

# THE ADVOCATE

## A Monthly 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. 1-21d, 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.

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THE SOLDIER AND DRUG ABUSE--ROUND TWO:  
THE ALCOHOL & DRUG ABUSE PREVENTION & CONTROL PLAN OF  
2 SEPTEMBER 1971

During the past several months, in response to the intensity of the drug problem in the military and increasing public clamor, a Directorate of Discipline and Drug Policy (DDDP) was established in the Department of the Army as a general staff supervisory agency under the Deputy Chief of Staff-Personnel (DCSPER). The Directorate itself contains two subdivisions: (1) the Discipline and Order Division, and (2) the Drug Abuse Control Division (DACD). The latter was recently the staff proponent of a DA letter dated 3 September 1971, (AGDA-A (M) (26 Aug 71) DCSPER-DACD), SUBJECT: Headquarters, Department of the Army Alcohol and Drug Abuse Prevention and Control Plan (HQ DA ADAPCP). The purpose of the new plan is to "promulgate . . . basic policy, outline . . . programs, and provide . . . guidance to DA staff agencies and major Army commands for implementation of a worldwide alcohol and drug abuse prevention and control program throughout the Army." The plan itself is contained as an inclosure to the DA letter, and provides that "provisions of AR 600-32 in conflict with this directive are superseded pending its revision." The plan itself is "effective for implementation upon receipt."

Attempting comprehensiveness, the DA plan itself fills approximately 100 pages of text, and actually represents no major departure from the purposes and policies of AR 600-32, but rather strives to expand upon them. One significant change, of course, is the inclusion of alcohol abusers in the rehabilitation plan. All major commands are required to "develop and implement [a] command program in accordance with [the] plan" not later than "30 days after receipt of this document." In an effort to assist counsel in wading through the mass of information the new plan presents, THE ADVOCATE has attempted to capsule its more salient features, and offers herewith a preliminary reflection on the subject.

## Policies

When AR 600-32 was promulgated, it announced that Department of the Army policy was to prevent and eliminate drug abuse and to "attempt to undergo such restoration." Para. 1-3a, AR 600-32. The new plan provides that DA policy is to prevent and control alcohol and drug abuse, and to "rehabilitate members who evidence a capacity to undergo such rehabilitation." Para. 1e(1), Plan. Thus, the individual abuser's "desires" can no longer be considered the criterion for applying or not applying Army's new policies: if a person has the "capacity" to undergo rehabilitation, he will be rehabilitated. On the other hand, even when a person desires rehabilitation, it may be refused if it is determined that he lacks the capacity for rehabilitation. The Army, in the new plan, continues to acknowledge its "particular responsibility" for counseling against drug abuse, and disciplining those who "promote the use of drugs in an illegal or improper manner." Para. 1e(2), Plan. The new plan also continues the regulation's insistence that disciplinary and administrative actions be based upon the circumstances of each case, "including consideration of the degree of involvement with drugs," Para. 1e(4), Plan.

One further aspect of the Army policy is set forth in the new directive: It is now departmental policy to "encourage Army personnel to submit themselves voluntarily for treatment and rehabilitation." In an effort to enhance the invitation to voluntary treatment, the plan provides that the "act of volunteering for treatment" cannot, "be used in any disciplinary action under the Uniform Code of Military Justice or as a basis for supporting, in whole or part, an administrative discharge under other than honorable conditions." Likewise, "evidence developed by urinalysis administered [involuntarily] for the purpose of identifying drug users" may also not be used in criminal proceedings, or to support certain administrative discharges. Presumably, though, less than an "honorable discharge" can be imposed, e.g. a general discharge under honorable conditions, which many in the civilian community may view as the equivalent of a dishonorable discharge. Nor, it goes on, can a member be the subject of such disciplinary or administrative action "solely because he volunteered for treatment under the DOD Drug Identification and Treatment Program." Yet, in the same breath, the plan presents this caveat:

"This policy does not exempt members from disciplinary or other legal consequences resulting from violations of other applicable laws and regulations, including those laws and regulations relating to the sale of drugs or the possession of significant quantities of drugs for sale to others, if the disciplinary action is supported by evidence not attributed to a urinalysis administered for identification of drug abusers and not attributable solely to their volunteering for treatment . . ." Paragraph 1 e(3), Plan. (Emphasis added.)

