

T H E A D V O C A T E

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A SURVEY OF THE DECISIONS OF THE UNITED STATES
COURT OF MILITARY APPEALS: OCTOBER 1969 TERM

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Note on Citations: For brevity, cases of the October 1969 term are cited by appellant's name only; the CMR cite is abbreviated while the USCMA citation and the year are omitted.

JURISDICTION

O'Callahan v. Parker

During the October 1969 term, the Court explained the "service connection" required for court-martial jurisdiction by the US Supreme Court in O'Callahan v. Parker, 395 U.S. 258 (1969). Despite the rather flexible fact-oriented criteria apparently used by the Supreme Court, the Court of Military Appeals has now established some firm guidelines for determining when there is sufficient "service connection" for court-martial jurisdiction. Thus, the Court has ruled that any crime committed on post,¹ regardless of its apparent civilian characteristics, and regardless of whether the crime is otherwise punishable by a federal court² is cognizable by court-martial. "In view of the military interest in and responsibility for the activities of military personnel in those areas under its care and control," the Court said, "it is apparent that a crime committed on base, by a serviceman, is one 'committed under such circumstances as to have directly offended against the government and discipline of the military state,'"³.

It is also now clear that whenever there is a military victim, the offense is triable by court-martial regardless of the location of the crime.⁴ This is true even if the offender did not know of the military status of the victim.⁵

The Court of Military Appeals has continued to define the offenses it considered to be service-connected per se. Espionage is always cognizable by a military court if military secrets or information form part of the compromised material.⁶ Drug offenses which are calculated to lead directly to the use of drugs by servicemen or the introduction of drugs onto a military post are service connected⁷ but drug offenses which are remote from such use or introduction are cognizable only by a civilian court.⁸ Petty offenses, those offenses which would not entitle the accused to a trial by jury or indictment by grand jury, are not within the O'Callahan ambit.⁹

1. Allen, 41/31; Fields, 41/119.

2. Fields, supra.

3. Allen, supra.

4. Cook, 41/3; Plamondon et al, 41/22; Nichols, 41/43; Lovejoy, 42/210.

5. Comacho, 41/11.

6. Safford, 41/33; see also United States v. Harris, 40 CMR 308 (1969).

7. Rose, 41/3; see also United States v. Beeker, 40 CMR 275 (1969).

8. LeBlanc, 41/381.

9. Sharkey, 41/26.

Bad check offenses plagued the Court during this term, and again, strict and inflexible rules were laid down. Whenever military status is used to facilitate the commission of the crime, the offense is service connected. If a military ID card is shown when a bad check is passed, the offense is service connected.¹⁰ Likewise, if a military service number or other information is written on the check, there is a presumption that the drawee relied on the military status of the drawer, and the offense can be tried by court-martial.¹¹ Finally, if the check is uttered at a bank located on a military post, there is military court jurisdiction.¹²

Reliance on military status was also used as a basis for jurisdiction over other offenses. A military member who wore a uniform to steal a car from a car dealer can be tried for larceny in a court-martial, and a lieutenant who becomes indebted while in uniform is liable for military punishment for his indebtedness.¹³

The Court of Military Appeals also ruled that since O'Callahan was intended to insure constitutional rights, rather than to assure court-martial jurisdiction affirmatively, it only had application where constitutional rights could be enforced in an Article III court or a state court as an alternative to court-martial jurisdiction. Thus, the "service connection" requirement has no application to courts-martial held overseas.¹⁴ While discussing the jurisdictional requirements for courts-martial overseas, however, the Court seemed to establish a jurisdictional prerequisite of its own. If the offense is one for which the host country would have primary jurisdiction under a status of forces agreement, the court-martial apparently cannot proceed unless there is an affirmative showing in the record that there has been a waiver of such jurisdiction to the military court.¹⁵

Perhaps the most controversial ruling of the Court in the area of jurisdiction was its decision in Mercer, 41/264. There, the Court ruled that O'Callahan had only limited retroactive effect, and applied solely to those cases which were not final before the date of the O'Callahan decision, 2 June 1969. The "transcendent reason" the Court said, for its decision was the "effect of a retroactive application of O'Callahan on the administration of justice." Curiously, the Court chose to resolve this issue while Relford v. Commandant, 38 U.S.L.W. 3338 a case which would resolve the issue finally, was pending before the Supreme Court.

10. Frazier, 41/40.

11. Hallahan, 41/46

12. Id.

13. Peak, 41/19.

14. Keaton, 41/64.

15. Easter, 41/68.

As quickly as it decided Mercer, however, the Court carved out an exception to it. In Brant, 42/95, a conviction became final six months before O'Callahan was decided. However, the conviction of a co-accused was reversed for lack of jurisdiction because his case took longer to reach appellate channels than did Brant's. Following a policy of treating equally companion cases which present the same issue and which were pending appeal at the same time the court granted Brant's petition for reconsideration and dismissed the charges.

Rehearings

In United States v. Robbins, 39 CMR 86 (1969) the Court had reversed the appellant's conviction a second time because the case had not been referred to the original convening authority for disposition after the first reversal. Article 67(f), the Court said, was mandatory in requiring such referral (except for good cause) before any other convening authority could take jurisdiction over the case and direct a rehearing. This case, however, now stands alone. In the October 1969 term, the Court so emasculated the Robbins rule as to make it virtually extinct. In a series of four cases, the Court ruled that failure to remand to the original convening authority was not a jurisdictional defect,¹⁶ that the defect may be waived¹⁷ that it could be waived by failure to object or by a guilty plea¹⁸ and that even if express objection is made, the error is not prejudicial.¹⁹ Judge Ferguson, who wrote the opinion for the two-judge court in Robbins, dissented in these four cases. The present state of the law seems to be that unless specific prejudice can be shown by the failure to refer the case to the original convening authority--that he would dismiss the charges for example--the failure is a minor defect and not reversible error.

Jurisdiction over Civilians

In perhaps its most far reaching and boldest decision of the term the Court ruled that the United States was not at "war" in Vietnam for the purposes of Article 2(10) of the Code, and thus, there was no court-martial jurisdiction over civilians accompanying the troops in Vietnam. In Averette, 41/363, the appellant was a civilian contract employee living and working in Saigon who was tried by court-martial and was sentenced to confinement and a fine. The Court declined to apply the previous rationale with respect to the tolling of the statute of limitations for AWOL in time of war [United States v. Anderson, 38 CMR 386 (1968)] and ruled instead that insofar as jurisdiction over civilians was concerned, "the words 'in time of war' mean . . . a war formally declared by Congress." The

16. Martin, 41/211; see Hart, 42/40.

17. Id.; Condron, 41/217.

18. Washington, 42/52.

19. Sessions, 42/54.

Court declined to express an opinion on the constitutionality of court-martial jurisdiction over civilians even in a declared war. Chief Judge Quinn dissented, writing that even if a declared war is required, there had been sufficient congressional participation in the Vietnam war to satisfy the requirement.

Expiration of Enlistment

An enlistment in the service is not a contract, but evidence of a change in status. Thus, one who remains in the service past his enlistment expiration date is still amenable to court-martial jurisdiction. In Hout, 41/301, an Air Force sergeant remained on active duty past his ETS, received pay and performed work. Although he was by regulation entitled to be discharged, he made no effort to seek a discharge. Eight months after his ETS, charges were preferred against him. The Court held that he consented to his retention in the service, and that once charges were preferred against him, his absolute right to be separated changed to a qualified one under Para. 11d, MCM, US, 1951. Moreover, in Taylor v. Resor, 42/7, the Court ruled that court-martial jurisdiction is retained over those "awaiting discharge" after the expiration of their terms of service, and that the mere passage of time itself cannot effect a discharge so as to divest a court-martial of jurisdiction.²⁰

PRETRIAL PRACTICE

Specifications

Specifications which omit either words of criminality or an element of an offense have generated considerable litigation. In an assault and battery case, a specification which alleged a striking without denoting that it was done unlawfully was held insufficient to state an offense.²¹ This same result was reached in a case where words of criminality were omitted completely from a specification involving open and notorious cohabitation.²² Likewise, omission of an allegation that the accused's vehicle was involved in an accident reappeared in pleadings involving fleeing the scene of an accident.²³ The specification was apparently drafted using the form contained in the 1951 Manual²⁴ as a guide. Use of this form pleading, which had been held defective²⁵ some four years ago, required dismissal of both the charge and specification. Interestingly, a recent case has held that if the trial counsel discovers defects like those referred to above at trial, he may by motion amend the specification to add a missing element of an offense with the consent of the accused.²⁶ In this manner, specifications may be perfected without returning them for corrective action by the convening authority.

20. See also Leonard, 41/353 (recommendation for medical discharge without receipt of discharge certificate does not terminate court-martial jurisdiction.)

21. Jones, 4/282.

22. Acosta, 41/341.

23. Yatsko, 41/57.

24. Appendix 6, form 142, MCM, 1951.

25. United States v. Fleig, 37 CMR 64 (1966).

26. Rodman, 41/102.

Duplicitous specifications also received scrutiny by the Court. While normally a specification may allege only one criminal act, multiple criminal acts may be pleaded in a single specification when this duplicitous pleading benefits the accused by reducing the maximum punishment.²⁷ But in an absence without leave offense, the fact that the accused also missed the movement of his ship may be neither pleaded nor proven in aggravation because, as it authorizes no increase in punishment, it is irrelevant.²⁸

Even though the pleader drafted proper specifications, the court-martial may itself create a defective one if after excepting and substituting it writes a new specification which fails to state the intended offense.²⁹ Whether the specification is sufficient may be tested by fair implications from the language of the specification,³⁰ but pleading wrongful appropriation of "personal property" does not sufficiently define the res to allege an offense.³¹ An allegation which pleads a disavowal of any allegiance to the United States, however, is sufficient to allege the making of a disloyal statement.³²

Command Influence

The Court recognized that command control over gun shot wounds in a combat division was essential. Harrison, 41/179, involved a division directive which informed the chain of command of the problem, suggested strong action was necessary, and ordered that "in all cases where the soldier will be hospitalized for 30 or more days charges and supporting documents will be forwarded to the hospital commander." While this directive appears to demand prosecution, it was described by the Court as "essentially directed towards prevention of gun shot incidents." Although the case was reversed on other grounds, its language illustrates the Court's current view that combat commanders must have broad authority to protect their men.

