

T H E A D V O C A T E

A Bi-Monthly Newsletter for Military Defense Counsel

Defense Appellate Division
HQDA (JAAJ-DD)
NASSIF BUILDING
Falls Church, Virginia 22041

Vol. 6 No. 1

July 1974

THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21f, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and officers therein, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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ARTICLE 92(1) -- The Possibility of Attack on Nonpunitive,
Vagueness, and Knowledge grounds

Article 92(1), Uniform Code of Military Justice, provides the criminal sanction for conduct which "violates or fails to obey any lawful general order or regulation." It has been the basis for numerous arrests, convictions, trials and appeals. Case law has, and is, developing certain guidelines for successful attacks on charges preferred under Article 92(1). In appropriate factual settings, a timely motion made at trial may provide the basis for immediate dismissal of the charges, or at least preserve the error to be litigated more fully on appeal.

Probably the most fruitful attack on charges preferred under Article 92(1) can be made by a motion to dismiss on the grounds that the regulation under which the soldier has been charged is nonpunitive in nature. This issue of the punitive application of an otherwise administrative regulation is a recurring one in military law. The foundation was laid by the Court of Military Appeals in the oft-cited case of United States v. Hogsett, 8 USCMA 861, 25 CMR 185 (1958). The majority opinion by Judge Ferguson stated "A regulation which combines advisory instructions with other instructions which contain a specific penalty for noncompliance is not intended as a general order or regulation within the meaning of Article 92 of the Uniform Code." (Hogsett, supra, p. 189). The Court thus determined that a paragraph of the regulation entitled POSTAL SERVICE, JOINT MILITARY POSTAL PROCEDURES, GUIDE FOR POSTAL CLERKS was nonpunitive in nature and merely an administrative regulation.

The case law defining nonpunitive administrative regulations and the nonpunitive application of these regulations developed in the cases of United States v. Farley, 11 USCMA 730, 29 CMR 546 (1960); United States v. Wilson, 12 USCMA 690, 31 CMR 276 (1962); and United States v. Tassos, 18 USCMA 12, 39 CMR 12 (1968) which cited Hogsett, supra. The guidelines were then solidified in United States v. Baker, 18 USCMA 504, 40 CMR 216, (1969) and United States v. Nardell, 21 USCMA 327, 329, 45 CMR 101, 103 (1972) when the Court of Military Appeals defined the method and standard of interpretation of regulations for Article 92(1) purposes. The Court in Baker, supra, discussed "that a statute should be interpreted in a manner that will render it consistent or in conformity with its general scope or purview. Courts may not, ordinarily, regardless of merit, extend a statute to meet cases not within its purview. Indeed, the general purview of a statute may control the literal meaning of a particular provision." In Nardell, supra, the Court stated "The order in its entirety must demonstrate that rather than providing general guidelines for the conduct of military functions it is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident."

The cases thus tend to declare regulations nonpunitive when the regulation is of a type ordinarily couched in administrative terms, not in criminal language. Therefore, if the regulation charged retains an administrative tenor, a timely motion to dismiss would be appropriate.

The United States Army Court of Military Review has been refining the general guidelines in this area by dismissing a number of convictions charged under Article 92(1) for violations of what are typically administrative regulations.

In United States v. Jackson, 46 CMR 1128 (ACMR 1973) the court declared "the use of the word 'prohibited' per se is not a single characteristic which determines that a general order applies punitively to members of a command. Instead, the order in its entirety must demonstrate that, rather than providing general guidelines for the conduct of military functions, it is basically intended to regulate conduct of individual members and that its direct application of sanctions for violations is self-evident."

The Court in United States v. Wright, 48 CMR 319, 320 (ACMR 1974), stated "The regulation does not refer to the fact that a violation of its provisions will subject an offender to punishment under the provisions of Article 92, UCMJ..., and it directs its attention to different subjects, such as purchase, possession, transportation, and registration of firearms, other weapons and ammunition. This diffusion of interests by itself is not fatal to the punitive nature of a regulation." The Court went on to discuss that the word prohibit is not, per se determinative of the nature of the regulation, and the general order in its entirety must demonstrate that it is intended to regulate conduct and that its direct application of sanctions for violations is self-evident.