Thus, it appears that an addict, who submits to rehabilitation and then admits that he sold drugs to support his habit would still be amenable to prosecution for his illegal sales, a prospect that may seriously dampen the command's interest in rehabilitating him. In addition, a confessed drug user would be a clear target for CID investigation into the sources of his supply or other criminal conduct related to drug abuse. While his cooperation with investigators is not a predicate upon which the operation of the drug plan is based, indirect pressures could easily compel his compliance. Suppose, for example, an individual rests upon his Article 31 rights and recognizes the narrow limits of exemption which the Plan allows, and thus only admits to his own personal use of drugs. Having been identified as an abuser, his name may go into the CID files, and other suspects may be later questioned about his involvement in trafficking or other misconduct. Thus, the CID could easily build a case against the abuser who sought help entirely from outside sources, with apparent comfort that the plan's exhortation against prosecuting him is not seriously compromised.

Thus counsel should urge, at the local level, that the participation of an individual in the drug plan should not make him the focal point for police investigation or interrogation, and should be wary to look for situations in which police pressures may have compelled the production of incriminating evidence against their clients subject to prosecution.

For those who wish to conceal their personal drug abuse, compulsory urinalysis performed at such times as annual or separation physicals can well be viewed as an unreasonable search without probable cause under the fourth amendment. See United States v. Barley, F.Supp. (D.N.Ill. 1971); 9 Crim. L. Rep. 2261. When drug abuse status is discovered by compulsory urinalysis, it is hard to imagine any evidence subsequently discovered which would not be "tainted." See United States v. Moore, 19 USCMA 586, 42 CMR 188 (1970).

The New Army Drug Abuse Prevention and Control Plan provides an excellent opportunity for military defense specialists to police official compliance with the plan, especially its rehabilitation provisions. Staff judge advocates should be requested to bring their advices and reviews into compliance with the letter and spirit of the regulation. As a last resort, defense counsel might consider initiating direct communication with the convening authority before trial to advise him of the possibility of rehabilitation programs rather than criminal proceedings. Where the post-trial review does not cover rehabilitation programs, a timely Article 38(c) brief after trial can be used to inform the convening authority of amnesty alternatives. Where criminal proceedings have been initiated, it is extremely important that an adequate appraisal is made of a soldier's rehabilitative potential. Under AR 600-32, compliance with this requirement has been superficial, principally because no one has made an issue of it. In many ways, defense counsel will be the only group which can turn the Drug Abuse Prevention and Control Plan into a reality, by insisting that their clients be given treatment rather than trial.

## STIPULATION AND SPEEDY TRIAL MOTIONS

After a defense counsel moves to dismiss the charges because his client has been denied his right to a speedy trial (U.S. CONST. amend. VI; Article 10, UCMJ, 10 U.S.C. §810), the attorney's most important decision regarding the motion may be whether he should stipulate to the prosecutor's chronology of events. Although the decision to stipulate will be governed ultimately by the specific facts in each case, trial defense counsel should refrain from agreeing, as a matter of course, to stipulations of fact which chronicle the government's efforts to bring the accused to trial. In most instances the prosecutor is better able to construct a convincing description of the government's pretrial activity through a chronology which he composed than through the testimony of live witnesses and assorted documentary evidence. Great care should be taken in cross-examining government witness to avoid giving the witness an opportunity to explain delays in such vague phrases as "necessary processing time."

When the defense counsel declines to stipulate to a chronology, he should then adopt an aggressive attitude in preventing the prosecutor from introducing less than competent evidence to carry the government's burden on the speedy trial motion. The prosecutor may attempt to prove the reasonableness of the government's processing of the charges in the case through his own unsworn statements to the military judge or by his own chronology of events which is agreed to by neither the accused nor his counsel. Faced with this prosecutorial tactic, defense counsel should object to the evidence on the ground that it is inadmissible hearsay.

Paragraph 68i, Manual for Courts-Manual, United States, 1969 (Revised edition), states:

"When the accused moves for a dismissal of certain charges on the ground that there has been an unreasonable delay as to those charges, the prosecution has the burden of establishing that the delay was not unreasonable."

This responsibility of the government to demonstrate through competent evidence that the duration was not unreasonable is reiterated at Paragraph 215e of the Manual, supra:

"When the accused's right to a speedy trial is in issue, the prosecution has the burden of accounting for the time which it took to bring the accused to trial."

If the prosecutor's evidence is hearsay, defense counsel should object to its admission and emphasize that the information lacks probative value. It should be noted that prior to the 1969 Manual, supra, strict compliance with evidentiary rules was not required during hearings on certain preliminary motions.

"On interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, or to the availability of witnesses (see 145b; Art. 49d), the court may in its discretion relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writing of similar apparent authenticity and reliability, such as a certificate of a physician as to the illness of a witness, unless on objection to a particular writing it is made to appear that the relaxation might injuriously affect the substantial rights of the accused or the interests of the Government." Paragraph 137, Manual for Courts-Martial, United States, 1951.