The Court was unwilling to apply lower standards to the conduct of a military judge because he was performing in a combat zone, however. A pretrial conference between the military judge and staff judge advocate, 101st Airborne Division, was condemned because it was an ex parte, off-the-record transaction.³³ If the defense

27. Lovejoy, 42/210.

28. Venerable, 41/174; Bobadilla, 41/178. Chief Judge Quinn agreed that the missing movement offense could not be pleaded, but he would permit proof of the offense to be submitted by the government as a matter in aggravation.

29. Marshall, 41/97. The court-martial found the accused guilty of involuntary manslaughter but omitted the words "unlawfully kill" from the specification.

30. Pettigrew, 41/191.

31. Curtiss, 42/2.

32. Gray, 42/255.

33. Priest, 42/48.

affirmatively waives any objection to such a conference, even though it is unauthorized under military law it will not be considered prejudicial to the substantial rights of the accused.³⁴

Pretrial Publicity

The Court was not presented any issues concerning pretrial publicity on direct appeal, but the alleged massacre at My Lai 4 generated such an unusual degree of publicity that both parties in the court-martial case of Lieutenant William L. Calley, Jr., requested injunctive relief against all news media "operating or otherwise doing business in the United States of America or any territory thereof."³⁵ The military judge had ordered the court-martial members not to listen to or read news accounts of the incident. He also had ordered the prospective witnesses not to discuss the incident with anyone.

The Court denied injunctive relief, and commented favorably on the actions already taken by the military judge. It also encouraged that official to take additional steps at the time of the trial in accordance with the Supreme Court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966).

Convening Authority

There was very little litigation affecting the convening authority, but that litigation that did occur was particularly significant because of its potential impact on the position of the convening authority in military law. It is now clear that the convening authority may sit as an appellate court and rule on interlocutory appeals during the trial. This power is not limited only to those trials where the presiding officer is legally untrained, for the convening authority may overrule the military judge on questions of law, and he may require reconsideration of most other questions. It is now lawful for the convening authority to interject himself into the trial before it has been completed.³⁶

In addition, the Court, in a series of Navy cases, questioned the authority of the Secretary of the Navy under Article 23(7) of the Code to delegate his authority to empower commanders to convene trials by special courts-martial. As the statute did not authorize the Secretary to delegate his authority, his attempted delegations were unlawful. This meant that convening authorities who had received their courts-martial jurisdiction from the Secretary's delegee had in fact received no valid authority to be convening authorities, and cases which they had referred to trial were void for lack of jurisdiction.³⁷

34. Powell, 42/237.

35. Calley, 41/97.

36. Priest v. Koch, 41/293.

37. Greenwell, 42/62; Walker, 42/271; Hevner, 42/272.

The Court also reaffirmed its prior holding³⁸ that when the convening authority makes a judgment as to the credibility of a government witness, this disqualifies him from further actions in the case.³⁹

Speedy Trial

The Court as now constituted apparently desires to relax military rules relating to speedy trial somewhat. Thus in a case involving violations of both Articles 10 and 33 of the Code, and an unnecessary delay of 56 days caused by government error in requesting the accused's service record, no prejudice was found.⁴⁰ Also if an accused is confined under more than one set of charges, each set may be used by the government in computing the time requirements established by Articles 10 and 33 of the Code, and as long as the government asserts that it contemplates only a special court-martial, Article 33 does not apply.⁴¹ In addition, when the issue of speedy trial has not been raised below, the Court will not require the government to justify the delay. Hence in a case where the accused was released after 35 days of pretrial confinement, had an intervening civilian trial, and was court-martialed thirteen months after his apprehension, the Court viewed the delay as beneficial to him in that it allowed him to complete his civilian trial before he was tried by court-martial.⁴²

TRIAL PRACTICE

Counsel

Right to counsel. The Court reversed a conviction where the record of a trial held more than 30 days after 7 March 1969 failed to reflect compliance with the Court's directive in United States v. Donohew, 39 CMR 149 (1969), regarding the right to assistance of counsel provided by Article 38(b), UCMJ. All that appeared in the record was that the defense counsel informed the president of a special court-martial that the accused understood her right to have civilian counsel and the accused stated that she was satisfied with the appointed defense counsel.⁴³

Appointment, qualification, and replacement of counsel. The Court held that an appointing order correctly designating the role of counsel who function in a case is necessary to comply with the requirement of Article 27(a), UCMJ, that the convening authority detail the defense counsel for the particular case involved. The Court dismissed charges in a case where the officer serving as defense counsel was

38. United States v. White, 27 CMR 137 (1958).

39. Marks, 41/389.

40. Przybycien, 41/120.

41. Mladjen, 41/159.

42. Pierce, 41/225.

43. Fortier, 41/149.

named in the appointing orders as trial counsel and the record contained no later orders relieving him of that designation. This result was reached despite the fact that the accused was advised of his rights regarding counsel, he accepted the officer in question, and statements at the trial established that this officer had not acted for the prosecution, or in any other prohibited capacity, and was not disqualified.⁴⁴

The Court was less formalistic when the appointing orders did not reflect the defense counsel's qualifications within the meaning of Article 27(b), UCMJ. In such a case, the Court indicated that the Article 32 investigating officer's report certified those qualifications and the Court judicially noted from other cases filed before the Court that the defense counsel was indeed certified.⁴⁵

Certification of counsel resulted in the striking down of a provision of the 1969 Manual, (Revised edition). Insofar as Para. 47 can be construed as preventing a lawyer who is not certified in accordance with Article 27, UCMJ, from actively participating in a general court-martial as an assistant defense counsel, it was held to conflict with Article 38(e), UCMJ, and, in such situations, the Code prevails. In a case in which such a lawyer was not allowed to be sworn, the Court found no prejudice as the appointed defense counsel announced he would defend the accused with the aid of the assistant defense counsel, and the latter presumably provided whatever assistance was required of him by the defense counsel.⁴⁶

The accused's right to be represented by defense counsel appointed in his behalf by the convening authority was held to be a fundamental right of military due process. Once entered into, the relationship between the accused and appointed military counsel may not be severed or materially altered for administrative convenience. Replacement of appointed military counsel, over an accused's objection, because of a routine change of duty station, was held reversible error.⁴⁷ However, if the accused has counsel of his own selection, the appointed military counsel may act as associate counsel, if desired by the accused, or he can be excused from the case.⁴⁸

The Court also had occasion to consider the more infrequent subject of qualifications of a trial counsel. The Court stated that if an allegation is made that an assistant trial counsel previously participated in the pretrial preparation of the defense case, the military judge will determine the propriety of such officer's continuance as a member of the prosecution. Even if the officer in question

44. Coleman, 42/126.

45. Hawes, 41/173

46. McFadden, 42/14.

47. Murray, 42/253

48. Feely, 41/152.

participated in the case only in pretrial activities, and was not appointed a member of the prosecution in the court-martial convening orders, the military judge can still determine if any conflict of interest existed at any time in the case, and if so, whether it had any effect on the substantial rights of the accused.⁴⁹

Arguments of counsel The Court established the principle that, in an appropriate case, the defense counsel, in argument, may assist the accused in an attempt to persuade the court-martial to impose no punishment other than a discharge. However, if the defense counsel concludes that, in the circumstances of the case and in good conscience, he cannot argue for the kind of sentence the accused desires, he may ask for leave to withdraw as counsel.⁵⁰ Arguing for a punitive discharge will be considered improper, however, when there is no indication in the record that the accused requested such an argument or if there is substantial evidence that the accused desired to remain in the service.⁵¹ In the case of an improper argument for a discharge which was not stopped or expressly discounted by the military judge, the Court held that there was a fair risk that the judge was influenced by the argument in adjudging a discharge as part of the punishment.⁵² The Court applied the same considerations to a case where the defense counsel made it apparent that the accused desired a punitive discharge in preference to confinement, not through argument, but by answers he elicited from the accused testifying under oath after findings.⁵³ The Court's language in these cases appears to indicate that the requested discharge must be as an alternative to all confinement and other penalties and not in conjunction with a requested minimum period of confinement.