The Court of Military Review has dismissed a number of convictions under Article 92(1) for charges preferred under regulations which are nonpunitive in nature. See United States v. James, 41 CMR 417 (ACMR 1968) (Army Regulation regards possession a driver's license); United States v. Allen, CM 426871, (ACMR 13 December 1972), (regulation requiring local implementation of drug program); United States v. Thornton, CM 427680 (20 July 1972) (ration card regulation); United States v. Bala, 46 CMR 1121 (ACMR 31 January 1973) (local regulation about termination of family quarters); United States v. DeFrain, CM 429178 (11 April 1973) (Army Regulation concerning operating a military vehicle without a permit); United States v. Branch, SPCM 8983 (ACMR 25 October 1973) (general post regulation discussing everything from baby sitters and calling cards to possession of narcotic paraphernalia) United States v. Wright, 48 CMR 319 (ACMR 1974) (paragraph of

local regulation concerning possession of dangerous weapons or instrument); and United States v. Madlock, CM 429893 (ACMR 12 February 1974) (local regulation controlling possession of ammunition and privately owned firearms). Thus, if the issue is lost at the trial level but favorable appellate results are nevertheless possible.

A second basis of attack at trial is that of "vagueness" of both the Article itself and on the underlying general order or regulation. The Court of Military Appeals in dicta in Hogsett, supra, posited a number of possible violations of the statute but qualified each by stating "assuming, of course, that the provision is not so vague and indefinite as to fail to meet the standard of a penal statute." It thus, appeared the Court opened the door for attacks on the basis of the constitutional concept of "vagueness."¹

1. The recent Supreme Court decision in Parker v. Levy, No. 73-206 (June 19, 1974), should not discourage defense counsel from making the vagueness argument as it pertains to general orders and regulations which are not congressionally approved statutes. The concept of vagueness as embodied in the Constitution has been expressed in numerous Supreme Court decisions. It has been stated that the "vagueness doctrine" concerns two points. A statute suffers from the constitutional infirmity of vagueness unless it provides both notice to persons of ordinary intelligence what conduct has been declared criminal (see Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948); Connally v. General Construction Co., 269 U.S. 385, 391; Bowie v. Columbia, 378 U.S. 347, 84 Sup. Ct. 1697, 12 L. Ed. 894 (1964) and provides guidelines for those responsible for enforcing the statute so that arbitrary arrests and convictions are avoided. (See Grayned v. City of Rockford, 408 U.S. 104, 92 Sup Ct. 2294, 33 L. Ed. 2d (1972); Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093; Herndon v. Lower, 301 U.S. 242, 57 Sup. Ct. 732 81 L. Ed, 1066). Convictions obtained under "vague" statutes are in violation of the constitutional right to due process of law contained in the Fifth Amendment.

This attack has been used sparingly, yet referred to in the lower military court decisions. In dicta, the Air Force Board of Review in the case of United States v. Upchurch, 26 CMR 860 (AFBR 1958) stated "an order may be invalid because it is too vague and uncertain to constitute a basis for a criminal charge" citing Hogsett, supra. In another Air Force case, United States v. Henderson, 36 CMR 854 (AFBR 1965) the Board of Review dismissed charges preferred under a statute in which "the language of paragraph 3a, AFR 30-30 is otherwise too vague and uncertain to have been intended to support a criminal charge." The vagueness concept has only recently been adduced by the Army Court of Military Review and has been partially averted by combining the theory with the concept of nonpunitive application of the regulation. The Army Court of Review stated in United States v. Jackson, supra, "absent the entire regulation and in consideration of the vague and indefinite wording of the portion that has been furnished, we are unable to hold that the regulation applied punitively to appellant."

It is submitted, however, that the constitutional concept of "vagueness" remains a viable basis for attack on charges preferred under Article 92(1) for violations of general orders or regulations.

