

# T H E        A D V O C A T E

## A Monthly Newsletter for Military Defense Counsel

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The views expressed in THE ADVOCATE are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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### ARMY LAWYERS IN FEDERAL COURTS

May an Army lawyer represent his criminal client in a collateral or extraordinary proceeding in a federal court? This question is being asked increasingly in light of the recent intervention of some federal courts directly into courts-martial pretrial procedures.

In Torres v. Connor, Civil No. 13,895 (N.D. Ga.) (2 July 1970), a federal district court enjoined the Army "from taking testimony at the plaintiff's court-martial on the issue of guilt or innocence" until a three-judge federal court could rule on the constitutionality of certain procedures arising out of one My Lai case. And in Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) a federal district court permanently enjoined the Marine Corps "from proceeding in any way with disposition of the charge now pending against the plaintiff which alleges a violation of Article 134 of the Uniform Code of Military Justice" because the marijuana offense there involved was not service-connected. [See THE ADVOCATE November 1969.]

On the other hand, the District Court for the Eastern District of North Carolina has declined to enjoin military authorities from taking a hair sample from the accused during the pendency of the Article 32 Investigation because the court had no jurisdiction to "intervene collaterally in matters before a military tribunal." MacDonald v. Flanagan, Civil No. 915, (E.D.N.C. 17 July 1970).

In all of these cases, the military members were represented in federal court by a civilian lawyer retained by them despite the fact that each accused had appointed military counsel. The question whether military lawyers may represent their clients in federal courts, assuming that federal court remedies are otherwise available, has been the subject of some comment in recent legal periodicals and is one which, we are informed, The Judge Advocate General is currently seeking to resolve.

Some commentators have criticized military lawyers for failing to seek collateral relief. Writing in the February 1970 issue of the ABA Journal, Professor Arthur John Keefe, a noted military-law expert, opined: "For reasons which I do not understand, military defense counsel have failed in many instances to file petitions for writs of habeas corpus in United States

district courts. This forces civilian counsel, usually at considerable personal expense, to give the defendant the legal defense that the military court-martial system should have given." 56 ABAJ 193 (February 1970). See also a rebuttal to this by a military lawyer in 56 ABAJ 426 (May 1970). It does seem to be a fair statement that much of the revolutionary military law being forged today by federal courts is being handled almost exclusively by civilian lawyers. See, e.g., O'Callahan v. Parker, 395 U.S. 258 (1969).

Military lawyers are not specifically precluded from seeking federal relief for their clients, contrary to a widely held view.<sup>1/</sup> Paragraph 4, Army Reg. 27-40 provides that military lawyers may "appear as counsel" in two situations relevant to our discussion: (1) if the appearance is authorized by or is incident to a mission assigned by The Judge Advocate General, or (2), the individual counsel first obtains the approval of the staff judge advocate of the responsible commander exercising GCM jurisdiction, or the responsible head of the procuring activity not exercising such jurisdiction. Conflicts of interest are naturally prohibited, as are "appearances as an Army representative in behalf of individuals in matters not connected with the performance of official duties."

Despite the fact that there is no official prohibition at the present time on civilian court appearances by military counsel, we can find no case in which permission to appear has ever been granted, and very few cases in which permission has ever been requested. There are perhaps three reasons for the paucity of requests. First, the regulation does not seem to be widely known, and many appear to believe that there is a specific prohibition somewhere against

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<sup>1/</sup>"There are times when the only way a serviceman's rights can be protected is by seeking federal court relief, and if he is unfortunate enough to be represented by a military lawyer, that avenue will be foreclosed to him." Sherman, The Civilianization of Military Law, 22 Maine L. Rev. 3 (1970).

such appearance. Second, the regulation is itself unclear, and does not appear to have been written with the current problem of collateral federal appearances by military counsel in mind. Third, federal remedies, at least at the pretrial stages, have been almost impossible to obtain because of the reluctance of federal courts to become involved in military litigation. See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Levy v. Corcoran, 389 F.2d 929 (D.C. Cir., 1967), cert. denied, 389 U.S. 960 (1967). This may be no longer true in some districts. While we will not here discuss the efficacy of advisability of seeking federal remedies during the pendency of court-martial litigation, it is true that some courts are gaining experience in dealing with the jurisdictional and constitutional aspects of courts-martial. See, e.g., Latney v. Ignatius, 416 F.2d 821 (D.C. Cir., 1969). Thus, at least in those districts which have expressed in the past an interest in court-martial litigation, it would seem that effective representation of the military client would include examination into the availability of collateral remedies when similar military remedies are either not available or have been exhausted.