However, Paragraph 137 of the 1969 Manual, supra, reflects a change with regard to the admission of evidence during contested preliminary motions.

"Unless it is shown that the relaxation of the rules of evidence might injuriously

affect the substantial rights of the accused or the interest of the United States, the military judge or the president of a special court-martial without a military judge may as a matter of discretion relax them as to interlocutory matters relating to an application for a continuance (see 58) or to the availability of witnesses (see 145b,c; Art. 49(d)). For example, with respect to these matters it is permissible to receive in evidence affidavits, certificates of military or civilian officials and other writings of similar apparent authenticity and reliability, such as certificates of a physician as to the illness of a witness."

As a result of this change, only in two interlocutory matters may the rules of evidence be relaxed, and a speedy trial issue is not listed as one of the two exceptions. This alteration of Paragraph 137 has been examined and explained in the Department of the Army Pamphlet, No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition) 28 July 1970.

"In the second paragraph the material relating to the relaxation of the rules of evidence in connection with interlocutory matters relating to the 'propriety of proceeding with the trial' was revised as being too broadly stated in the former Manual. For example, insanity at the time of the trial affects the propriety of proceeding with the trial and so do a number of other motions raising defenses and objections, and certainly a relaxation of the ordinary rules would be inappropriate with respect to a number of these matters. See paragraph 122c of the Manual. The paragraph was revised with these principles in mind." Id., at 27-1.

This change in paragraph 137 of the 1969 Manual, supra, precludes the prosecutor from introducing less than competent evidence to support the government's burden on the motion to dismiss.

If the military judge overrules the objections to the prosecutor's evidence, defense counsel should contend in his argument on the motion that the military judge is required as a matter of law to dismiss the charges because the prosecution has failed to prove through competent evidence the government's delay in the case was not unreasonable.

#### PREVIOUS ARTICLES REVISITED AND REVISED

With this issue, THE ADVOCATE inaugurates a new section in which articles from back issues will be republished. Because of the quick turnover in military lawyers, THE ADVOCATE is constantly deluged by new subscribers requesting back issues, which simply are not available in large quantities, although we are able to honor some requests on a case-by-case basis. Reprinting old articles for new subscribers will help to alleviate this lack of access to back issues. The articles selected for republication will be those which are most needed in the field. Where necessary, they will be updated and expanded. Some selections, of course, will reflect the original intention behind their publication in the first place, as with the article "Special Findings," which is republished herewith. This article has been almost completely ignored by trial defense counsel, and many bench courts-martial are going down the drain on appellate review because the military judge has not been required to articulate his findings.

#### SPECIAL FINDINGS\*

The Military Justice Act of 1968 provides that in trials by a military judge alone, the judge must, upon

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\*See THE ADVOCATE, Vol. 1, No. 8, October 1969.

request, find the facts specially in the event of a conviction. Article 51(d), Uniform Code of Military Justice. Paragraph 74i, Manual for Courts-Martial, United States, 1969, goes further and provides that upon request, "special findings shall be made of factual matters reasonably in issue." Counsel desiring special findings must make a request prior to the announcement of the general findings.

Military defense counsel should take full advantage of the new special finding procedure. Special findings in a trial by a judge alone have the same relation to general findings as do instructions to the court in a trial with court members. The significance of this for appellate purposes should be apparent. Unless special findings are requested and made a part of the record, there will be no way to achieve appellate relief in a case where the judge operates under an erroneous concept of the applicable law, relies on inadmissible evidence, or is otherwise misguided. We suggest the following approach:

1. Make full use of special findings. Request special findings on all seriously contested factual issues. The basic policy behind special findings is to promote better-reasoned decisions by making the judge stop and think before ruling. Use your professional judgment in making requests, but do not be cajoled out of making a request. The Manual provides that upon request, findings shall be made on factual issues reasonably in issue. This includes findings on motions and defenses as well as on the elements of the offenses. The Manual also provides that only one set of special findings may be requested by a party in any case. Appendix G of the new Military Judges' Guide has interpreted this to mean that while counsel may make numerous requests for findings during trial, the judge is only required to issue findings at one time during trial and need not prepare individual findings as the requests are made.