While an averment of knowledge is not ordinarily required in pleading a violation of a general order or regulation under Article 92(1) (see United States v. Tinker, 10 USCMA 292, 27 CMR 366) if the violation of the regulation is perpetrated by passive acts or a failure to act, some knowledge of the regulation should be argued as required. In Lambert v. California, 355 U.S. 225, 78 Sup. Ct. 240, 2 L. Ed. 2d 228 (1957) the United States Supreme Court stated "There is wide latitude on the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. But we deal here with conduct that is wholly passive--mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." The rule that "ignorance of the law is no excuse" is deeply engrained in our law. However the Court went on to state that "on the other hand, Due Process places some limits on its exercise. Engrained in our concept of Due Process is the requirement of notice." Thus, in cases where a soldier is charged with violating a general order or regulation by conduct which is wholly passive in nature, some requirement of knowledge or notice should be proven.

Actual knowledge or notice is also required when the order is issued by a commander not authorized to issue general orders (United States v. Curtin, 9 USCMA 427, 26 CMR 207 (1958)). Under paragraph 171a, Manual for Courts-Martial, United States, 1969 (Revised edition), general orders or regulations are those properly published by the President, Secretary of Defense or department general court-martial convening authority, a general or flag² officer in command, or a commander superior to one of these.² An argument should be made that commanders of other units may not lawfully promulgate general orders or regulations. The element of knowledge in those cases must be pleaded and proven under Article 92(1). See Meagher, Knowledge in Article 92 Offenses - When Pleaded, When Proven?, 5 Mil. L. Rev., 119 (1959).

In summary, it should be clear that "if a general order is to provide a course of conduct for servicemen and a criminal sanction for a failure to abide by it, we see no reason why the drafter of the order cannot clearly state therein to whom the provisions are applicable and whether or not further implementation is required as a condition to its effectiveness as a criminal law." United States v. Scott, 22 USCMA 25, 56 CMR 25 (1972). Where the regulation allegedly violated appears nonpunitive, vague, or would seem to require actual knowledge, a defense motion to dismiss should be made. When a local regulation is being attacked, a copy of the entire regulation should be made an appellate exhibit.

2. Each regulation itself must be promulgated pursuant to some statutory basis. Therefore, the authority on which each regulation is premised should be verified to insure proper delegation and basis. For example, an Army regulation must be related to a statute applying to the Army or to a Department of Defense Directive (which in turn springs from a statutory authority).

THE REQUIREMENT OF FINALITY -
PROVING A PREVIOUS COURT-MARTIAL CONVICTION

Paragraph 75b(2), Manual for Courts-Martial, United States, 1969 (Revised edition) provides in pertinent part:

"Unless the accused has been tried for an offense within the meaning of Article 44(b), evidence as to the offense is not admissible as evidence of a previous conviction."

Article 44(b), Uniform Code of Military Justice, 10 U.S.C. § 844(b) states:

"No proceeding in which an accused has been found guilty by a court-martial...is a trial ...until the findings of guilty has become final after review of the case has been fully completed."

Generally, finality of a conviction involving an unsuspended punitive discharge or confinement at hard labor for one year or more is shown by a supplementary court-martial promulgating order (final order) published after appellate review by the Court of Military Review and/or the Court of Military Appeals has been completed. Articles 66 and 67, Uniform Code of Military Justice. Paragraph 15-5a(2), Army Regulation 27-10.

In general court-martial cases involving a sentence of less than one year's confinement and no punitive discharge which are reviewed by The Judge Advocate General under Article 69 and in Article 66 cases where the sentence was initially ordered into execution or suspended in its entirety by the convening authority, and the sentence is not otherwise modified, a supplementary promulgating order is not necessary. Paragraph 15-3 and 15-5a(1), Army Regulation 27-10. Finality in the case of review under Article 69 is shown by a stamped order returned to the general court-martial convening authority by The Judge Advocate General and placed in the 201 File. Finality in the Article 66 situation is shown by a copy of the Court of Military Review decision which should appear in an individual's 201 File and the expiration of the time for petition, if any, to the Court of Military Appeals. Paragraph 2-25 and 15-2b, Army Regulation 27-10.

A special court-martial not involving a bad conduct discharge and all summary courts-martial become final after review for legal sufficiency by a judge advocate of the general court-martial supervisory authority who places an appropriate notation on the order. (Article 65(c), Uniform Code of Military Justice; paragraph 91b(2) and 94a, Manual, supra) paragraph 2-24, Army Regulation 27-10.

