductions.

Before examining these concepts, the following list of arguments formerly thought to be valid by the government, should be noted:

- (1) The Army's regulations exist solely for the benefit of the government (Citing United States v. Grimley, 137 U.S. 147 (1890)).
- (2) Constructive enlistment
- (3) The differences between enlistment and induction.

As indicated in Russo, Burden and Barrett, these arguments are no longer dispositive of the issue due to the following countervailing considerations (assuming properly developed or "framed" by trial defense counsel).

- (1) Trial defense counsel must first demonstrate an actual disqualification for Army service on the part of his client. These disqualifications are listed in Army Regulations 601-210 (enlistment) and 601-270 (induction) and are categorized as either "waivable" or "nonwaivable".

(2) Where the specific disqualification hinders the client's ability to serve adequately in the Army (e.g. inability to read), then the argument that the Army's regulations exist only for the Army's benefit will not be applied. These facts would distinguish United States v. Grimley, where the disqualification (over age) did not affect the accused's ability to render acceptable military service.

(3) Trial defense counsel should, if possible, establish his client's continuing disability, i.e. his disqualification was never corrected. Correction of the disability strengthens the Government's constructive enlistment argument.

(4) The failure of the Government to utilize its procedures for waiving the disqualification should be demonstrated. Specific provisions exist in the regulations to allow otherwise disqualified individuals to enter the Army, but these procedures must be followed.

(5) Any actions of protest by the client as to his military status will be important. Such protests are further evidence that the accused's service was not voluntary. Document, if possible, complaints to superior officers or any military personnel.

(6) The Army, is under the obligation to comply with the regulations that it promulgates. Any deviation should be highlighted.

(7) Perhaps the single most important factor preventing the formation of jurisdiction under a statutory disqualification is active misconduct by agents or the Army. This is most easily shown by the recruiter's knowledge of the specific disqualification and/or his fraudulent participation in the enlistment or induction process, e.g. supplying answers to tests, concealing prior convictions, etc. Further evidence of Army misconduct would be the failure of the accused's superior commissioned officers or NCO's to take proper action after a careful investigation of the accused's complaints.

(8) As indicated in Russo and Burden, there is no distinction between enlistment and induction as to this jurisdictional question. All of the above matters are equally applicable to both.

These legal concepts have now been held by the Court of Military Appeals to allow an accused to avail himself of the protections afforded him by Army Regulations, to prevent the formation of a constructive enlistment and to establish the lack of court-martial jurisdiction over him. By directing one's pretrial investigation, questions to the accused and argument and evidence before the court in terms of the above principles, trial defense counsel can effectively deal with this increasingly prevalent issue. These steps should be taken at the trial level to develop the proper record, assuming the military judge denies the motion. In so doing, counsel can prevent the need for Dubay or limited hearings on the jurisdictional defects which have been ordered by both the United States Court of Military Appeals and Court of Military Review with increasing frequency because of insufficient facts on the record on which to make a decision.

#### Off-Post Drug Offenses-Councilman Revisited

The Court of Military Appeals is showing renewed interest in examining claims of lack of jurisdiction in off-post drug cases. In the last few months the Court has granted review in numerous cases to determine if the requisite "service connection" is present. United States v. Lampe, (Docket No. 30,337) pet. granted 9 July 1975 (off-post possession, transfer and sale of cocaine, heroin, and meth-amphetamines charged under Article 134); United States v. McCarthy, (Docket No. 30,560) pet. granted 21 August 1975 (off-post transfer of marijuana charged under 134); United States v. Canavan, (Docket No. 30,795) pet. granted 23 September 1975 (off-post possession of marijuana charged under 134); United States v. Grundy, (Docket No. 30,873) pet. granted 24 September 1975 (off-post possession of heroin charged under 134); United States v. Lanzano, (Docket No. 30,858) pet. granted 1 October 1975 (off-post possession, transfer, and sale of heroin); United States v. Woods, (Docket No. 30,930) pet. granted 10 October 1975 (possession and delivery of amphetamine - off-post). United States v. Williams, (Docket No. 30,959) pet. granted 21 October 1975, (off-post sale, possession, and transfer of phencyclidine - unknown that agent was CID).

While the question of jurisdiction can be raised at any time during the course of an appeal, it would help to build a record early-on in off-post drug cases. Some of the factors which could have an impact on the question of "service connection" would include:

- (1) time of the offense;
- (2) duty status of the accused at the time of the offense;
- (3) identity of the "victim" [CID undercover agent or fellow G.I.?];
- (4) whether or not the offense(s) began on post and merely culminated off-post, or were transacted entirely off-post;
- (5) degree of threat to the military installation presented by the accused's offense; and

(6) involvement [or lack thereof] of local law enforcement agents. The Court of Military Appeals apparently has not closed the door to this area as many may have concluded, it had, after reading United States v. Sexton, 21 USCMA 101, 48 CMR 662 (1974). On the contrary, it would appear that the Court has committed itself to taking an ad hoc look at the "service connection" argument as it arises in each case which comes before it.