Modern jurisprudential thought seems to impose a duty on the defense lawyer to avail his client of all of his legal remedies. The new ABA Code of Professional Responsibility provides specifically that "a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary rules . . ." Disciplinary Rule 7-101 (A)(1). The ABA Minimum Standards Relating to Providing Defense Services are more specific. Standard 4.2 provides that "counsel should be provided in all proceedings arising from the initiation of a criminal activity against the accused, including extradition, mental competency, post conviction and other proceedings which are adversary in nature, regardless of the designation of the court in which they occur or classification of the proceedings as civil in nature". Standard 5.2 provides that "counsel initially appointed should continue to represent the defendant through all stages of the proceedings unless a new appointment is made because

geographical considerations or other factors make it necessary." Finally, the ABA notes in the discussion to Standard 1.4 that "the staff lawyer or appointed lawyer [should] be free to perform his function in as nearly as possible the same manner as he would if privately employed by the client."

The Army regulation, as we have noted, seems on its face to permit military counsel to appear in civilian courts, with certain permission. The regulation is silent, however, in two central areas. First, the regulation does not specify what is considered to be "a mission assigned by The Judge Advocate General." Some have argued that this means any appointed defense counsel function. Certainly the regulation could be interpreted that way, in which case no defense counsel would need specific permission to appear in federal court. One must, in our view, interpret the regulation this way only at his peril, however, for it is by no means clear that those who now exercise effective control over defense counsel would interpret the regulation the same way. There have been, to our knowledge, no official interpretations of that language.

Second, the regulation does not make clear how one appeals what he considers to be an arbitrary and capricious denial of a request. The regulation provides that if a staff judge advocate himself desires to appear, he must request permission from the SJA of the next superior command. Presumably counsel who considers his local superior's denial arbitrary could appeal the decision through the same channels. Another method of appeal would be directly to The Judge Advocate General, for the regulation provides that either the local SJA or The Judge Advocate General may authorize the appearance.

What criteria should be used to determine whether permission will be granted? Again, the regulation is silent. One can assume that the general administrative standards relating to arbitrary and capricious action would apply to this area, but the problem will be

a touchy one if the personal actions of the staff judge advocate or of the local commanding general are to be tested in a civilian court. Any denial in that case would be suspect. Moreover, the regulation does not specify whether the counsel seeking permission must make a specific disclosure of the course he proposes to follow and the grounds he seeks to urge before permission will be granted.

In short, although the regulation authorizing appearance has been in effect since 1967, it is difficult to make any positive statements about it or to discuss the situations it covers with any particularity. We simply have no body of experience under it. Until further guidance is received, presumably in the form of military justice opinions rendered on specific requests, counsel are advised affirmatively to seek permission in every case where civilian court appearance is available and appropriate, even though this may delay the proceedings somewhat. Although the regulation does not appear punitive, counsel who acts without authorization acts, in our view, at his peril. On the other hand, however, counsel should not shrink from requesting such permission, and should prosecute an appeal from a denial vigorously, even through the military courts, if need be, to insure that military accused are not denied their substantive and procedural rights.

As we have noted, the question of federal court appearances by military counsel is currently under examination at the highest levels of The Judge Advocate General's Corps. THE ADVOCATE has been informed that in response to a recent request for permission to appear in federal court, which did not state that federal court remedies were either available or immediately necessary, The Judge Advocate General of the Army deferred action on the request until the necessity for federal court intervention became imminent, so that "a full study may be made of the matter." The Judge Advocate General stated that without such a thorough study, he was "not ready to conclude that paragraph 4, AR 27-40 authorizes JAGC counsel to appear in federal court on behalf of a military accused."

Some of the matters which The Judge Advocate General might study in connection with this or similar requests would probably relate to conflicts of interest, funding, court costs, manning levels and the like. It appears that these significant questions were never raised when the current regulation was written in 1967, yet they must be resolved before a workable Army-wide policy can be established.