To be admissible as evidence of a previous conviction there must be a showing that the conviction is final -- that supervisory or appellate review has been completed. The Defense Appellate Division has observed that in a great number of the cases received for appellate review the prosecution has failed to offer evidence conclusively showing the finality of a previous court-martial conviction. The three common methods of proving a previous court-martial conviction are by introduction of the DA Form 20B (from the accused's 201 file), the DD Form 493 (an extract of previous convictions made from the Form 20B), and a copy of the promulgating order of the previous conviction. In determining whether the finality of a previous conviction is properly proved by these three documents, reference must be made to the regulations which govern their preparation. The applicable regulations have undergone changes which render some prior case law on the subject irrelevant.

The Form 20B

The two regulations which govern the preparation of the document are paragraphs 2-25 and 2-31 of Army Regulation 27-10 and Army Regulation 640-2.

Paragraph 2-31 of Army Regulation 27-10 stated in pertinent part that "the date of supervisory or appellate review is to be entered on DA Form 20B pursuant to paragraph 2-25, this regulation and paragraph 2-78(d)(3), Army Regulation 600-200."³ Paragraph 2-25 of Army Regulation 27-10 provides:

On receipt of any communications made by the supervisory reviewing authority or any court-martial order after the initial order in a case, which affirms the approved court-martial findings and sentence, the custodian of the personnel records will enter the date of appellate or supervisory review in Item 51, DA Form 20B (Insert Sheet to DA Form 20 - Record of Court-Martial Conviction).... The custodian of personnel records will place his signature block in Item 52, DA Form 20B, even if he is the same individual who placed the original sentence information in Item 51.

Page 4-1 of Army Regulation 640-2-1 restates the requirements for an entry of the date of supervisory review and provides an example of how the review or finality must be entered.

1. Paragraph 2-78(d)(3) of Army Regulation 600-200 was superseded by Chapter 9 of Army Regulation 640-2, subsequently republished as Army Regulation 640-2-1 (15 October 1973). Accordingly, reference to Army Regulation 600-200 was deleted from paragraph 2-31 in Change 10 (23 February 1973) to Army Regulation 27-10.

<p>40. TYPE COURT MARTIAL # NUMBER Summary 231</p>	<p>6. HEADQUARTERS 2nd Bn 19th Mech Inf</p>	<p>C. ARTICLE 86</p>	<p>53. ALTERATION, SUSPENSION, REMISSION, SETTING ASIDE OF TRIAL RESULTS PER: <i>Delete words not applicable</i></p>
<p>50. SYNOPSIS OF SPECIFICATIONS, INCLUDING DATE OF OFFENSE AWOL from 660809 to 660827</p>		<p>5. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>54. SIGNATURE & TYPED OR PRINTED NAME, GRADE, ORG <i>Joe L. Conrad</i> JOE L. CONRAD CW4 HQ 19th Mech Inf</p>
<p>51. SENTENCE AS APPROVED, INCLUDING DATE ADJUDGED AND DATE APPROVED Conf at hard labor for 1 mo and forfeiture \$10 per mo for 1 mo Adjudged 660830 Approved 660831 Supv Rev 660903</p>		<p>5. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>55. ORDERS SUSPENDING SENTENCE VACATED PER</p>
<p>52. CHECK IF THE FOREGOING IS CORRECT (Signature and typed or printed name, grade, organization) <i>Joe L. Conrad</i> JOE L. CONRAD CW4 HQ 19th Mech Inf</p>		<p>5. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>56. SIGNATURE & TYPED OR PRINTED NAME, GRADE, ORG <i>Joe L. Conrad</i> JOE L. CONRAD CW4 HQ 19th Mech Inf</p>
<p>41. TYPE COURT MARTIAL # NUMBER Special 44</p>	<p>6. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>C. ARTICLE 121</p>	<p>57. ALTERATION, SUSPENSION, REMISSION, SETTING ASIDE OF TRIAL RESULTS PER: SPCMO 98 HQ 19th Mech Inf <i>Delete words not applicable</i></p>
<p>50. SYNOPSIS OF SPECIFICATIONS, INCLUDING DATE OF OFFENSE Larceny, wrist watch, 671015</p>		<p>5. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>58. SIGNATURE & TYPED OR PRINTED NAME, GRADE, ORG <i>Joe L. Conrad</i> JOE L. CONRAD CW4 HQ 19th Mech Inf</p>
<p>51. SENTENCE AS APPROVED, INCLUDING DATE ADJUDGED AND DATE APPROVED Conf at hard labor for 6 mo and forfeiture \$50 per mo for 6 mo Adjudged 671027 Approved 671030 Supv Rev 671109</p>		<p>5. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>59. ORDERS SUSPENDING SENTENCE VACATED PER</p>
<p>52. CHECK IF THE FOREGOING IS CORRECT (Signature and typed or printed name, grade, organization) <i>Joe L. Conrad</i> JOE L. CONRAD CW4 HQ 19th Mech Inf</p>		<p>5. HEADQUARTERS 2d Bn 19th Mech Inf</p>	<p>59. SIGNATURE & TYPED OR PRINTED NAME, GRADE, ORG <i>Joe L. Conrad</i> JOE L. CONRAD CW4 HQ 19th Mech Inf</p>