Trial defense counsel should find this to be a fertile time to begin litigating the issue once more at the trial level.

#### Pending Novel Issues

##### Proper Charging of Drug Offenses

An issue currently pending at the United States Court of Military Appeals is whether an individual is denied equal protection and due process of the law by having been prosecuted under Article 13<sup>4</sup> rather than under Article 92 for drug offenses. The primary focal points are marijuana and heroin and the corresponding disparity in sentences authorized under paragraph 127c, Manual for Courts-Martial, United States, 1969 (Revised edition). (Two

years confinement at hard labor for either under Article 92, and five years confinement at hard labor for marijuana, and ten years confinement at hard labor for heroin under Article 134).

A further issue raised on some of these cases has been the propriety of ordering charges re-referred under Article 134 after being initially referred under Article 92. Counsel should develop the record as fully as possible on this issue <sup>7</sup> both as to whether a pattern may exist at the given post of utilizing Article 134 to either more severely punish certain offenders, and the possibility of interference with the Commander's discretion on the appropriate punishment in a given case. <sup>8</sup> An analagous issue is the use of this practice to coerce or encourage an individual to plead guilty because of a misapprehension as to the maximum imposable sentence. See United States v. Bowers, 24 USCMA 5 , 51 CMR 5 (1975).

#### Court of Military Appeals Examines Haircut Regulations

The Court of Military Appeals has requested and received final briefs on the issue of "Whether military necessity justifies the need for military regulations governing the length and style of a service person's hair or whether such regulations are an invasion of his personal rights." (United States v. Young, Docket No. 30,103). The initial granted issue had been whether a commander had the authority to impose a hair cut standard which was more restrictive than that found in Army Regulations; the issue was then expanded to include a discussion on the necessity for grooming regulations.

Government Appellate urged the Court of Military Appeals to order a rehearing on the issue rather than reach a decision. It may be that the Government was concerned that a haircut specification had reached the Court of Military Appeals, and may have intended to dismiss the specification if a rehearing were ordered, thus preventing the Court of Military Appeals from ruling on the validity of grooming regulations. The Court of Military Appeals denied the Government's request and will decide the case as it now stands.

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<sup>7/</sup> The most thorough and practical method is to prepare a stipulation of fact documenting the number of cases referred under Article 134 as opposed to Article 92 and any instances of re-referral.

<sup>8/</sup> Obviously, the individual Commander must testify or at least have a stipulation of testimony to enter in evidence.

Until the Court of Military Appeals rules on these items, defense counsel should urge convening authorities to take a liberal approach as to existing regulations. However, in the event an accused is charged with violation of the grooming standards, counsel should argue that:

- (1) There is no military necessity for grooming standards; and,
- (2) in appropriate cases, assuming arguendo, the validity of the regulation a Commander has no authority to impose more restrictive requirements, since the regulation itself provides "the acceptability of the (hair) style will be judged solely by the criteria described (in the regulation), Paragraph 5-39b, AR 600-20.

#### Digest of Recent Decisions

##### NOTE

Counsel may be aware or confronted with the decision of United States v. McFarland, 49 USCMA 834 ACMR (1975), as a limitation on the United States v. Ruiz, 23 USCMA 181, 48 CMR 797 (1974), decision. Any such reliance is misplaced as the United States Court of Military Appeals summarily reversed the Army Court of Military Review by order on 7 July 1975. The obvious impact of that decision being that any order to submit to a urinalysis test is unlawful.

20 August 1975

Simpson, SPCM 10078. Jurisdiction - Expiration of term of service - AWOL.

Appellant entered the hospital and remained there beyond his ETS date. He did not consent to his retention, received no emoluments other than the medical treatment, and complained to his doctor, before and after his ETS date, that his term of enlistment had expired. The Government took no affirmative action to hold the appellant beyond his normal term until termination of his first AWOL. Held: the Government estopped here. Dismissal.

26 August 1975

Mehan, CM 432241. Speedy trial - release of foreign jurisdiction.

218 days of pretrial confinement. Held that delay in communicating release of Dutch jurisdiction over appellant to his organization, coupled with delay in obtaining foreign witnesses, does not excuse the delay, where matters could have been expedited, and other matters contributed

to the long delay. See United States v. Young 23 USCMA 451, 50 CMR 490 (1975).