The Court also considered this past term an argument by trial counsel claiming that an accused perjured himself by denying that he heard the order he was alleged to have disobeyed. The Court held the argument improper and erroneous as no witness testified to the contrary and the record therefore contained no evidence that the accused committed the offense of perjury. Reversal in such situations is required where there is a fair risk that the deliberations of the court were improperly influenced. Although the president of a special court-martial ordered the trial counsel's perjury argument stricken from the record, reversal was required because the argument related directly to the accused's testimony on an essential element of the offense and the Court was not cautioned regarding the effect of such argument.⁵⁴

49. MacDonald v. Flanagan, 42/187.

50. Weatherford, 42/26.

51. Schwartz, 42/33; Weatherford, supra.

52. Schwartz, supra.

53. Freeland, 42/57.

54. Pettigrew, 41/191.

Effective assistance of counsel In an unpremeditated murder case in which the entire defense effort hinged on the mental responsibility of the accused, it was claimed that the defense counsel stipulated to parts of a psychiatric examination that were most favorable to the prosecution and excluded parts favorable to the defense. The Court refused to conclude that the accused was deprived of the effective assistance of counsel because the counsel agreed to this stipulation. The Court noted that the trial defense counsel was experienced and was a certified counsel in the grade of major. The Court further noted that the excluded portion of the psychiatric report, indicating a diminished capacity to intend, would not have contradicted the report's conclusions as a complete lack of the capacity to entertain the specific intent to kill was required. The Court therefore held that the triers of fact were not denied information that was likely to have changed their decision.⁵⁵ A variation on this theme of inadequate representation was mentioned but not decided in another case. It was claimed that a pretrial agreement for a guilty plea, negotiated by military counsel in Vietnam, did not conform to the instructions of civilian counsel in the United States in that the provision for a bad conduct discharge provided for suspension rather than immediate remission. The Court treated this contention as an issue affecting the providency of the plea entered pursuant to the agreement, but held the issue moot as the period of suspension had terminated and the discharge had been remitted.⁵⁶

Guilty Pleas

In regard to the military judge's inquiry into the providency of a guilty plea, the Court indicated that it would not require strict adherence to the directive it enunciated in United States v. Care, 40 CMR 247 (1969). In Wimberly, 42/242, the factual basis for the plea was established by the military judge inserting the facts from the specifications into his delineation of the elements of the offense. The military judge then asked the accused if he had committed the acts alleged in the specification. The Court held that the military judge's inquiry "marginally complies" with the requirements of Care for interrogation about the actions and intentions of the accused in order to determine whether his actions constitute the offense to which he is pleading guilty. The Court noted, however, that the questions by the military judge tended to be long and covered more than one action or element, and stated: "We contemplated a more segmented interrogation procedure with separate attention to the elements and to the facts."

The Court also stated that adherence to Care did not require an explanation by the military judge of the law of principals even

55. Chappell, 41/236.

56. Feely, 41/152.

though it appeared from the stipulations of fact that a co-actor was involved in the offenses alleged against the accused.⁵⁷ In further consideration of the stipulations of fact normally introduced in guilty plea cases, the Court stated that stipulated evidence need not establish the accused's guilt in order to uphold a plea of guilty. In order to justify setting aside a guilty plea on the basis of the stipulation of fact, the stipulated evidence must negate the accused's guilt of the offenses.⁵⁸

In pre-Care cases (cases not tried more than 30 days after the decision in Care), where the inquiry into the plea was comparable to the inquiry in Care itself, the Court reviewed the cases to assure itself that the accused understood the nature of the offenses to which he was pleading guilty.⁵⁹ The Court examined the "record as a whole", and primarily the accused's testimony in mitigation, to determine whether the plea of guilty was provident.⁶⁰ In one case, the accused's prior convictions for the same offenses to which he pleaded guilty were utilized to show that the accused knew what acts constituted the charged offenses.⁶¹

The element that prevented the Court from sustaining a number of convictions was the specific intent requirement of various offenses. A plea of guilty to the offense of mutiny was reversed where there was no delineation of the elements and especially the intent to usurp or override lawful military authority, and there was no evidence in the record to correct this deficiency.⁶² Several guilty pleas to desertion were not sustained by the Court because the mitigation testimony established only an unauthorized absence and failed to reveal an intent to remain away permanently.⁶³ A guilty plea to desertion with intent to shirk important service was reversed when the facts in the case failed to supply the requisite intent.⁶⁴

In addition to the cases where the evidence after findings was held to be insufficient to fill the vacuum created by the inadequate providency inquiry, the Court, in several cases, found that the mitigation evidence affirmatively contradicted the elements of the offense to which the accused was pleading guilty. The Court indicated that when evidence after findings was inconsistent with the plea of guilty the plea must be vacated.⁶⁵ A specification alleging the smuggling of cigarettes into a jail cell was rendered improvident by evidence that a guard stopped the accused before he ever entered the cell.⁶⁶ A plea of guilty to assault with a dangerous weapon was inconsistent with the accused's testimony that he acted in

57. Wimberly, 42/242; Weaver, 42/250.

58. Wimberly, supra; Falls, 41/317.

59. Brooks, 41/35; Hawes, 41/173; Williams, 41/334.

60. Id.

61. Brooks, supra.

62. Wilson, 42/100.

63. Kingston, 41/7; Cuero, 41/398; Rumpler, 42/81.

64. Matheny, 41/39.

65. Stewart, 41/58; Lowery, 41/245.

66. Lowery, supra.

self-defense.⁶⁷ An accused's statement that he absented himself from a rear area in Vietnam because he wanted to be at the "front" rendered improvident a plea of guilty to desertion with intent to avoid hazardous duty as the Court held that there was a difference between intending to avoid such duty and following a course of action leading to the same result regardless of intent.⁶⁸ Finally, testimony by an accused that he attempted to withdraw from a criminal venture before, in the view of the Court, the criminal venture was completed (the mailing of an obscene and threatening letter to the President) was held to be inconsistent with a plea of guilty to that offense.⁶⁹

Where a defense exhibit introduced after findings indicated that, during the period in which several unauthorized absences occurred, the accused had been committed to a state mental hospital and state medical authorities regarded him as a psychotic, the Court held that a plea of guilty could not stand without an inquiry into the accused's mental responsibility. The Court further stated that a report from a military psychiatrist declaring the accused competent throughout the period in question merely made insanity a controverted question of fact for the court to decide.⁷⁰

The failure of the military judge to delineate the elements of the offense resulted in the setting aside of a plea of guilty when the facts in the case raised a reasonable doubt as to whether there had been a meeting of the minds between the government and the defense. The accused entered a plea of guilty to wrongful possession of an unauthorized identification card with intent to deceive. The pretrial agreement, however, described the charge as simply the wrongful possession of an identification card and the plea of guilty was apparently negotiated on this basis. The finding of guilty as to the greater offense was approved by the convening authority although the post-trial review treated the findings as a conviction of the lesser included offense.⁷¹

In discussing the effect of a plea of guilty on alleged errors in a trial, the Court, citing federal law, held that a valid plea of guilty waives all nonjurisdictional defects in all earlier stages of the proceedings against an accused, such as a challenge to the regularity of the Article 32 investigation.⁷²

Witnesses

The Court, in an important decision on the subject of defense-requested witnesses, indicated that a pretrial request for the

67. Saplala, 41/344.

68. Stewart, *supra*.

69. Williams, 41/334; Binkley, 42/96.

70. Batts, 42/128.

71. Jagow, 42/105.

72. Lopez, 42/268.

presence of a witness that was renewed and denied at the trial became reviewable on appeal in regard to whether there was an abuse of discretion on the part of the military judge. The Court stated that the Codal authority for the use of depositions did not conflict with the right to compulsory process as depositions are an exception to the general rule of live testimony before a court-martial and are to be used only when the government cannot reasonably have the witness at the trial. The Court struck down the hundred-mile clause of Article 49(d)(1), UCMJ, as a basis for the admission of depositions in courts-martial and held that, in regard to military witnesses, the right of confrontation as embodied in military due process requires that actual unavailability be established before a deposition of a serviceman can be admitted into evidence. The Court therefore held a denial of a defense-requested witness to be prejudicial error when there was no showing apart from geographical location that the witness was unavailable and his credibility, based in large part on his demeanor while testifying, was crucial to the accused's case.⁷³

The Court's liberal policy toward defense-requested witnesses, however, apparently depends on the specific language of the request. In one case, the senior member of a three-man sanity board testified at a trial in regard to the mental responsibility of the accused. At the trial the defense counsel requested the appearance of a particular doctor, who was one of the other members of the board, in order to cross-examine him in regard to the board's conclusions. The Court viewed this request, not as one for a defense witness but for cross-examination of a witness the defense thought the government was obligated to call. The Court held that the sanity board report was not introduced into evidence and there was no sound basis for contending that the doctor in question was a witness before the court and that the defense had a right to cross-examine him.⁷⁴

The Court reaffirmed the right of a court member to question a witness as long as the questioning does not reach the level of partisan advocacy or establish a propensity on the member's part to convict an accused regardless of the matters presented.⁷⁵

Common Trial-Severance

The Court, in one case, discussed the related questions of common trial and severance. The general test for the propriety of joinder of two or more accused is the similarity of proof--whether the offenses alleged against each accused is provable by "substantially" the same evidence. A separate question apart from the propriety of joinder of accused for a common trial is the question of prejudice resulting from such joinder. The burden of establishing a reason for severance of a particular accused rests on the party requesting the severance. The fact that one of two accused tried for willful disobedience of an identical order pleaded guilty did not render a common trial improper. In view of the personal nature of this offense

73. Davis, 41/217.

74. Howard, 42/149.

75. Papenheim, 41/203.

one accused's confession would not indicate that the other accused also willfully disobeyed the order. Whether the guilty plea of one accused reflected adversely on the other accused's attempt to litigate the legality of the order was rendered moot when the first accused changed his plea to one of not guilty before the government's first witness concluded his testimony.⁷⁶

EVIDENCE

Search and Seizure

This term, the Court of Military Appeals clarified the law of shakedown inspections and inventory searches. The Court ruled that once a regular shakedown inspection is scheduled and already begun, it does not turn into an illegal search simply because one of the subjects of the inspection becomes a suspect during the search. In Grace, 42/11, a squadron shakedown inspection "to check living conditions" was under way when information was conveyed to one of the inspectors that the accused had marihuana in his locker. After suspicious activity by the accused, he was "apprehended", and legal advice was sought before the inspection of his locker was continued. The Court upheld the admission of marihuana discovered in the locker, distinguishing United States v. Lange, 35 CMR 458 (1965), where the date for the inspection had not been set until after the commander learned of the offense. If the scope of the search is not impermissibly broadened after the subject becomes a suspect, it is still a lawful shakedown.