Figure 4-1.

Thus, unless the Form 20B introduced by the prosecution contains a second signature in Item 52 and a date of supervisory review in Block 51 there is no showing of finality of that previous conviction. Trial defense counsel should object to the attempted introduction of such an incomplete document citing United States v. Engle, 3 USCMA 41, 11 CMR 41 (1953). There, the Court of Military Appeals held that where service regulations required the filling of certain spaces upon completion of appellate or supervisory review on an extract of previous convictions, the absence of such entries failed to demonstrate finality:

We must presume regularity in the keeping and copying of the records involved and that had action been taken by the supervisory authority it would have been duly recorded in the service record and truly reflected in the exhibits. If we do that, the exhibits affirmatively show that the officer exercising general court-martial jurisdiction has not acted. While there was no objection to their admission, they cannot constitute evidence of finality because they deny the very thing they seek to establish. There might be a substitute for the order publishing the result of trial. (Paragraph 90e, Manual for Courts-Martial, United States, 1951, were it not for the fact that any claim to finality is effectively destroyed by the affirmative showing that appellate review was not completed. at p. 46

See also United States v. Conley, 13 CMR 564 (NBR 1953).

This argument has been accepted by the Court of Military Review in United States v. Perkins, CM 430895 (ACMR 26 June 1974) and in several other unpublished opinions. Also, in United States v. Sidney, 23 USCMA ___, 48 CMR ___ (July 5, 1974) the Court of Military Appeals, after a government concession of inadmissibility of the Form 20B for failure to reflect supervisory review, returned a record of trial to the lower court for a reassessment of the sentence.

The DD Form 493

Paragraph 2-31 of Army Regulation 27-10 provides:

2-31. Preparation of DD Form 493, Extract of Military Records of Previous Convictions. DD Form 493, Extract of Military Records of Previous Convictions, will be prepared from DA Form 20B, Insert Sheet to DA Form 20, Record of Court-Martial Convictions. No Court-Martial conviction is properly admissible at court-martial unless supervisory or appellate review has been completed, and therefore no conviction should be entered on DD Form 493 unless supervisory or appellate has been completed. The date of supervisory or appellate review is to be entered on DA Form 20B pursuant to paragraph 2-25, this regulation. The date of supervisory or appellate review is entered in the block on DD Form 493 labeled "DATE SENTENCE FINALLY APPROVED."

Insofar as the DD Form 493 is prepared from (or is an extract of) the Form 20B, if the Form 20B fails to reflect appellate review so should the 493. Thus, trial defense counsel can successfully attack the DD Form 493 by showing a deficient Form 20B or by showing with a promulgating order that the Date Sentence Finally Approved block erroneously reflects the date of the convening authority's action. See United States v. Turner, S-9385 (ACMR 11 June 1974) (MSF); United States v. Stone, CM 429627 (ACMR 14 March 1974) (MSF); United States v. Hopper, CM 428332 (ACMR 18 January 1973).

The Promulgating Order

Paragraph 2-24 of Army Regulation 27-10 requires that the judge advocate conducting a supervisory review of a special or summary court-martial note the results of the review on the promulgating order. Paragraph 2-25 of Army Regulation 27-10 requires that the stamped order be transmitted to the custodian of the individual's 201 File in order that the DA Form 20B may be appropriately completed. Thus, defense counsel should object to the introduction of an unstamped promulgating order by utilizing a Form 20B (if incomplete) to show a lack of finality.