2. Specify your request. Do not merely ask for findings on all factual matters reasonably in issue. Specify the motions, defenses and offenses on which you wish findings to be made. The judge may require you to put the request



PRESENTING THE ACCUSED'S TESTIMONY IN  
EXTENUATION AND MITIGATION

"[T]he sentence of the law for adjudged misconduct," says the Court of Military Appeals, "is the product of the trial court. It alone, of all agencies of the law, is authorized to 'adjudge' the law's penalty." United States v. Allen, 8 USCMA 504, 507, 25 CMR 8, 11 (1957). In most cases tried by courts-martial throughout the Army the sentence is not merely one important aspect of defense representation; it is often the only one.\* Many offenses, by their very nature, leave very little to litigate on the merits, and the weight of the defense case is correctly placed on a plea for leniency in extenuation and mitigation of the offense. In every case, counsel must advise his client whether to take the stand at this time. In many cases, a client's demeanor and candor may serve him well, and the personal impact of his story upon the court can have a salutary effect; in a few instances, however, counsel's election to place the accused before the court may be somewhat ill-advised, suggesting the necessity for the continual re-evaluation of this mode of proof as a beneficial trial tactic in every case.

At times, it is difficult for counsel to resist the temptation to have a client discuss the offenses of which he was convicted. If the accused's testimony will delineate severe stress or frustration not amounting to a legal defense, fine; otherwise, the choice could prove unwise. For example, in one case recently reviewed the accused testified in extenuation and mitigation upon his conviction of house-breaking. He explained how he planned the break-in and described, in great detail, how the feat was accomplished. His testimony, far from placing him in a good light, only confirmed what the court no doubt suspected, that the accused was a calculating thief. In other situations, one can fairly surmise that a drug offender's protestations that this offense constituted his first contact with narcotics will certainly fall on deaf ears if couched in the jargon of the long-time junkie. Thus, counsel should be absolutely

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\*See: "Matters in Extenuation and Mitigation," Vol. 2, No. 2, THE ADVOCATE, (March 1970), at pp 16-18.

certain that an accused's explanation of the offense will produce only extenuating matters, or leave the subject alone entirely. Sometimes, the matters in extenuation may cut both ways, as in the case where an addict is charged with robbery or larceny to which he was driven by his narcotics addiction.

The decision to place a client on the stand raises another question of trial tactics: should the client testify under oath or should he make an unsworn statement? All other factors being equal, testimony under oath is more credible than an unsworn statement because the accused has demonstrated a willingness to be subjected to cross-examination. Of course, whatever value the added credibility has can be overwhelmed if an aggressive trial counsel elicits adverse matters from the accused's own mouth. Thus, counsel must make his decision after weighing the value of added credibility against the risk of adverse matters being introduced through cross-examination. If counsel elects to place his client on the stand under oath, he can also reduce the risk of adverse matters being introduced by carefully avoiding potentially damaging areas on direct examination and objecting to any cross-examination beyond the scope of direct. See United States v. Henry, 6 CMR 501 (AFBR 1952).

Sorrowfully, on occasion it is the questioning of the defense counsel which produces information unfavorable to the accused, as the following excerpt from a record of trial indicates:

" Q. Could you explain to the court why you entered the service?

A. Well, I went to court on the outside to civilian court, and they gave me a choice. If I wanted to come in, they would keep my record clean, pardon me. Would leave my record clean if I came in the service.

Q. If you came in the service. What was the reason for civilian court?

A. Frequent narcotic nuisance.

Q. Could you explain to the court what happened on your first absence from the second to the fifth of June?

A. I came home on a pass and overstayed.

Q. And then you eventually came back here to Fort \_\_\_\_\_, is that correct?

A. Yes, I was picked up."

Obviously, discussing the testimony of the accused with him prior to trial would prevent such mistakes.

In short the extenuation and mitigation portion of a court-martial contains potential traps for the unwary counsel. These traps may be avoided by careful preparation for trial on a case-by-case basis.

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N O T I C E

THE ADVOCATE is planning to conduct a survey of pretrial confinement practices in the U.S. Army. Our subscribers are asked to send us a copy of the local regulation which governs pretrial confinement in their jurisdictions. Such a local regulation should be supplemented by commentary indicating how pretrial confinement is administered, in fact, if the practice diverges from the letter of the regulation. Any other comments concerning pretrial confinement policies or facilities are welcomed.

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THE ARMY COURT OF MILITARY REVIEW LOOKS AT  
DEFENSE COUNSEL AND THE GUILTY PLEA

In "Defense Counsel and the Guilty Plea," THE ADVOCATE, Vol. 3, No. 6, August 1971, the extent of a defense counsel's interest in insuring the providency of his client's plea of guilty was discussed. In a new case, United States v. Henderson, \_\_\_ CMR \_\_\_ (ACMR 21 September 1971), the Army Court of Military Review, per curiam, considered this matter and added some further observations which are offered by way of a sequel to our last article.