In Welch, 41/134, the Court ruled that once military policemen arrested the appellant for a traffic violation and impounded his motorcycle and "AWOL bag" for safekeeping under an Army Regulation, they could lawfully "inventory" the contents, and marihuana found therein was admissible in evidence. The Court held that even after Camara v. Municipal Court, 387 U.S. 523 (1967), the standard for administrative searches was still "reasonableness" and the search here was reasonable because not to have searched would have subjected the MP's to sanctions for dereliction. The test used by the Court was whether the police acted in good faith and were not intent on using the inventory procedure as a subterfuge.⁷⁷

The quantum of evidence necessary for probable cause gave the Court pause this term. In perhaps its leading search case, Elwood, 41/376, the accused had been arrested off-post by civilian authorities for possession of marihuana. As a result of this arrest, the accused's barracks property at Fort Hood was searched, and marihuana was found. "Not every authorized search," the Court said "is a valid one." Here, there was absolutely no evidence at all that the accused had marihuana among his personal belongings except the rank

76. Respass, 41/230.

77. But see Bell, 41/167 where in addition to listing the quantity and description of the item, the police officer illegally "conducted an inquiry to establish ownership."

speculation of the commanding officer. The fact of the arrest alone did not give rise to probable cause to believe that the accused had marihuana in the place where he lived.⁷⁸

A searcher authorized to look for a knife or other sharp object, the Court said this term, cannot legitimately seize a "wet towel" because the limits of the search had been "well-defined" and specifically restricted. If the towel had been in plain view, however, and had "visible bloodstains" on it as a suit of clothes also seized had, the towel would have been admissible.⁷⁹

The Court reaffirmed that probable cause to believe that the item to be seized is where the authorizer thinks it is must exist at the time of the authorization, not sometime before. In Crow, 41/384, the informer told the commander that he had smoked marihuana with the accused about three weeks previously. The Court struck down the subsequent search because probable cause, if any there were, did not exist at the time of the search.

In a procedural ruling, the Court agreed with several federal circuits, and ruled that the dictates of Chimel v. California, 395 U.S. 752 (1969) limiting the scope of searches incident to arrest, were not retroactive, because "the misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved."⁸⁰

When determining probable cause on appeal, the Court will look only to the evidence actually presented to the person authorizing the search. Facts known to the agents but not actually communicated to the authorizer are irrelevant to probable cause. Thus, in McFarland, 41/356, probable cause was found when the commander received information from one who incriminated himself in a drug scheme that the appellant had been seen with marihuana six days before and that he was going to take the marihuana to Hawaii. A search authorized when the commander also learned that the appellant turned up at the flight counter for Hawaii was a legitimate one.⁸¹

Lineups

In Schultz, 41/311, the accused was part of a battalion formation called for the purpose of a lineup. The battalion was advised as a group that nobody was required to participate without a lawyer and that anyone who wanted one should fall out. Three identifying

78. See also Bunch, 41/309, where even though an arrest was unauthorized the Court found that it was based on probable cause because the ONI agent took pains to corroborate in three fundamental details the information transmitted to him from a previously unreliable informant. A subsequent search was lawful because it was incident to the arrest.

79. Schultz, 41/311.

80. Bunch, supra; see Linkletter v. Walker, 381 U.S. 618 (1965); United States v. Bennett, 415 F.2d 1113 (2d Cir 1969).

81. In this case the Court declined to decide whether an implicated informer was more or less reliable. But see Crow, 41/384; THE ADVOCATE October 1970.

witnesses viewed the battalion but could not positively identify the accused, though they said he resembled the culprit. The witnesses testified at trial that the accused looked like the person fleeing the scene of the crime. The Court held that the advice was proper, the lineup was not suggestive, and evidence of it was admissible. Some jurisdictions exclude evidence of previous positive identifications to bolster testimony not amounting to a positive identification, the Court said, while others admit prior identifications, whether positive or not, to bolster in court nonpositive identifications. Under either test the testimony was admissible. No previous positive identification was admitted, nor was there any prejudice because of the previous nonpositive identification since the in-court testimony was uninfluenced by the prior identification.

Confessions

This term, the Court firmly and categorically refused to apply the harmless error rule[(Cf. Chapman v. California, 386 U.S. 18 (1967))] to the admission into evidence of a confession without a showing of the proper warning regardless of other evidence of guilt. In Kaiser, 41/104, the Court wrote of an unwarned confession: "Where a constitutional error of this magnitude is present, we will not speculate on the impact it might have had on the court's determination of guilt".⁸² However, if the defense affirmatively makes use of the unwarned confession, if it was "an essential part of the defense," then the government's failure to show a proper warning is not error at all, even if the defense first objects to admission of the confession.⁸³ The Bearchild rule, that the government must show that its use of the illegal confession did not induce the defendant to testify, apparently only has application where the in-court testimony and the confession conflict.

If the evidence of the warning is equivocal, however, the Court seemed to be more inclined to affirm. In Hart, 42/40 the defendant was not advised that he could have "civilian" counsel but acknowledged at trial that he knew a military lawyer would be provided free. This, the Court said satisfied the warning requirement--assuming that there is a requirement that the availability of civilian counsel even be mentioned. Also, an accused who not only knew of his rights but who actually had counsel could waive his counsel's presence at an interrogation. The failure of the CID to deal directly with the accused and not his counsel, while inadvisable, is not reversible error without a showing of specific prejudice.⁸⁴

Article 31 warnings, the Court reaffirmed, are not constitutionally required before a search, but if the search turns into an interrogation or if the seizure results from what is essentially an

82. See also Bell, 41/167.

83. Masemer, 41/366.

84. Estep, 41/201.

interrogation, the warning will be required. In Rehm, 42/161 a suspecting sergeant asked the accused what he had in his hand, and to hand it over. The accused never spoke. Nevertheless, a warning was required before the envelope in the accused's hand could be seized. The sergeant's acquisition of the marihuana, the Court said "resulted from what was essentially an interrogation, not a seizure."⁸⁵ Article 31 warnings are also not required before an accused can be made to submit to a psychiatric or psychological exam [United States v. Babbidge, 40 CMR 39 (1969)]⁸⁶ but if at trial the government seeks to introduce into evidence admissions made by the accused to the psychiatrist in the absence of a warning, error will result. White, 41/338. Article 31 is thus clearly a shield, and not a sword. An accused may not raise insanity as a defense and then hide behind Article 31 to insulate himself from government rebuttal; neither may the government, in the guise of psychiatrically examining the accused, unlawfully elicit incriminating evidence from him.

Notice to counsel before a psychiatric exam, while desirable, is not required unless the failure to give notice can be shown specifically to have prejudiced the accused.⁸⁷

In addition to requiring that the proper warning foundation be laid for the admission of a confession, the Court also required once again that instructions be clear and free from language which might tend to shift the burden of proof to the accused. In Truman, 42/106, the Court noted that although "syntactical nicety is not the standard of instructional adequacy," instructions which shift the burden to the accused are erroneous, and in the case of doubt, the doubt will be resolved in the accused's favor. There, the law officer included one correct sentence on burden of proof in the middle of otherwise erroneous instructions. Unless the erroneous instruction is clearly withdrawn, the Court said, later correct instructions will not remedy an earlier defect.

In Hurt, 41/206, the Court restricted the Harrison-Bearchild rule to cases where the government makes affirmative use of the tainted in-court testimony. There the appellant litigated the voluntariness of a confession and then testified in his own defense. The Court found that the judge's instruction to the court to disregard the appellant's in-court testimony unless it found his confession to be voluntary was an erroneous instruction. "Bearchild was never intended to be construed so as to deprive the appellant of a defense," Judge Darden wrote.

85. Compare with Bell, 41/167 and Schultz, 41/311.

86. See Ross, 41/51.

87. Hayes, 41/60; see also Ross, 41/51.

Previous Convictions

In 1969, the Manual was amended to provide that evidence of previous convictions committed within a six year period preceding the current offense would be admissible in aggravation during the presentence hearing.⁸⁸ But in Griffin, 41/348, the Court ruled that this Manual change had the effect of increasing the punishment from that to which the accused was subject at the time of the offense, and struck down the use of such a previous conviction in trials for offenses committed before the effective date of the Manual change. Support for the Court's position came from the Manual's promulgation, Executive Order 11430 which provided that the maximum punishment for an offense committed before the new Manual should not be increased. Clearly, the Court said, the "six year rule" was intended to operate to the practical disadvantage of the accused."

Before evidence of a previous civilian conviction can be admitted on sentence, however, an independent evidentiary rationale is required. In Hamilton, 42/283 the Court ruled that evidence of a previous civilian conviction was properly admitted before sentence to rebut specific evidence of good character and of a good military record offered by the accused for the period in question.

The Court has warned many times of the dangers implicit in the use of previous convictions before findings--especially when intent to desert is sought to be proved by evidence of prior absences. The evidence must "shed light clearly on the accused's mental attitude." [United States v. Powell, 11 CMR 64 (1953)]. But in Wallace, 41/146, evidence of a previous conviction for AWOL coupled with evidence that the accused absented himself again before the period of a suspended sentence ended clearly portrayed him as a man "who refuses to remain with the service except when he is in confinement . . ." and is admissible to show intent to desert.

Sufficiency

Theoretically, the Court of Military Appeals determines only questions of law. Art. 67(d), UCMJ. Factual questions are supposed to be resolved at the intermediate appellate level. Nevertheless, each year, the Court hears a number of cases wherein it determines the factual as well as the legal sufficiency of the evidence.