Two observers of military practice have recently recommended a change in existing procedures to make it very clear that military counsel have the right to seek federal remedies on their client's behalf at any time without permission. Professor Edward Sherman, writing in the Maine Law Review, suggested an amendment to the Uniform Code which would insure that "defense counsel shall be authorized to bring suit in federal district courts when deemed necessary to protect the interests of a client", Sherman also proposes that court costs be paid by the military. Sherman, supra at 99-100. Senator Birch Bayh (D. Ind.), in a speech on the Senate floor reported in 116 Cong. Rec. S 10438 (daily ed. Jul. 1, 1970), noted the applicable regulation and proposed that legislation be enacted which "would empower military defense attorneys to seek collateral relief for their clients in federal courts when appropriate, and would thereby make the availability of this form of relief independent of the representation of the accused serviceman by civilian counsel."

In our view assuming that the problems noted above can be resolved, and further assuming that federal remedies become available to military accused, judicious exercise by staff judge advocates of the power granted to them under Paragraph 4, Army Reg. 27-40, or under a similar provision which may emanate from policy studies will have salutary effects on military justice in many cases. Not only will military counsel resume their positions alongside their civilian counterparts as lawyers fully able to represent all their clients' legitimate interests, as the Code of Professional Responsibility envisions, but military accused will have a higher regard for the abilities of their military counsel as well. In addition, since so much litigation is being brought in federal courts anyway, it would seem desirable to infuse experienced military counsel into the process so that federal courts can gain an accurate picture of the workings of military justice. By encouraging the active participation of military lawyers in federal cases we can help assure that the litigation is going to be oriented toward the realities of military life.



## EXCESS LEAVE WITHOUT PAY

In our April 1970 issue, we reported that a change to Army Reg. 630-5 was imminent. This change would make it possible for convicted soldiers who have served their confinement, if any, or whose confinement was deferred, and who were restored to duty could apply for excess leave without pay pending appellate review if they had an unexecuted punitive discharge as an approved sentence.

Pursuant to DA Message 960085, dated 10 July 1970, we can now report that Paragraph 5 (3) has been added to Army Reg. 630-5 to provide that the officer exercising general court-martial jurisdiction over the accused may grant excess leave for an indefinite period pending appellate review. The regulation still requires that the sentence include a punitive discharge or a dismissal, and that confinement be either served or deferred.

Although the regulation is silent, presumably the application must be made in writing, and must still include a promise by the accused to report to a military facility for a physical exam and outprocessing in the event his discharge is approved. [See THE ADVOCATE, April 1970.]

## MULTIPLICITY

Two recent cases in the Army Court of Military Review have renewed interest in the doctrine of multiplicity and have served warning that "the ever growing practice of multiplying charges growing out of what appears to be a 'single integrated transaction'" will not be countenanced. In United States v. Simpson, No. 420894 (ACMR 25 June 1970), the Court ruled that where there is a substantial doubt as to whether charges are multiplicious, the doubt should be resolved in favor of the accused. There, the Court refused to punish the accused separately for disobedience of the same order issued by three different authorities, and likewise held assault on an officer in the execution of his office and disrespect to be multiplicious.

Similarly, in United States v. Johnson, No. 421287 (ACMR 16 June 1970), escape from the custody of a sergeant and a threat to kill him at the same time were ruled multiplicitious for sentencing purposes even though the elements and proof of the two offenses were different. Likewise, resisting apprehension, assault on an MP and kidnapping were multiplicitious when they occurred at the same time and place. The Court here drew variously on the "same evidence", "single impulse" and "continuous transaction" tests. See generally United States v. Mirault, 18 USCMA 321, 40 CMR 33 (1969).

The lesson seems clear. Counsel should make motions based on multiplicity (either for dismissal or for a reduction of the maximum sentence) both before and after findings in all cases dealing with several counts of assault and disrespect arising out of the same general transaction. Moreover, counsel should be wary of offering to plead guilty to a spate of offenses which were obviously multiplied unreasonably, simply to gain a pretrial agreement which would not appear as favorable if based on nonmultiplicitious charges. Where such an agreement is made, multiplicity motions should nonetheless be made at trial. The tide seems to be turning against multiplicitious pleading, and counsel should take advantage of it.