In Henderson, the accused, a WAC, was convicted of communicating a threat, aggravated assault and AWOL, in accordance with her pleas of guilty to those offenses. After the entry of findings by the military judge, she elected to make an unsworn statement, during the course of which she recounted the circumstances surrounding the offenses of which she stood convicted. As her statement progressed, the military judge perceived the possible existence of the defense of self-defense to the aggravated assault charge, and spread his doubts upon the record. Upon his suggestion that the defense counsel "talk to [his client] for a minute before we proceed any further," a brief recess ensued, and, upon its conclusion, counsel asserted that the accused "did not feel that neither herself [sic] nor her friend was [sic] in danger at the time of receiving serious bodily injury or any type of lethal injury. . . ." Id. This comment apparently satisfied the judge who proceeded through the remainder of the trial without comment about his earlier misgivings.

The Court of Military Review noted that United States v. Care, 18 USCMA 535, 40 CMR 247 (1969), "placed squarely upon the shoulders of the military judge the responsibility of personally determining from the accused whether there is a proper factual basis underlying an accused's plea of guilty." Id. Thus, the Court observed, citing United States v. Hook, 20 USCMA 516, 43 CMR 356 (1971), "[i]t is clear that a military judge may not abdicate his role in this area, nor may he delegate his responsibility to an accused's defense counsel; and if he does so, he faces reversal." In Henderson, even though the improvident matters surfaced after findings, the Court could perceive "no rational basis upon which to permit a lesser standard [for the judge] than personal inquiry of an accused, merely because the providency of the plea of guilty has come into doubt after findings rather than before." Id.

While the Court's holding in Henderson turned on the issue of the military judge's failure to inquire personally into the providency of the accused's plea and resolve inconsistencies in her later testimony, the court suggested parenthetically that "defense counsel should be aware that whenever they allow themselves to be placed in a position where they are personally reassuring an unconvinced judge of their client's guilt, they are standing on precarious ethical ground," citing DR 7-106(C)(4), Code of Professional Responsibility. Id. Disciplinary Rule 7-106(C)(4) reads as follows:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

...

Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused. . . ."

The rule goes on to permit counsel to "argue, on his analysis of the evidence, for any position or conclusion" with respect to those matters. Thus, counsel should not be apprehensive about asserting that he perceives no legal defense to a charge, but, on the other hand, counsel should scrupulously refrain from any personal assurances of a client's guilt. Although the local defense counsel in Henderson did not necessarily cross the fine line of ethics drawn by the Court, it was clearly not his role to assist the judge in delineating the factual basis for his client's guilty plea. If fault must be found in that case, it rests squarely with the judge who "confused the pursuance of his duties under . . . Care . . . with the Manual prohibition forbidding 'cross-examination' of an accused who elects to make an unsworn statement." Id.

The Army Court of Military Review set aside the findings of guilty of the aggravated assault, and, rather than authorize a rehearing, in order to terminate the litigation, the Court dismissed this specification and reassessed and affirmed the sentence.

JUDGE-JURY DIFFERENTIALS INCREASE IN CONTESTED  
CASES IN FAVOR OF THE ACCUSED

In "Statistical Comparison of Military Judge-Military Jury Conviction Rates and Sentence Differentials," THE ADVOCATE, Vol. 3, No. 5, June & July, 1971, information was presented to compare general court-martial conviction rates and sentence differentials between military judge cases and military jury cases. As promised in that article, THE ADVOCATE is now able to present further refinements in that data by breaking the information down according to plea. This is done in order to eliminate the effect of guilty pleas on conviction rates, because a guilty plea always results in a conviction for the purposes of these statistics. By comparing military juries with military judges, only with regard to contested cases, any statistical bias created by the propensity to take guilty pleas to one or the other forum is eliminated. Thus, this information is most useful in analyzing which forum to choose once a decision has been made to contest a case. All other things being equal (and THE ADVOCATE does not wish to imply that many valid indicators besides gross conviction rates and sentence differentials are not crucial to an informed decision to choose a judge or jury) these statistics do indicate that military juries convict in a lesser percentage of cases than military judges, that military juries adjudge punitive discharges in a lesser percentage of cases, and that military juries adjudge confinement in a lesser percentage of cases than military juries.

TABLE 1

ARMY-WIDE GENERAL COURT-MARTIAL DATA\* (Contested Cases)  
1 January 1970 - 30 June 1970

	Court Members	Military Judge Alone
Persons tried	128	482
Persons convicted	98 (77%)	435 (90%)
Punitive discharge adjudged**	64 (50%)	396 (82%)
Confinement adjudged**	78 (61%)	411 (85%)

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\*Data compiled and based on all GCM records received in the US Army Judiciary during 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.