Where the appellant, in the course of a struggle, grabbed a lieutenant from behind, put his hand over the lieutenant's on a pistol, forced it to his chest and neck, and where the lieutenant testified that "my trigger finger was being pushed down", the Court found that the facts were sufficient enough so that, under proper instructions, a jury could convict the appellant of assault with intent to commit murder. Intent to kill can be inferred from the nature of the assault and the use of a deadly weapon.⁸⁹

88. Para. 75(b)(2), MCM, US (1969).

89. Leonard, 41/353.

The test for sufficiency at the Court of Military Appeals level is not whether it was reasonable or likely that the facts occurred a certain way; it is rather whether there was enough evidence so that the court members could have determined them a certain way. This distinction was apparent in Gray, 42/255, where the Court held that it was unlikely that the accused who had entered a disloyal statement in a Crash Crew log book "entertained an intent to promote disloyalty and disaffection among the members of the Crash Crew." Nevertheless, there was still enough evidence from which the Court members could conclude that the log was not an inappropriate or useless means of communication, and thus the conviction was affirmed.⁹⁰

In some cases, the accused's conduct appears so blameless that the Court will apply a "reasonable doubt" test and reverse the conviction. In Brooks, 42/220, the accused, an Air Force major, was convicted of wrongful appropriation when the evidence showed that he had obtained furniture for his off-base apartment from the Central Supply Officer. The Court set aside the finding of guilty in light of evidence that at the time there was a base policy permitting such a personal account, and that as soon as the appellant discovered that it was an impermissible practice, he returned the furniture.

A combination of these tests--some evidence from which the members of the court could determine guilt beyond a reasonable doubt--was used to set aside the conviction of an Air Force sergeant who was charged with wrongfully taking mail matter out of a unit mail box before it was received by the addressee. The sergeant, who legitimately had access to the mail room, fled when a civilian guard approached at midnight. Unopened mail was found on the floor, and after a consent search of the appellant's room, two more opened letters not addressed to him were found in the drawer of a night stand. The evidence of the violation concerning the letters in the night stand could not be used to sustain a conviction for taking the letters found on the floor of the mail room. There were other legitimate explanations, the Court noted, for the mail being on the floor, and the appellant's flight was not enough to sustain a conviction.

The presence of a bystander at the scene of a crime, the Court ruled this term, is insufficient to sustain the conspiracy conviction of an admitted participant. In Mahoney, 42/97 the appellant was convicted of transferring marihuana to an undercover CID agent, but there was no evidence of an illegal agreement between the appellant and another "bystander." "To sustain a conviction for conspiracy," the Court noted, "there must appear in the record some persuasive evidence of an agreement between the alleged conspirators and an overt act."

90. In this case, however, the Court held that with respect to another charge, a statement showing disloyalty to the Marine Corps was not disloyalty to the "United States as a political entity" and thus was not a criminally prohibited statement.

COURT PERSONNEL

Military Judge

The Court examined a number of activities of the trial judge and resolved a question prompted by the enactment of the Military Justice Act of 1968.

In the area of the judge's pretrial activities, the Court decided that an accused could waive possible error in a situation where the judge had previously acted on his case in the capacity of chief of military justice. In Wismann, 42/156, the judge had reviewed the charges and pretrial investigation, and had recommended reduction from larceny to wrongful appropriation and trial by special rather than general court-martial. The judge disclosed these facts completely and solicited a challenge. The accused waived objection, requested trial by the judge alone and pleaded guilty before him. A unanimous Court, noting the full disclosure and the judge's favorable sentence recommendation for restoration to duty, held that there was no fair risk of prejudice on the record and saw no good cause to set aside either the findings or sentence. It seems likely, though, from the Court's citation of United States v. Turner, 25 CMR 386 (1958) that it felt that this situation presented an appropriate ground for challenge had the accused elected to do so. In Powell, 42/237, a similar result obtained where the judge had consulted prior to trial with the SJA's representative about an item of proof (the exchange value of the German mark). This item was later the subject of a stipulation between the parties. Again, full disclosure was made and the defense affirmatively indicated that it did not wish to challenge for cause. The Court perceived no possibility of prejudice, saying that the judge did nothing to modify the proceedings so as to affect his impartiality and import an appearance of evil.

The Court drew the line, however, in Priest, 42/48. There the judge, noting a deficiency in one of the specifications, approached the SJA and informed him of this. He inquired whether the SJA would cancel the pretrial agreement if the accused were to plead guilty to a lesser offense, and the SJA assured him that he would abide by the agreement. Despite full disclosure, the Court condemned this "volunteer out-of-court transaction." Without deciding whether the judge acted to insure to the accused the benefits of his agreement or to rescue a doubtful specification, it said his activity served only to circumscribe the area in which he could properly act in a judicial capacity. Significantly, the Court held the judge disqualified as to that specification only. Judge Darden in dissent, criticized this "partial" disqualification and proceeded to find no prejudice because the accused did not challenge the judge.

The military judge's post-trial activities also were scrutinized by the Court. In Johnson, 42/66 and Thompson, 42/86, the Court saw no error in a trial judge's certification of certain exhibits which

came from the accused's personnel file. Describing this action as an adjunct of his record authentication duties, it held that this did not make him a witness.⁹¹

In a trial before a judge alone, may the judge look at the terms of the pretrial agreement between the accused and the convening authority prior to adjudging a sentence? A divided Court said yes. In Villa, 42/166 and its companions⁹² the majority rejected defense contentions that seeing the agreed sentence would hinder the sentencing judge's discretion. In doing so, it held that the proper analogy to the military judge in this situation is the civilian trial judge, who customarily knows of the plea bargain prior to imposing sentence. Judge Ferguson believes that such a practice is fraught with difficulties and a judge is more likely to exercise his unfettered discretion if he defers examination of the quantum of the agreement until after he sentences the accused. This is the practice recommended in The Military Judge's Guide, DA Pamphlet 27-9, Chapter 3.

Staff Judge Advocate

In four cases this term, the Court maintained its customary close scrutiny of SJA activities. Two cases arose from familiar facts-- omission, in post-trial reviews of matters favorable to the accused. In Collier, 42/182, the SJA characterized the credibility of the chief prosecution witness as the "key issue" but omitted from the review the emphatic testimony of a base legal officer that he would under no circumstances believe that witness. A unanimous Court found that prejudice to the accused was apparent. In Rivera, 42/198, the Court ordered a new post-trial review because the SJA omitted a recommendation of an intermediate that the accused be retained in the service.

The other two cases are more novel and controversial. In an interesting variation of the fact situations of Collier and Rivera, the Court found prejudice where the SJA had omitted unfavorable matter from the post-trial review. In Wetzel, 41/370 an assistant SJA had prepared a memorandum as a basis for the post-trial review wherein he recommended clemency based upon favorable recommendations from the accused's superiors. Several days later the SJA received a letter from the trial counsel objecting to clemency on the ground that the accused had wrongfully, in his opinion, refused to give evidence against his accomplice. A defense counsel put in a similar plea against clemency reciting that the accused had reneged on a promise to give favorable testimony for the counsel's client. The accused's post-trial review was ultimately prepared and it cited the favorable recommendations and omitted mention of the unfavorable matter.

91. In passing on this, however, the Court reaffirmed the rule in United States v. Moore, 16 CMR 249 (1954) where the pretrial authentication of a record of previous convictions was held to disqualify the judge.

92. Razor, 42/172; De Wees, 42/173; Ward, 42/175.

Nonetheless, it recommended no clemency, contrary to the earlier memorandum. In its opinion, the Court found the letters from counsel improper and held that despite the SJA's disavowals, there was more than a fair risk that the anti-clemency papers influenced the ultimate recommendation, which, in turn, the Court said may have directly affected the convening authority's action. The majority, over Judge Darden's dissent, remanded for new post-conviction proceedings. Although the facts of this case are rather unusual, it clearly represents a new area of judicial inquiry into post-trial reviews.

In Marsh, 42/234, the Court signalled what may be a departure from its earlier strict construction of statutory disqualification of staff judge advocates. There, the assistant SJA wrote the post-trial review after having previously served as Article 32 investigating officer. The Court noted that this was error and violated Article 6(c), UCMJ. In holding that the accused was not prejudiced, the majority relied upon the favorable nature of the review, the officer's disclosure, the accused's failure to object and his characterization of the approved sentence as fair.

SUBSTANTIVE OFFENSES

Drugs

Where drug offenses are concerned, the Court of Military Appeals dealt with such issues as the burden of coming forward with evidence, the use of admissions to identify marihuana, and the self-incrimination aspects of the Marihuana Tax Act.

In Rose, 41/3, the Court affirmed a conviction of unlawful delivery of barbiturates under Art. 134, incorporating 21 U.S.C. §360a. At issue was an instruction that the "delivery of a barbiturate may be found to be wrongful unless the contrary appears." The court was also instructed about the two exceptions when such delivery would not be unlawful (when authorized by law or in the performance of duty). It was held that the burden of proof lies with the accused to bring his case within one of the statutory exceptions. The Court reasoned that the failure to place such a burden on the government in sale, delivery, or disposal cases as had been done in possession cases evidences a statutory purpose to place that burden on the accused. The Court did not specify the quantum of evidence that the accused must present, or how the Court should be instructed once the accused comes forward with some evidence that a statutory exception should apply to him.

In Weinstein, 41/29, the Court upheld a conviction of marihuana possession and use. Although no expert testimony was received in evidence to identify the substance as marihuana, the Court found that "contemporaneous declaration as to the nature of a substance by a person using the material, and who may be presumed to know its nature, is evidence of the identity of the substance." Thus, evidence that the accused himself described the material as "grass," "pot," and "good stuff," and the cigarette as a "roach," sufficiently

identified the prohibited substance. The Court held, "All these words are indicative of marihuana.", but neither citation of authority nor declaration of judicial notice was made by the Court.