#### THE MARIHUANA TRACES PROBLEM: MILITARY DEVELOPMENTS

In the May 1969 issue of THE ADVOCATE, we indicated, in regard to possession of de minimus amounts of marihuana, that several state jurisdictions had assaulted the traces problem on two theories: (1) the amount allegedly possessed must be a usable amount, and (2) the illegal possession must be knowledgeable. Recent Court of Military Review decisions have indicated that the latter approach may be a fruitful area for attack by military defense counsel.

In United States v. Avant, No. 420719 (ACMR 7 July 1970), the accused and a defense witness presented

unrebutted testimony that the accused had picked up a pipe with the initials "J.R.C." in the EM Club and had placed it in his pocket. About an hour later, the accused was arrested, his clothes were searched, and a .05 gram particle of marihuana was scraped from the bowl of the pipe, of which only .005 grams was conclusively identified as marihuana. The Court of Military Review, acknowledging the principle of law that conscious knowledge of possession (an essential element of the offense) may be inferred from the fact of possession, held that this presumption in this case is "substantially rebutted by evidence of his non-conscious possession." The Court therefore held that the requisite knowledgeable possession of .05 grams of marihuana was not established beyond a reasonable doubt.

In United States v. Shikuma, \_\_\_ CMR \_\_\_ (ACMR 1970), the Court of Military Review held that possession of traces of marihuana in the particular factual setting presented, did not amount to overwhelming evidence of guilt so as to cure any prejudice resulting from improper cross-examination and argument by the trial counsel regarding uncharged misconduct. The Court indicated that the main thrust of the defense was that the possession of .007 grams of marihuana dispersed over a field jacket, laundry bag, tobacco pouch, plastic bag, white shirt and pair of trousers, did not constitute knowledgeable possession on the part of the accused. In addition, the field jacket, tobacco pouch, and plastic bag belonged to another individual with whom the accused was staying and who had access to and had worn the trousers. It was established that this individual had been court-martialed and it was implied that he may have planted the marihuana in an effort to "curry favor" with law enforcement authorities.

In United States v. Heicksen, \_\_\_ CMR \_\_\_ (ABR 1969), .02 grams of marihuana had been found in an accused's jacket. Defense witnesses testified that several

persons other than the accused frequently wore this jacket. The then Board of Review specifically stated that it was not "impressed" with the testimony concerning the many people who might have worn the accused's jacket, but, nevertheless, held that the government failed to establish beyond a reasonable doubt that the accused had any awareness or consciousness of the physical possession of the drug on his person.

### Proposed Legislation of Interest to Defense Counsel

#### SENATOR PROPOSES SWEEPING AMENDMENTS TO UNIFORM CODE

Senator Birch Bayh (D. Ind.) has recently proposed to introduce legislation which would change and improve military justice in several significant respects. In a speech on the Senate floor (116 Cong. Rec. S 10438) (daily ed. July 1, 1970), he expanded on the trial command concept favored by Senator Tydings (D. Md.) (See THE ADVOCATE, December 1969), and urged that the trial command include prosecutors as well as defense lawyers and judges. Senator Bayh's legislation has not yet been submitted, but it is anticipated that it will be referred to the Senate Judiciary Committee when offered. We think counsel should be aware of the changes advocated by Senator Bayh. Effective advocacy demands cognizance of legislative as well as judicial developments. Therefore, we summarize Senator Bayh's proposals in detail:

1. Establish an independent trial command composed of four divisions: defense, prosecutorial, judicial and court reporter and administrative.

2. Grant a number of important powers to military judges:

- (a) the power to "issue all writs necessary or appropriate in aid of . . ." their jurisdiction;

- (b) the same contempt power as is now possessed by the Federal judiciary and

- (c) the power to authorize searches and issue arrest warrants.

3. Extend to servicemen certain basic rights now accorded their civilian counterparts:

(a) the right to appointment of an independent defense counsel upon request immediately following arrest at a formal presentment;

(b) the right to obtain subpoenas from an independent military judge;

(c) the right to protection against trial by court-martial after trial in a State court for the same act, and vice-versa; and

(d) the right of military defense attorneys to seek collateral relief for their clients in Federal courts.

4. Establish a system of random selection for members of special and general courts-martial, and abolish the requirement that two-thirds of the members of such courts-martial must be officers.