TABLE 2

ARMY-WIDE GENERAL COURT-MARTIAL DATA\* (Contested Cases)  
1 July 1970 - 31 December 1970

	Court Members	Military Judge Alone
Persons tried	140	638
Persons convicted	99 (71%)	586 (92%)
Punitive discharge adjudged**	60 (43%)	525 (82%)
Confinement adjudged**	82 (59%)	546 (86%)

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\*See Legend under Table 1

TABLE 3

ARMY-WIDE GENERAL COURT-MARTIAL DATA\* (Contested Cases)  
1 January 1971 - 31 March 1971

	Court Members	Military Judge Alone
Persons tried	61	304
Persons convicted	47 (77%)	276 (91%)
Punitive discharge adjudged**	29 (48%)	243 (80%)
Confinement adjudged**	38 (62%)	246 (81%)

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\*See Legend under Table 1

A close comparison of these tables which deal only with contested cases, with the comparable tables in the previous article, which deal with all cases, contested and not contested, indicates that the disparity in results is even greater between military juries and military judges when only contested cases are analyzed. In every instance, the percentage deviation between the results in military jury cases and the results in military judge cases is greater when only contested cases are concerned. For example, in Table 2 (all cases) military juries adjudged confinement in only 81% of the cases while military judges adjudged confinement in 95% of cases, for a difference of 14%, while in Table 2 (contested cases) military juries adjudged confinement in only 59% of contested cases as opposed to military judges in 86% of contested cases for a difference of 27%. This trend indicates that the judge-jury differentials are much greater in contested cases (and in a direction favoring the accused) than in non-contested cases.

## THE AMNESTY PROGRAM CAN'T HIDE THE FACTS

A recent survey of cases tried in the Army during the past eighteen months has pointed out a steady increase in the number of drug-related offenses being prosecuted in courts-martial. Of primary interest, of course, is the indication that the rise in drug prosecutions has continued unallayed even after the promulgation of AR 600-32 on 1 December 1970. Even if the incidence of drug abuse in the Army is increasing, while troop strength generally is decreasing, the expectation that drug prosecutions would decline as a result of AR 600-32 has not materialized. It would appear that AR 600-32's policies and procedures, which compel the consideration of all drug offenders for rehabilitation, whether they turn themselves in or not, is not being implemented, and that commanders do not consider disposing of such offenders in manners other than by trial. These statistics (from a report prepared for The Judge Advocate General by Records, Control and Analysis Branch) are offered as an indication that the much publicized Army drug amnesty program has been ignored by commanders and their legal advisers. Records of trial now being reviewed in the Defense Appellate Division rarely include any mention of the amnesty program at all.

### INCIDENCE OF DRUG-RELATED COURT-MARTIAL CASES

	Jan-Jun 70	Jan-Jun 71	Increase (Decrease)
<b>General Court-Martial Cases</b>			
All Cases	1456	1366	-6.2%
Drug Cases	124 (8.5%)	162 (11.9%)	+30.6%
<b>Special Court-Martial Cases</b>			
All Cases	17544	13059	-25.6%
Drug Cases	1468 (8.3%)	1288 (9.8%)	-13%
<b>Summary Court-Martial Cases</b>			
All Cases	8097	7548	-6.7%
Drug Cases	184 (2.2%)	348 (4.6%)	+89%

While the number of general courts-martial cases tried in the first half of 1971 decreased from the first half of 1970 by 6.2 percent, cases involving drug offenses showed a marked increase of over 30 percent.

Among special courts-martial, the statistics appear even more significant. Although the number of cases tried by special-court in the first half of 1971 dropped significantly from the number tried in the same period in 1970 (25.6 percent), the decrease in the number of drug-related cases failed to keep pace, dropping only 13 percent from 8.3% to 9.8% of all cases.

In cases tried by summary court-martial, drug offenses actually reversed the trend of fewer trials by summary court. While the actual number of summary courts-martial decreased by 6.7 percent between the first half of 1971 and the same period in 1970, drug-related cases tried by summary court-martial surged ahead by 89 percent.

At every level of court-martial, drug cases increased as a percentage of cases tried, from 8.5 percent to 11.9 percent of cases tried by general courts-martial, from 8.3 percent to 9.8 percent in special courts-martial, and from 2.2 percent to 4.6 percent in summary courts-martial. This would indicate that commanders are relying more heavily on prosecuting drug cases since the new amnesty program took effect than before its promulgation.

#### RECENT CASES OF INTEREST TO DEFENSE COUNSEL

TAINTED MORNING REPORTS--Recently a panel of the Army Court of Military Review set aside the findings of guilty in a desertion case because the morning report entries were based on the accused's unwarned admissions. United-States v. Matthews, No. 424615, CMR (ACMR 12 August 1971).