In Adams, 41/262 and Wysingle, 41/263, the Court, upon reconsideration, affirmed convictions of unlawfully transferring marihuana in violation of 26 U.S.C. §4742, against defense contentions that the statutory obligation to sell only pursuant to an official order form required a seller, who must be named by the buyer, to incriminate himself. This action was taken on the authority of Minor v. United States, 396 U.S. 87 (1969), in which the Supreme Court held that the Marihuana Tax Act, 26 U.S.C. §§4751-4753, does not compel a seller of marihuana to incriminate himself in violation of the fifth amendment. The Supreme Court considered the possibilities of self-incrimination to be imaginary. Since the purchaser must secure the order form, a seller is unlikely to be confronted with an unregistered seller who has such a form, and consequently the typical sale will be made to an unregistered seller and without a form, or not at all. Leary v. United States, 395 U.S. 6 (1969) was distinguished on the basis that a purchaser was involved there, and an order form which legitimized his purchase under federal law, incriminated him under other laws. For the transferor in Minor, it is the buyer who must provide the foundation for a lawful transaction. Although the buyer may not be compelled to incriminate himself as a price of making a lawful purchase as far as federal law is concerned, no such fifth amendment price is exacted from the seller, for unless the buyer is qualified, no lawful transaction is possible and the seller's only option is simply not to sell. Prior to this action on the government's petition for reconsideration, these cases had been returned to the Army Court of Military Review. This first time around, these cases elicited three separate opinions in the Court of Military Appeals. Chief Judge Quinn voted to reverse the transfer conviction on the grounds, inter alia, that an instruction was required that the conduct had to be prejudicial to good order and discipline. Judge Darden wrote that Leary was inapplicable, substantially on the same grounds utilized in Minor, and consequently voted to reverse. An Article 134 instruction was unnecessary because the offense was laid under 26 U.S.C. §4742. Judge Ferguson concurred in the reversal on the theory that the Leary rationale also extended to the transferor-seller of marihuana.

Article 134

The Court's decisions involving Article 134 all involved other federal statutes besides the UCMJ. They concerned the self-incriminating aspects of the Marihuana Tax Act, and other provisions on air piracy, and disloyal statements. In Adams, 41/75 and Wysingle, 41/81, before the Court of Military Appeals reconsidered the decision and affirmed a conviction for the unlawful transfer of marihuana on the basis of Minor v. United States, 396 U.S. 87 (1969), the conviction was originally reversed, with Chief Judge Quinn's vote grounded on the failure to instruct that the transfer of marihuana must specifically be found prejudicial to good order and discipline within

the service. Neither Judge Darden nor Judge Ferguson agreed. In the second opinions in these cases, the instructional error issue was limited to Chief Judge Quinn's dissent.

In Clark, 41/82 the Court reversed a guilty plea conviction of attempted air piracy, prohibited under 49 U.S.C. §1472(i), on the ground that the stipulation of fact contradicted an essential factual element of the offense--that the aircraft must be in flight. Judge Darden's concurrence, however, was based on the proposition that the crime of aircraft piracy, being a capital offense against the United States, is not triable by court-martial, under Article 134's limitation of military jurisdiction to "crimes and offenses not capital."

The case of Daniels, 42/131 resulted in a reversal of conviction of eight specifications of violating 18 U.S.C. §2387, tried under Article 134. Specification 1, for example, charged that the accused, over a period of time, with intent to interfere with, impair, and influence the loyalty, morale, and discipline of a named marine, urged and attempted to cause insubordination, disloyalty and refusal of duty by him. The Court found instructional error in the failure to charge that it must be found beyond a reasonable doubt that the language and the circumstances of the accused's declarations presented a clear and present danger that those declarations would cause insubordination, disloyalty, or refusal of duty. However, the Court affirmed the lesser included offense of soliciting a member of the Marine Corps to commit a military offense. In a companion case, Harvey, 42/141, although charged under 18 U.S.C. §2387, the accused was convicted of a lesser offense of making disloyal statements in violation of Article 134. The Court held that the lesser offense was included in the offense charged, but found instructional error in the failure to require a finding of disloyalty to the United States, as opposed to disloyalty only to the Marine Corps. It was also error not to instruct that the willful disobedience of an order does not necessarily constitute disloyalty to the United States. The Court, however, affirmed findings that the accused solicited a member of the Marine Corps to commit a military offense.

Orders and Regulations

The Court of Military Appeals also reviewed various military regulations governing such areas as currency control in Vietnam, and the more generalized standards of conduct type of regulation. In Benway, 41/345, the issue was a paragraph of MACV Directive 37-6 which limited the purchase of dollar instruments in any one month to \$200.00. In finding the directive to be punitive, the Court distinguished United States v. Baker, 40 CMR 216 (1969) on the grounds that the directive in that case was "designed more to guide those administering the postal service and accomplishing postal money order transactions than to give notice of prohibited actions involving purchase of dollar instruments." Here, the directive itself purports to apply "to all persons having MPC [military payment certificates] privileges in the RVN." Moreover, the regulation established other kinds of currency violations, limited the total amount of MPC authorized at any one time, and presented the possession of U.S.

currency after arriving in RVN. Additional support for the directive's punitive nature was found in parts giving "adequate notice that such a violation of the prohibition [as charged] is punishable."

The successor directive to the one involved in United States v. Baker, supra, was before the Court in McEnany, 42/158. The Court found the amended directive to be sufficiently "mandatory." The directive now prescribes rules rather than merely establishing procedures. Rather than directing implementation by subordinate commanders, it directs postal clerks and other postal personnel to comply with its provisions.

In Brooks, 42/220, the Court upheld an Air Force regulation predicated upon Executive Order No. 11222, and DOD Directive 5500.7 which concern "Standards of Conduct for Government Officers and Employees." This regulation, which prohibits the unauthorized use of Government property of any kind, was upheld against charges of vagueness and its "advisory" nature. The decision was based upon the regulation's directive that "all Air Force personnel 'will familiarize themselves and comply' with 'all of section A.'" The offense was charged under that section. Moreover, the Court found the regulation to be cast in prohibitory words, and not vague.

FINDINGS INSTRUCTIONS

Predictably, last term's cases on instructions are rather a mixed bag. One point which the Court apparently wished to bring home to the trial judges, however, is that instructions are not to be applied mechanically without regard to the concrete fact situation. Thus, in Pelton, 41/131, the Court held there was no need for the judge to instruct upon the issue raised by the admission of an accused's pretrial statement denying mens rea in a larceny where the defense acknowledged that the statement was false and defended on the ground that he had not done the act. In Buchana, 41/394, the Court approved the admission of evidence of flight to establish guilt but disapproved such an instruction where the facts indicated that the flight was equally susceptible of a different interpretation. Finally, in Harrison, 41/179, a self-injury, malingering case, the Court disapproved of the use of the standard instruction on accident where it conflicted with the instructions on the elements of malingering which require that the court must find that the injury was intentional. While the accident instruction given might have been proper in a homicide or assault case, said a unanimous Court, it was clearly erroneous as applied to malingering.

The Court considered self-defense instructions in two cases, last term. In Pressey, 41/360, it held nonprejudicial a contested self-defense instruction on the ground that the evidence failed to raise that defense. There, the accused was grabbed and reprimanded by another NCO. The accused then proceeded to beat the victim severely with his rifle. A unanimous Court held that the accused's testimony established that he acted not out of fear of bodily harm but, rather, in vindication of his hurt pride. But in Thornton, 41/140, the Court disagreed with the trial judge who ruled that self-defense was not raised. Here, the victim struck the first blow and a mutual affray

followed in which the accused was twice knocked down. The accused testified that, fearful of being badly hurt, he drew a knife and attempted to withdraw but was prevented by the crowd. The Court, with Chief Judge Quinn dissenting, reaffirmed that the test is whether there is "evidence which if credited could raise a reasonable doubt whether the accused acted in self-defense."

In another area, the Court reversed on an instruction which tended to shift the burden of proof to the accused. Acosta, 41/341. Here, on a charge of bigamy, the trial judge instructed that "if, in fact, the accused was under the honest but erroneous belief that he was legally divorced from his first wife . . . and that he was legally married to Joan . . . the court must find the accused not guilty."⁹³

An instruction stating that the court-martial could vote orally on a request to rebalot on the findings was held to be contrary to Para. 74(d)(3), MCM, US, 1969, which requires a secret written ballot.⁹⁴ This error is prejudicial as to any offenses to which an accused pleads not guilty regardless of whether a rebalot on the findings is in fact reflected in the record. The requirement for a secret written ballot on reconsideration of the findings is a valuable right accorded an accused and is not a mere technicality. It is therefore presumptively prejudicial and although compelling evidence in a record may rebut the presumption, a silent record will not do so.⁹⁵

SENTENCE AND PUNISHMENT

Sentence Procedure

During the October 1969 term, the Court decided two major issues bearing on sentencing procedure. First, the Court held that in a trial by military judge alone it was not error for the military judge to examine an accused's pretrial agreement with the convening authority, including its provisions as to the maximum sentence to be approved, as part of his inquiry into the providency of the accused's plea of guilty.⁹⁶ Next it was decided that in military procedure the accused should be reminded by the military judge of his privilege to speak before sentencing and that in a trial with military jury such advice should be given outside the hearing of the court members. However, the Court held that the failure to remind the defendant of this privilege is not such error that materially prejudices his substantial rights.⁹⁷

93. In Wilson, 41/100, the accused refused to obey an order to put on his military uniform on the ground of conscientious objection. The conviction was affirmed over the argument that the court was erroneously charged that "personal scruples or qualms, whether based upon religious convictions, personal philosophy, or otherwise, are no defense to the offense of willful disobedience . . ."