5. Modernize military confinement and sentencing procedures and policies by:

(a) transferring from the commanding officers to independent military judges the power to release an accused serviceman pending trial or pending appeal;

(b) granting complete credit for pretrial confinement towards any ultimate sentence;

(c) eliminating the power of the convening authority to review sentences and findings;

(d) transferring the sentencing power, including the power to suspend sentences, from the members of the court (the "jury") to the military judges in all non-capital cases;

(e) permitting all confined servicemen--including those awaiting trial or appeal--to participate in work, exercise and rehabilitation programs wherever adequate facilities are available; and

(f) directing an existing code review committee to study and suggest revisions in the current table of maximum punishments.

6. Modernize the appellate process to eliminate delay and excessive workloads, by:

(a) permitting the Judge Advocate General of each service to delegate certain review powers to his flag officer or general officer designee;

(b) empowering the Supreme Court to issue writs of certiorari to the Court of Military Appeals; and

(c) enlarging the Court of Military Appeals from three to nine judges and authorizing it to sit in panels of three judges each.

7. Direct the existing Code review committee to study and, within one year, to recommend solutions in four additional areas:

(a) the possibility of eliminating all summary courts-martial;

(b) the desirability of transferring jurisdiction over some absence offenses to the Federal courts;

(c) additional methods of eliminating delays in the appellate process; and

(d) means of dealing with prisoners who complete the service of their sentence to confinement prior to the completion of appellate review.

#### THE MISCELLANEOUS DOCKET

In MacDonald v. Keaton, COMA Misc. Docket No. 70-44 (order issued 2 July 1970), the petitioner, in a trifurcated claim, alleged, that he was being deprived by the government of effective assistance of counsel. His claim was premised, upon (1) the assertion that his phone was bugged and that confidential conferences

with his attorneys were thus violated; (2) the assertion that the government would not yield to petitioner certain physical evidence, otherwise undescribed, for examination by petitioner's own experts; (3) the allegation that MP guards had been directed to allow CID agents to see the petitioner at any time (notwithstanding absence of counsel) and the further assertion that petitioner's own witnesses had been intimidated, harassed and in some manner misled concerning the petitioner. The petitioner further alleged that the government intended to continue the offensive conduct.

To obtain relief from these alleged abuses, appellant filed a "Petition for Production of Evidence, Writ of Injunction and Temporary Restraining Order," seeking, inter alia, production of the tapes of the tapped phone calls, certain physical evidence and lab reports. The petition was denied, apparently for failure to set forth sufficient factual bases to substantiate the allegations. Counsel are thus reminded to set forth in detail, by affidavit or otherwise, the specific factual bases upon which their request for relief is founded. See THE ADVOCATE, May 1970. Judge Ferguson concurred in the denial, "for the reason that the accused can raise the questions at the Article 32 examination or the trial or both, and can call and cross-examine witnesses on the allegations set forth in the petition."

#### RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

ASSAULT ON A NONCOMMISSIONED OFFICER--LOSS OF STATUS--The accused was charged with striking a superior noncommissioned officer who was then in the execution of his office. The victim admitted that immediately prior to the assault, he had addressed an insulting remark to the accused concerning the accused's mother. The accused testified that this remark caused him to assault the NCO and the defense counsel argued on findings that the NCO "left the execution of his office," and "was no longer performing the duties of an NCO." The Court

of Military Review held that an issue was thus presented for the court-martial's determination as to whether the conduct of the victim right before the assault was such as to have divested him of his status as "a superior noncommissioned officer then in the execution of his office" with regard to the offense charged. The Court affirmed the lesser included offense of assault and battery in violation of Article 128, Uniform Code of Military Justice. United States v. Gibson, No. 420974 (ACMR 1 Jul 1970).

DISRESPECT--FAILURE TO STATE AN OFFENSE--The Court of Military Review held that the mere utterance of the words, "People get hurt like that," to a superior commissioned officer was not, per se, disrespectful language. The Court stated: "In the absence of an averment in the specification under consideration that the quoted innocuous statement was made in a certain described manner evincing a disrespectful attitude, we are constrained to hold that the specification is legally insufficient to state an offense." United States v. Klein, No. S5913 (ACMR 30 Jun 1970).