The length of time from conviction should also be argued as irrelevant as the former judicially created presumption of finality has been eroded by the changes in regulations regarding previous convictions and recent Court of Military Review decisions. Compare United States v. Larney, 2 USCMA 563, 10 CMR 61 (1953) and United States v. Reed, 2 USCMA 622, 10 CMR 622 (1953) with United States v. Perkins, supra, United States v. Reed, CM 430323 (ACMR 31 October 1973) (MSF); United States v. Yokley, CM 430204 (ACMR 11 October 1973); United States v. Bryant, SPCM 8858 (ACMR 4 May 1973); DA Pam. 27-2, "Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition," paragraph 75b(2) (July 1970).

Summary

Defense Counsel who have a client with a previous court-martial conviction should always check his 201 File to see if the requirements for noting appellate or supervisory review have been satisfied. If the records have been improperly maintained, a proper objection should assist your client in the presentencing stage of the court-martial. If your objection is denied, sentence relief on appeal becomes more likely.

THE ADVOCATE REVISITED - CLEMENCY AND PAROLE

The following is an update of an article that appeared in The Advocate, Vol. 2. No. 3, April 1970, designed to educate trial defense counsel in the possibilities of post-trial sentence relief apart from the judicial process.

Most individuals recently convicted of an offense arrive at the United States Disciplinary Barracks unaware of the potential for clemency and parole. Parole and clemency opportunities may be even more immediately important to a prisoner than is appellate review. To some, the chances of being released from confinement by parole are higher than is release by reversal of their conviction. Trial defense counsel should therefore take the time to understand and then explain to their clients how the clemency and parole system operates before they are transferred to the U.S. Disciplinary Barracks.

Parole. The authority for parole is found in 10 U.S.C. § 952 (1964) which empowers the Secretaries of the Army and Air Force to establish a system of parole for prisoners confined in military correctional facilities. Accordingly, Army Reg. 190-26, AFR 125-23 (20 March 1972) was promulgated to implement such a system. Parole is a form of conditional release from confinement granted by the Secretary of the Army to those select individuals who have served a portion of their sentences in confinement and whose release under supervision is considered to be in the best interest of the prisoner, the military and society. A parolee remains in the legal custody and under the control of the Commandant of the Disciplinary Barracks until the expiration of the full term of his sentence without credit for abatement (good time).

A prisoner with an unsuspended punitive discharge or dismissal and who is sentenced to between one and three years of confinement is eligible for parole after he has served one-third of his term of confinement, or at least six months. A prisoner with an unsuspended punitive discharge or dismissal, who is sentenced to more than three years confinement and who has served at least one year of confinement becomes eligible for consideration at such time as the Army and Air Force Clemency and Parole Board may recommend and the Secretary Approve. Paragraph 1-4a(2), AR 190-26. That time shall not be more than one-third of the sentence approved or not more than 10 years when the sentence is in excess of a term of 30 years or life. Good time or abatement time will be excluded in computing eligibility for parole consideration. The Commandant of the Disciplinary Barracks or the Clemency and Parole Board is empowered to waive these requirements in exceptional cases where a court-martial sentence has not been ordered into execution.

Each prisoner who desires parole must execute a parole officer reference (DA Form 1702-R) and a parole plan (DA Form 1704-R) prior to becoming eligible for parole. Requests for parole will be considered by the Disciplinary Barracks' Disposition Board and forwarded to HQDA (DAPM-CR) in Washington not later than 30 days prior to the prisoner's parole eligibility date. The prisoner will appear before the Disposition Board for a personal interview when his request is considered. The prisoner will appear alone but others may submit written matters they wish the board to consider. Final action on requests for parole will be taken by the Secretary of the Army and announced in a letter to the Commandant.

Approval of parole is further conditioned upon completion of a parole plan acceptable to the Commandant and the Federal Probation Service. This plan generally requires satisfactory evidence of employment. The prisoner is also required to sign a written agreement outlining the conditions of parole. Exact release procedures and post release procedures are explained in detail in Chapter 3 and 4 of AR 190-2b.