94. McAllister, 42/22.

95. Boland, 42/275.

96. Villa, 42/166; Razor, 42/172.

97. Williams, 42/239; Wilburn, 42/278.

Sentence Execution

The Court held that a military defendant is credited with confinement time from the date the sentence is imposed, whether or not he was actually in confinement, and that an accused whose initial conviction was reversed was entitled to credit for time spent in confinement between the date of reversal and a subsequent rehearing.⁹⁸ The Court also found that a convening authority's action approving and ordering executed a sentence to bad conduct discharge, forfeitures and confinement and then suspending its execution from the date of his action with provision for automatic remission at the end of the period of suspension was in accord with a pretrial agreement to suspend all punishment for a stated period.⁹⁹ The Court stated that the action purporting to order the sentence "executed" was nullified by the suspension provision and contrary to the limitations on execution prescribed by Article 71 of the Code.

Sentence Evidence

The Court's decisions concerning presentencing evidence during the October 1969 term related primarily to the evidentiary changes incorporated in the 1969 Manual. In Mallard, 42/59, the Court recognized that the 1969 Manual changed the prior law by permitting consideration of uncharged misconduct on sentence and that a sua sponte limiting instruction was no longer necessary. However, it recognized that when the offense tried occurred before the effective date of the Manual (1 January 1969) the evidence has a potential for ex post facto effect. Accordingly the Court has held where the offenses occurred before the effective date of the 1969 Manual that the military judge's instructions on sentence were deficient in failing to limit the use of evidence of uncharged misconduct,¹⁰⁰ and that advising the jury that it could consider evidence of other acts of misconduct on sentence was error.¹⁰¹ These errors were not considered prejudicial per se and the Court in each case weighed the objectionable evidence in light of the sentence imposed for prejudice.

Similar questions of the use of personnel records and records of nonjudicial punishment permitted under the 1969 Manual (Rev. Ed.) were decided. In Johnson, 42/66, the Court held that Article 15 punishment was not a conviction empowering a court-martial to adjudge additional punishments under Section B, Table of Maximum Punishments, and that the fact that the accused did not have legal representation at the Article 15 proceeding does not preclude its record being used at a subsequent court-martial. However, the Court held that where the offense tried was committed prior to the effective date of the revised 1969 Manual (1 August 1969) use of evidence of nonjudicial punishment on sentence was error. In the resulting line of cases in which records of nonjudicial punishment were erroneously admitted, the Court considered all factors, including the severity of the offenses nonjudicially punished, other aggravating factors in the case, the substantive offenses of which the accused was convicted, the sentence

98. Blackwell, 41/196.

99. Moore, 41/274.

100. Redd, 42/79; Taylor, 42/77; Flowers, 42/75.

101. Walker, 42/74; March, 42/78

imposed, and subsequent clemency action, to determine if the error was in fact prejudicial to the accused.¹⁰² In a related area the Court found error in the admission of evidence of nonjudicial punishment imposed for misconduct occurring after the offense tried but held that the error was waived by failure to object at trial.¹⁰³ Concerning the use of the accused's personnel records in sentencing, the Court in Montgomery, 42/227, held that only those personnel records which are maintained in accordance with applicable regulations and which reflect the accused's past conduct and performance are admissible in sentencing. The Court declined to limit such evidence to records reflecting only military conduct and performance of duty, but held that personnel records could not be considered in a trial for offenses committed prior to 1 August 1969. Subsequently, the Court decided that there was no error in admitting an accused's DA Form 20 where that form contained evidence of a prior uncharged AWOL.¹⁰⁴

In other areas relating to sentence evidence, the Court determined that where a bad conduct discharge was adjudged, a rehearing on the sentence was required when the court had not been informed that during the accused's current enlistment he had served in Vietnam and had been awarded the Vietnam Service Medal.¹⁰⁵ Similarly, the failure to bring to the attention of the court the fact that the defendant had the Vietnam Service and Vietnam Campaign Medals was considered prejudicial error.¹⁰⁶ In Bell, 41/167, the Court found that admission of data on the charge sheet reflecting an increase in the severity of pretrial restraint from restriction to confinement created a risk that the jury would infer misconduct in the absence of instructions to the contrary. The Court found this risk increased by the judge's instructions that the jury was to consider all matters in extenuation and mitigation as well as those in aggravation and that they could consider pretrial restraint, without characterizing such restraint as either extenuation or aggravation. However, in a subsequent case the Court found the military judge's instructions sufficient where he instructed that the accused was to be punished only for the offenses of which he stood convicted and where his reference to pretrial restraint made it clear that it was a matter in mitigation, not aggravation.¹⁰⁷

Sentence Instructions

Cases decided during the October 1969 term on sentence instructions primarily concerned matters of procedure rather than substance. The Court reaffirmed its holding in United States v. Johnson, 40 CMR 148 (1969), that failing to instruct the court members that when

102. Cases in which prejudice was found: Warrell, 42/89; Martin, 42/88; Iacono, 42/92; Duron, 42/165; Greene, 42/273. Cases in which no prejudice was found: Thompson, 42/86; Young, 42/83; Gauthier, 42/84; Tipton, 42/85; Deprado, 42/91; Alicea, 42/87; Mainard, 42/90; Bruns, 42/103; Lindsay, 42/104; Powell, 42/237.

103. Taylor, 42/285.

104. Id.

105. Anderson, 41/8.

106. Brooks, 41/35.

107. Lucas, 41/172.

voting on proposed sentences, they should begin with the lightest proposal and continue in this manner until a sentence was adopted by the concurrence of the required number of members was error.¹⁰⁸ The rationale of these cases obviously required reversal where no sentence instructions were given.¹⁰⁹ However, the Court modified its "plain error" approach in Pierce, 41/225, where the majority held that there was no prejudice requiring reversal in failing to give "lightest first" sentencing instructions where the defendant was sentenced only to bad conduct discharge and reduction to grade E3.

In Pryor, 41/279, and cases following,¹¹⁰ the Court held that failure to instruct court members orally on sentence voting procedure was prejudicial error in the absence of any indication that the court considered written advice provided them.

In other cases bearing on sentence instructions, the Court held that the military judge fulfilled his burden under United States v. Wheeler, 38 CMR 72 (1967), to tailor presentence instructions to the law and the evidence, where he instructed the jury to consider "all matters in extenuation and mitigation" including the accused's background, character, and performance of duty and where he cautioned court members to give full and free discussion and to use their independent judgment in arriving at a sentence.¹¹¹ However, in another case it was held error for the president of the court to instruct his court that it could consider matters in mitigation, including character and reputation evidence, where the accused had presented no such evidence.¹¹² The Court's rationale in that case was that the instructions unfairly focused the attention of the court members on the accused's failure to present mitigation evidence. And in a case in which a bad conduct discharge was authorized only because the aggregate confinement for the offenses of which the accused stood convicted was greater than six months, it was held prejudicial error to omit instructions explaining the basis for imposition of the discharge.¹¹³ But in Halvorsen, 41/107, the Court found no error in failing to instruct that the accused was not entitled to pay and allowances since his enlistment had expired during his unauthorized absence. In that case the Court's opinion was that such an instruction could have been prejudicial to the defendant.

In the area of multiplicity of offenses for sentence purposes, the Court held that escape from confinement and assault upon a military policeman were not separately punishable where the evidence indicated that the accused had helped restrain a guard in effectuating his escape.¹¹⁴ And in Lovejoy, 42/210, the Court held that an offense of fraternization between an officer and enlisted man merged with a sodomy offense and was not separately punishable where the evidence

108. Conner, 41/74; Dues, 41/130; Thornton, 41/140.

109. McDowell, 41/151; Hoff, 41/246.

110. Sandoval, 41/281; Ortiz, 41/283; White, 42/58; Tripp, 42/111.
Wright, 42/204.

111. Pressey, 41/360.

112. Tackett, 41/85.

113. Murray, 41/109.

114. Pearson, 41/379.

indicated that the fundamental aspect of the alleged fraternization was sexual intimacy. However, in a case where the accused divided money intended as travel pay into separate stacks for each payee, withheld \$20.00 from each stack, and then had each payee sign a pay list while he covered the column showing the amount due, the Court found that separate thefts from each man were committed rather than a single theft from the United States.¹¹⁵ And in Falls, 41/317, the Court found that failure to dismiss multiplicitious specifications was not prejudicial where the court was instructed that separate punishments could not be imposed.

Illegal Pretrial Confinement

In the October 1969 term the Court of Military Appeals held that a violation of Article 13 by the imposition of punishment upon an accused in pretrial confinement can justify post-trial consideration by an appellate court although the issue was not raised at trial.¹¹⁶ In that case, however, the Court found no prejudice to the accused where the improper confinement existed for only three days, where there were no indications that his guilty plea had been influenced thereby, and where the sentence imposed was substantially less than the maximum. However, in Pringle, 41/324, the Court found that the commingling of a defendant in pretrial confinement with sentenced prisoners for 40 days constituted a violation of Article 13 for which the Court returned the case for reassessment of the sentence and ordered that the reassessed sentence contain no confinement at hard labor. A similar action was ordered in Drown, 42/164, because the law officer had erred in excluding evidence raising the question of the legality of pretrial confinement. And in Jennings, 41/88, the Court held that confinement of an accused pending trial on a wilful disobedience charge was improper in view of Para. 20, MCM, US, 1969, and orders of the 3d Marine Amphibious Force and 3d Marine Division, where it appeared that confinement was not imposed to assure the accused's presence for trial and where the offense was not such as to constitute a threat to life, limb, or property. In Jennings, the Court again returned the case for reassessment of the sentence not to include confinement at hard labor.