MARIHUANA--PREJUDICE TO GOOD ORDER AND DISCIPLINE--The accused pleaded guilty to charges alleging the possession of marihuana and opium. The military judge informed the accused that both possession of marihuana and possession of opium were, as a matter of law, "detrimental to good order and discipline in the service." The Court of Military Review, citing United States v. Williams, 8 USCMA 325, 24 CMR 135 (1957), held that possession of narcotics is not, as a matter of law, conduct prejudicial to good order and discipline, and that the government must prove beyond a reasonable doubt that "under the circumstances of the particular case the conduct of an accused is prejudicial to the good order and discipline." United States v. Jennings, No. 422599 (ACMR 13 Jul 1970).

SEARCH AND SEIZURE--PROBABLE CAUSE--Two policemen observed a woman with an arrest record glance quickly over each shoulder before exchanging a tinfoil package at a

Berkeley intersection frequently used for narcotics transactions. The California Supreme Court held that the police did not have sufficient cause either to arrest or to stop and frisk the defendant as the circumstances were as consistent with innocence as with criminality. The over-the-shoulder glances were consistent with innocent activity such as "keeping an eye out for acquaintances." Although the officer knew that dangerous drugs are often packaged in tinfoil, so many legitimate items are similarly packaged that a tinfoil package is not a suspicious circumstance justifying police intervention. One officer admitted that, for all he knew, the tinfoil might have contained cookies. Also, the charges which resulted from the drug-associated circumstances of the defendant's prior arrest had been dismissed for lack of evidence without even coming to trial. The Court stated: "To allow officers to bootstrap unfounded arrests into later justification for what would otherwise be unreasonable arrests and searches is to reintroduce a substantial incentive for police officers to make arrests on less than probable cause." Remers v. Superior Court, \_\_\_ P.2d \_\_\_ (Cal. Sup. Ct. 16 June 1970); 7 Crim. L. Rep. 2298.

SPEEDY TRIAL--SPECIFIC PREJUDICE--In a court-martial convened in Vietnam, a total of 137 days elapsed between the date of the alleged offenses and the date of the trial. The main issues at the trial were the admissibility of the accused's pretrial statements and the defense of alibi. The testimony of the criminal investigator who interrogated the accused and the three alibi witnesses were presented to the court by depositions as all four of these individuals had departed Vietnam by the time of the trial. The Court of Military Review, indicating that the court-martial would have had the benefit of the personal testimony of these witnesses had the case been brought to trial without delay, stated: "When we couple the delay in this case with the absence of the key witnesses, we are not certain, as we must be, that the appellant was afforded a fair trial." The charges were dismissed. United States v. Dupree, No. 420965 (ACMR 6 Jul 1970).

UNCHARGED MISCONDUCT--IMPROPER CONSIDERATION BY MILITARY JUDGE--The accused was charged with nine specifications of violating a general regulation regarding the purchasing of postal money orders. Each specification enumerated several different purchases made by the accused in a particular month. The military judge, sitting alone, struck certain purchases from several of the specifications. When he imposed sentence, the military judge stated: "I have also . . . considered the matters that I struck out in those specifications as other acts of misconduct." The Court of Military Review held that while Paragraph 76a(2), Manual for Courts-Martial, United States, 1969 (Revised edition), authorizes the court to consider evidence of other offenses or acts of misconduct on the part of the accused, the condition precedent to such consideration is that the matter must be properly introduced in the case. The Court found that the trial judge's own statement indicated both the error and the resulting prejudice to the accused. United States v. Shirey, No. 422080 (ACMR 30 June 1970).

UNSWORN STATEMENT--REBUTTAL BY PROSECUTION--The accused, in an unsworn statement in extenuation and mitigation, indicated that he he had tried to be a good soldier and would like to be retained in the Army. The trial counsel then offered as evidence two prior civilian felony convictions which predated the accused's military service by two and four years respectively. The military judge instructed the court that it could consider these two convictions as a matter in aggravation. The Court of Military Review cited Paragraph 75c(2), Manual for Courts-Martial, United States, 1969 (Revised edition), which provides: "This unsworn statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence." The Court indicated that the accused had said nothing in his statement about his civilian life or his freedom from "prior-to-service" trouble or convictions. The Court held that the civilian

convictions were irrelevant to anything stated by the accused in his unsworn statement and, therefore, constituted improper rebuttal to such statement. United States v. Wilkins, \_\_\_CMR\_\_\_ (ACMR 1970).

A handwritten signature in cursive script, appearing to read "Daniel T. Ghent".

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