27 August 1975

Prowell, CM 431952. Instructions - Absence of defendant after arraignment.

The appellant absented himself subsequent to arraignment on a charge of desertion. The military judge failed to instruct a court with members that it could draw no adverse inferences from appellant's absence at trial. Failure to object by defense counsel is not waived. However, Court sees no prejudice in affirming the lesser included offense of absence without leave, and reassessing the sentence.

29 August 1975

Kalpakidis, CM 431642. Hearsay.

The military judge, due to a misapprehension that the Government was offering evidence of a fresh complaint on a secondary charge, allowed the mother of the victim to testify as to what her son told her about the incident. The judge instructed the Court that there was no evidence of fresh complaint, but failed to instruct that the hearsay evidence could not be considered. Court tests for prejudice and finds it. The hearsay here was not merely cumulative, but tipped the balance against the accused. Dismissed the sodomy charge.

12 September 1975

Taylor, CM 432057. Speedy Trial.

The Government failed to show extraordinary circumstances "particularly in processing the appeal of the denial of the availability of individual defense counsel and scheduling the trial date".

15 September 1975

Taylor, CM 431575, Military judge - Misconduct during Extenuation and Mitigation.

The Military Judge lost his impartiality by communicating to the court through facial gestures, his feelings regarding testimony given by defense witnesses on extenuation and mitigation. Although the courts would not hold the plea of guilty tainted solely on this point, because of an unsworn charge problem, a rehearing was ordered.

26 September 1975

Webb, SPCM 10192. On reconsideration. Appellant was on probation for a civilian felony conviction when he enlisted. The issue was whether or not the recruiter knew of this. A

document evidencing the conviction reflected a date of preparation subsequent to enlistment but prior to the offense for which charged. Court of Military Review sends case back for a rehearing in conformity with procedure of United States v. Torres, SPCM 9026 (ACMR 20 June 1975).

9 October 1975

Louis, SPCM 11294. Assault with a dangerous weapon. The pointing of an unloaded pistol does not constitute assault with a dangerous weapon. Court affirms only a finding of guilty to assault.

10 October 1975

Blake, SPCM 10340. Trial counsel misconduct.

Following a short recess and before the court members had filed out of the courtroom, trial counsel commenced to sing, "Goodbye Eddie, Goodbye Eddie" - an obvious reference to the defendant and the state of his case at that time. Held: general prejudice applies. Reversal considered necessary not only to protect the accused, but to preserve the integrity of the military justice system.

20 October 1975

Booker, CM 433031. Accomplice testimony. Robbery. Accomplice testimony was rendered incompetent because accomplice admitted both to perjury at his former trial and a willingness to lie to stay out of jail. Court finds that witness was not testifying to tell the truth, but under a subjective belief he must adhere to agreement with Government and that his reward was contingent upon his testimony. Therefore, there was no admissible evidence to link appellant to the crime.

31 October 1975

Eastman, CM 430550. Use immunity.

Appellant testified under a grant of use immunity at the Article 32 of two co-actors. Several people in appellant's prosecutorial chain read his immune testimony. Such exposure is prohibited. Only the exceptional case should be tried after a grant of use immunity. United States v. Rivera, 23 USCMA 430, 50 CMR 389 (1975). The Court sets out some guidelines for courts-martial when it is decided prosecution is necessary.

(1) No use, direct or derivative, can be made of the immune testimony.

(2) The government should be confined to evidence which was certified by the Court before the testimony was compelled.

(3) To assure non-use, no one involved in the prosecution of an accused may read his immune testimony.

29 October 1975

Croom, SPCM 11487. Multiplicity findings.

Disrespect is a lesser included offense of willful disobedience when the evidence establishes that the disobedience occurred in a disrespectful manner.

7 November 1975

Villalobos, SPCM 11265. Jurisdiction - recruiter misconduct.

The appellant, a citizen of Peru, had enlisted while in the status of an illegal alien. He could not read or speak English proficiently. The recruiter knew of these deficiencies, as well as the appellant's sole purpose in enlisting - to gain United States citizenship. The recruiter gave appellant exam answers, told him to say he was from Puerto Rico, and provided other false information for appellant. Charges dismissed.

10 November 1975

Stewart, CM 431672. Non-punitive Regulation.

USARJ 190-6 captioned "Military Police", "Control of Government and Privately Owned Weapons and Dangerous Instruments", is non-punitive. This was not the type of regulation which is "basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident."

20 November 1975

Michaud, CM 430328. Confessions-warnings-inability to comprehend.

Accused could not comprehend Article 31 warnings. Sanity board findings convince Court that accused did not have requisite mental capacity to comprehend. His disability was the type brought on by severe emotional stress - here, his wife's death.

The Advocate

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