The accused in the cited case was convicted of desertion from about 5 August 1968 to about 5 March 1970, from the Overseas Replacement Station at Oakland, California. After being apprehended, the accused was questioned by the SPD commander who informed him that nothing he said would be used against him. The accused then confessed his absence from the particular unit and for the period alleged. Armed with this information, SPD personnel contacted the Overseas Replacement Station at Oakland and found no record of the accused ever being assigned there. However, Oakland did make a delayed entry which showed the accused absent on the dates alleged.

Examining the factual context of the delayed entries, the Court of Military Review remarked:

"In sum, to this point, almost two years after the alleged fact, the Oakland Overseas Replacement Station never previously knew that appellant existed; but it prepared the delayed morning report entries, that later formed the sole evidence of the Government's case against appellant, after being informed by Fort Carson personnel of the information it had acquired, including appellant's unwarned statements.

Withing this factual construct, the Court held that the "presumption of regularity" which normally attends morning reports did not come into play. Instead, the Court reasoned that the conviction had to stand or fall on the question of whether the accused's unwarned admissions constituted the sole source of the information in the delayed entries. The Government argued that the entries were based upon a special order from the Presidio which purported to assign the accused to the Oakland Overseas Replacement Station. According to the Court, this special order did not remotely suggest an unauthorized absence. Consequently, the Court ruled that the extracts were based upon information obtained from the accused in violation of his constitutional rights and, as a result, were inadmissible.

When the Government's evidence to support an unauthorized absence is a delayed morning report entry made after the accused's return to military control, trial defense counsel should ascertain the extent of his client's cooperation with the authorities, whether civilian or military, regarding his absence. If he supplied information about his offense, without being properly advised of his rights, defense counsel should contact the reporting unit which made the delayed entry to establish the factual basis for the entry. In view of the Court's decision in Matthews, defense counsel should not allow the prosecution to rest on the "presumption of regularity" or the often held belief that a morning report is an unimpeachable document.

PRETRIAL AGREEMENT--CONTRARY TO PUBLIC POLICY AND VOID--Accused, in trial by military judge alone, pleaded guilty to two specifications of wrongful possession of heroin. Although the written pretrial agreement was of standard form--a plea of guilty in exchange for approval of no more than a certain punishment, statements made by the trial counsel at trial indicated that the pretrial agreement would be considered void by the convening authority if a motion other than "speedy trial" were made. Trial defense counsel stated in the record that, in part, he was not raising an "illegal search and seizure" motion because of the pretrial agreement. The Court of Military Review, relying upon the case of United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968), held that a pretrial agreement of this nature is clearly contrary to public policy and void. United States v. Peterson, S7138 (ACMR 21 September 1971). The findings of guilty and the sentence were set aside, and the charges ordered dismissed. Although the Peterson opinion does not so state, the record of trial in this case made clear that the Chief of Military Justice demanded trial defense counsel agree to forego raising issues at trial if the latter desired the Chief's favorable recommendation with respect to the defense request for a pretrial agreement.

MULTIPLICITY--DRUG OFFENSES--Appellant was convicted of the wrongful possession of four different drugs. Two were charged as violations of Article 92, Uniform Code of Military Justice, possession of meprobamate, a tranquilizer, and amobarbital and secobarbital, both barbiturates, in violation of an Army Regulation. The other two were charged as violations of Article 134, wrongful possession of marihuana and wrongful possession of a habit forming narcotic drug (opium). Appellant was found in possession of the four drugs at the same time and place. The Army Court of Military Review held that the simultaneous drug possessions involving both articles of the Code in question must be considered but one offense for punishment purposes. The Article 92 offenses are deemed multiplicitious with each other as are the 134 offenses and both the 92 and 134 offenses are deemed multiplicitious with each other so that the maximum punishment authorized for all becomes that authorized for the most serious offense, in this case, possession of a habit-forming narcotic drug under Article 134. The Court cited United States v. Valkenberg, CMR (ACMR 9 March 1970) and distinguished United States v. Burney and Aiken, USCMA, CMR (27 August 1971). United States v. Meyer, No. 425292 (ACMR 15 September 1971).

CHARGES AND SPECIFICATIONS--SUFFICIENCY TO STATE AN OFFENSE--  
The Army Court of Military Review recently held that the following specification failed to allege the offense of conspiracy to commit pandering:

"In that Private M . . . did at Building 730, Fort Leonard Wood, Missouri, on or about 13 December 1970, conspire with Specialist Four G . . . to commit an offense under the Uniform Code of Military Justice, to wit: pandering by receiving valuable consideration, to wit: six (6) dollars, on account of arranging for unnamed trainees to engage in sexual intercourse with prostitutes."

The Court noted that the specification fails to allege expressly or by necessary implication an overt act in pursuance of the conspiracy, an essential element of the offense denounced by Article 81 of the Uniform Code of Military Justice. United States v. Glothlin, No. 426384 (ACMR 22 September 1971).