Post-trial Confinement

On petition for a writ of habeas corpus from an accused who had been granted a new trial by the Navy Judge Advocate General but who remained in confinement, the Court held that the new trial grant had the effect of vacating the prior findings and sentence and restoring him to the status of an unsentenced prisoner.¹¹⁷ However, although the defendant was not a sentenced prisoner, he was not automatically entitled to release and could be held in what would amount to pretrial confinement in the discretion of appropriate authorities. And in Walker, 41/247, the Court held that post-conviction

115. Ventegat, 42/224.

116. Johnson, 41/49.

117. Johnson, 42/9.

confinement of an accused was not necessarily execution of a court-martial sentence prior to completion of appellate review. Such a determination would depend on the conditions of the confinement, including whether the defendant was working with sentenced prisoners and whether conditions were more rigorous than necessary to assure his presence. In the absence of such evidence the Court denied the habeas corpus petition. In a related case involving an officer defendant the Court again held that neither confinement during appellate review nor transfer to the disciplinary barracks was, standing alone, execution of sentence in violation of Article 71 of the Code.¹¹⁸ The Court further found that at the time the officer's petition for habeas corpus was acted upon, his confinement in a disciplinary barracks pending review of his conviction was not in violation of applicable Army Regulations. In both Walker and Dale the Court opined that the proper remedies for an accused who believes he is being wronged in the manner of his confinement pending appellate review are a complaint under Article 138 of the Code, presentation of the matter to the Court of Military Review which can take such evidence into account on review of sentence, and finally review by the Court of Military Appeals of such earlier asserted claims. The Court stated that since these remedies are available, extraordinary relief is generally inappropriate.

RECORD OF TRIAL AND APPEAL

Verbatim Transcript

Three decisions by the Court this term indicate that the requirement for a verbatim record of trial must be followed strictly. The requirement is a safeguard for the accused and deviations will not be lightly regarded. The Court will "take the record as authenticated"¹¹⁹ and will not speculate as to whether what is reported was actually said. Thus, where an accused's testimony in extenuation and mitigation tended to deny the intent to desert (to which he had pleaded guilty), the judge's inquiry as to whether the accused intended to "interrogate from the existence of that intent" was held not to be a sufficient inquiry into the accused's apparently inconsistent statement. The Court refused to assume that the judge had used the word "derogate" rather than "interrogate" and set aside the finding of guilty as to desertion, authorizing either a rehearing thereon or affirmance of the lesser included offense of AWOL.¹²⁰

In BeLarge, 41/91, the Court condemned the existence of unrecorded conferences between members of the court-martial (special, without judge) and trial and defense counsel. The Court noted that the accused was not present at the conference. Seemingly more important, however, was the fact that, unlike normal side-bar conferences, this conference was conducted within the hearing of the members. The Court noted, "since the conference was unrecorded and nothing further was said relative thereto, we are unaware of the nature of the question discussed and, hence, left completely in the dark about

118. Dale, 41/254.

119. Rumpler, 42/81.

120. Id.

a matter which quite obviously formed a material part of the proceedings." The record not being verbatim, the bad conduct discharge was set aside.

When recording equipment used at trial malfunctions so as to make transcription of the record impossible, even an apparently good faith effort by court personnel to reconstruct the record will not substitute for a verbatim record. Furthermore, though authentication of the record "imports verity," it does not serve to alter the fact that the record is not the verbatim record contemplated by the Code.¹²¹

Matters Considered on Appeal

The Court continued to establish guidelines for those matters which may be raised for the first time on appeal despite their availability to defense counsel at trial. Though the guidelines are not definitive, the Court has recently spoken of "serious defects in the proceedings leading to the accused's conviction and sentence" as matters which might be raised initially on appeal. In Johnson, 41/49, the Court viewed imposition of punishment upon a prisoner in pretrial confinement as one such matter.

On the other hand, however, once a matter has been reviewed by an appellate authority and appropriate remedial action has been taken, an appellant has no right to have the matter looked at again. Thus, where the staff judge advocate noted in his post-trial review that a presentencing instruction had been inadequate and he reassessed the sentence in light of that deficiency, concluding that no further reduction by the convening authority was required, such reassessment was deemed by the Court to be sufficient remedy for the asserted error. Further review was held to be unnecessary.¹²² It must be noted, however, that the convening authority in the cited case had in fact reduced the sentence (having suspended the punitive discharge). Had there been no such reduction, query whether the Court's holding would have been the same?

Cumulative Error

Many errors may, naturally, be cured by remedial action falling far short of dismissal of the charges against an appellant. The Court this term, however, once again made it clear that errors may become so numerous in a single proceeding as to deprive an accused of a fair trial. In such cases, dismissal of the charges seems the appropriate remedy.

In O'Dell, 41/37, the following factors were considered sufficient to raise a question as to whether the accused had been "accorded the rights and the kind of trial contemplated by the Uniform Code of Military Justice and the Manual for Courts-Martial": (1) representation

121. Weber, 42/274.

122. Ortiz, 42/213.

by a nonlawyer despite his request for a qualified military counsel; (2) absence of any indication in the record to show that any steps were taken to bring the accused to trial until the formal charge sheet was prepared some forty days after he was confined; (3) existence of an en masse arraignment procedure at trial for the accused and six others facing unrelated charges; (4) noncompliance with the approved procedure of inquiring into the providency of the accused's guilty plea and (5) numerous instructional errors with regard to sentence.

Cumulative error was also found by the Court where there was: (1) an insufficient inquiry concerning the accused's understanding of his rights to counsel; (2) utilization by trial counsel in his presentencing argument of matters not in evidence and (3) failure to instruct the court, prior to sentencing, to consider the fact that accused had twice served in Vietnam and had participated in various combat operations.¹²³

The absence of a verbatim record coupled with improper admission of pretrial statements of the accused and a delay of more than six months at the convening authority level caused the Court to see "no reason to put the accused to the harassment of another trial."¹²⁴

In Lowery, 41/245, the Court was convinced that the accused had not been accorded a fair trial in light of "the abundance of errors and irregularities which have already been deemed sufficient [by the Board of Review] to require reversal of at least six of the eight charges."

EXTRAORDINARY REMEDIES

Although the Court has power to issue extraordinary writs [United States v. Frischholz, 36 CMR 306 (1966)] it has limited its consideration this term to petitions which are deemed necessary or appropriate in aid of the Court's jurisdiction.¹²⁵ Thus, petitions for relief in summary courts-martial,¹²⁶ non-BCD special courts,¹²⁷ class actions¹²⁸ or nonjudicial punishment cases¹²⁹ will not be entertained. Nor will review of administrative decisions be granted.¹³⁰ Likewise review has been denied of cases where charges have not been preferred¹³¹ or of cases tried before the effective date of the Uniform Code.¹³² If the relief requested could be granted by the Article 32 investigator or by the military judge, the Court has declined to entertain the petition.¹³³

123. Scott, 41/383.

124. Weber, supra.

125. Snyder, 40/192.

126. Thomas, COMA Misc. Docket No. 70-26 (27 Mar 70).

127. Hyatt, COMA Misc. Docket No. 70-25 (27 Mar 70).

128. Watson, 42/3.

129. Whalen v. Stokes, COMA Misc. Docket No. 70-36 (21 Apr 70).

130. Hurt, 42/186.

131. Thompson v. Chafee, COMA Misc. Docket No. 70-4 (10 Jun 70).

132. United States v. Homey, 40 CMR 227 (1969).

133. Herrod, 42/176. 34

Extraordinary remedies need not be exhausted first in the Court of Military Review even though the Army Court has ruled that it has extraordinary writ power,¹³⁴ but the Court has refused to hear cases which could be disposed of by ordinary appellate means.

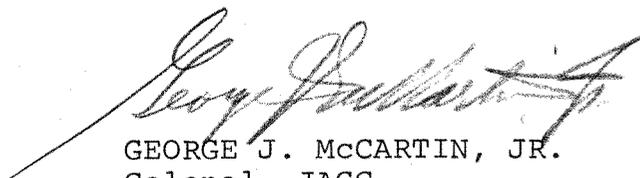
On one occasion, the Court opined that the relief requested should be granted, but lacked the power to grant it. In Hutson, 42/39, the petitioner asked that two investigators be assigned to work for the defense. The Court thought that investigators might be essential to a fair trial, and urged the service to make them available, but declined to order the requested relief itself.

Prejudice must usually be shown before extraordinary relief will be granted. Thus, a request for speedy trial with no such showing was denied,¹³⁵ but relief was granted where a convening authority held a record over 10 months after trial without taking action on it.¹³⁶

Abuse of discretion will also form a basis for extraordinary relief. In Horner v. Resor, 41/285, relief was denied because there was no showing that the convening authority had abused his discretion by ordering pretrial confinement but in Collier, 42/113, relief was granted in a post-trial confinement case because abuse was shown.

On rare occasions the Court will reach substantive issues in extraordinary proceedings. In Green, 42/178, the Court ruled that grant of immunity did not disqualify the convening authority from sending the case to trial, and in MacDonald v. Hodson, 42/184, the Court ruled that a closed Article 32 hearing was not prejudicial.

Finally, extraordinary relief was granted and a trial was enjoined where the court-martial would have been clearly without jurisdiction to proceed.¹³⁷


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134. United States v. Draughon, CMR (ACMR 1970) (en banc).

135. Eaton v. Laird, COMA Misc. Docket No. 70-47 (27 Jul 70).

136. Montavan, COMA Misc. Docket No. 70-3 (26 Feb 70); see also Priest v. Koch, 41/293 where a convening authority's ruling under 62(a) was held not reviewable as an interlocutory matter, and no prejudice was shown.

137. Zamora v. Woodson, 42/5 (trial of a civilian in Vietnam).