WARRANTLESS, IN-CUSTODY SEIZURE OF ACCUSED'S SHOES AS EVIDENCE--At the accused preliminary examination on other charges, a policeman asked the accused to lift his feet so he could see his heels. This was done for the purpose of pursuing a lead from another crime where a heel print had been left at the scene. Subsequently, the accused involuntarily relinquished his shoes to the police.

It was held that evidence pertaining to the shoes should have been suppressed on fourth amendment grounds. They were seized without a warrant, and, in any case, these facts could not have supported a warrant. When the shoes were seized, there was no probable cause to believe that the defendant's shoes were linked to the crime. That relationship was not uncovered until after an expert made his examination of them. The fact that the accused was in custody for another crime, of course, did not supply independent authority to seize the shoes. People v. Trudeau, \_\_\_ N.W.2d \_\_\_ (Mich. Sup. Ct. July 7, 1971); 9 Crim L. Rep. 2366.

ENTRAPMENT--ACCUSED AS INTERMEDIARY BETWEEN TWO GOVERNMENT AGENTS--Entrapment is found as a matter of law when a government informer furnished narcotics to the accused for sale to a government agent. Both the accused and the government informer were addicts, and the government informer asked the accused to make a sale because of his own inability to make the present sale resulting from a previous sale of diluted material. The government informer secured the narcotics which the accused then transferred to the government agent. The government agent testified that the accused sold the narcotics willingly, without any need for persuasion.

The Fifth Circuit Court of Appeals held that the issue was not coercion, but the activity of the government informer. The accused would not have had the narcotics to sell unless the government informer had supplied it to him. It would exceed the bounds of reason to charge the accused with crime, when all which occurred was the government buying heroin from itself through an intermediary. United States v. Bueno, \_\_\_ F.2d \_\_\_ (5th Cir. 1971); 9 Crim. L. Rep. 2397.

EXPERT TESTIMONY ON EXPERT QUALIFICATIONS--In Commonwealth v. Mount, \_\_\_ Pa. \_\_\_, 279 A.2d 143 (1971), the Pennsylvania Supreme Court held it error for a trial court to refuse to permit a defense expert to give his opinion on the formal educational training required to be an expert in the field of serology. Such testimony would have undercut the government's case which was based on tests by a laboratory technician who apparently could not have met the qualifications as an expert as defined by the defense expert witness.

CHANGE OF VENUE--HOSTILITY OF COMMUNITY TO GROUP OR SUBCULTURE--A change of venue has been ordered by the California Supreme Court in the trial of John Linley Frazier for the murders of Dr. Victor Ohta, his wife, family, and secretary which took place in Santa Cruz County, California. Evidence of record established that many residents in the area, even before the murders, felt a deep-seated antagonism toward hippies. The Attorney General of California conceded that this community attitude still prevailed. The crucial factor supporting

the change of venue is the existence of "hostility towards the group or subculture" with which the accused is identified.

This case goes beyond the traditional requirement of finding hostility towards the individual accused himself. United States v. Carter, 9 USCMA 108, 25 CMR 370 (1958). Indeed, it raises the question whether enlisted people generally, or enlisted people who are black power advocates, or enlisted people who are "peaceniks," or any other recognizable "group or subculture" in the Army, might not be running "the very real risk of being judged not for what [they have] done, but for what [they are], or what [they appear] to be." Although changing venue may solve many such problems in civilian life, what relief is available for the soldier? Frazier v. Superior Ct., 95 Cal. Rptr. 798 (1971).

UNLAWFUL SEARCH--PUBLIC RESTROOMS--In Buchanan v. State, S.W. (Tex. Ct. Crim.Ap. September 14, 1971); 9 Crim. L. Rep. 2412, one sodomy conviction was affirmed and one reversed, even though the overhead surveillance in each instance was identical, on the theory that the fourth amendment protected the accused in the one case where he committed the act in a restroom in Sears inside a commode stall which had a door which locked from the inside, but not in the other case which took place in a restroom in a park inside a commode stall which had no doors and was visible to all in the general restroom area. The crucial factor for the Texas court was the design of the restroom stalls. Where the design is such that there is no reason to expect privacy therein, there can be no invasion of privacy. The moral of this case seems to be that lawyers with sodomist clients should very carefully check the physical structure in which the alleged acts were committed. Of course, if a court will pay more than mere lip service to United States v. Katz, 389 U.S. 347 (1967), it would also have to hold that the expectation of privacy also protects people from spooks hiding behind peepholes in restroom ceilings or walls, whether or not the commode stall has a door.



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