Clemency. The clemency avenues for an individual at the United States Disciplinary Barracks and elsewhere awaiting appellate review are more varied and flexible than parole. Eligibility for clemency is governed by Army Reg. 190-36 (17 November 1971). The Army and Air Force Clemency and Parole Board acting for the Secretary of the Army considers each prisoner for possible clemency. In cases involving less than 8 months confinement this occurs as soon as possible after arrival at the Disciplinary Barracks. For sentences between 8 months and 2 years, consideration occurs between 4 and 6 months from the effective date of confinement and annually thereafter. For cases of confinement of 2 years or more, consideration first occurs between 6 and 8 months and annually thereafter.

Clemency does not depend on the completion of appellate review or application by the individual. A written application for special clemency consideration setting forth sufficient grounds for further action may be made by the prisoner and forwarded to HQDA, (DAPM-CRA) Washington, D.C. 20314.

Clemency is extended in order to mitigate a patently excessive sentence, to reward a prisoner whose progress warrants such action, and to change a discharge when warranted by the offense, by the offender, or by a change in the offender in the correctional setting. See Caughlin, Army and Air Force Clemency and Parole Board - A Brief Summary, AFRP 125-2, Security Police Digest 16 (Summer 1968).

Another avenue of clemency that may be pursued by an individual prior to the completion of appellate review is a petition to The Judge Advocate General under paragraph 2a, AR 190-36. Such a petition, normally accomplished with the assistance of appellate defense counsel, must be accompanied by a statement from the individual stating the reasons why he desires restoration to duty or believes the adjudged sentence is too severe. Supporting statements from past or present commanders, noncommissioned officer, and work supervisors attesting to the individual's attitude, performance and character are extremely important.

A relatively unknown, but potentially useful, source of clemency under AR 19036 is the commanding officer (or any higher commander) of a person convicted by court-martial who has the authority to appoint a court of the kind that imposed the sentence. Subject to certain limitations, such a commander may mitigate, remit or suspend in whole or in part any executed portion of

a sentence. Paragraph 2, AR 190-36. Further, paragraph 3a of this regulation provides:

...[A]ny commanding officer or a person convicted by court who has the authority to appoint a court of the kind that imposed the sentence, or any superior military authority, may mitigate, remit, or suspend in whole or in part, any unexecuted portion of a sentence (including all uncollected forfeitures) adjudged by a court-martial, other than a sentence extending to death or dismissal or affecting a general officer.

. . . .
So far as may be consistent with the maintenance of military discipline and the preservation of good order, commanders will exercise their authority to mitigate, remit, or suspend unexecuted portions of court-martial sentences when they deem that such action is merited and will result in restoration to duty or otherwise contribute to the rehabilitation of the prisoner. . . . Upon completion of appellate review of a court-martial case involving a punitive discharge and prior to ordering the sentence to discharge into execution, a general court-martial authority will evaluate the entire record of the accused. If it appears that his restoration to duty is warranted, either immediately or by the time the sentence to confinement is completed, the punitive discharge will be suspended with a provision for automatic remission or it will be remitted.

Defense counsel in the field who has a client desiring to be restored to duty and/or obtaining a favorable discharge may wish to ask the commander to take clemency action, usually remission or suspension of the punitive discharge. Such a request may be successful when accompanied by a positive statement from the individual and supporting statements from past or present commanders.

A few minutes time taken by trial defense counsel to explain these procedures will provide for well informed clients and should serve to rebuild the morale of a soldier recently convicted by court-martial.

"POST-TRIAL DELAY AND TRIAL DEFENSE COUNSEL"

In the January 1974 issue of The Army Lawyer the Defense Appellate Division published a note concerning post-trial delay, recent Court of Military Appeal's decisions regarding post-trial delay, and trial defense counsel's obligation and opportunity to serve their clients actively after trial. In the recent case of Dunlap v. Convening Authority, Miscellaneous Docket No. 74-16 (June 21, 1974), the Court has made it even more important and essential that trial defense counsel monitor their cases after the findings and sentence have been adjudged.

In Dunlap, Judge Quinn, writing for the majority, after reviewing the problems related to post-trial delay announced:

"years of experience have demonstrated the need for a guideline as to the timeliness of the convening authority's action when the accused is continued or placed in arrest or confinement after conviction by the court-martial. See Manual for Courts-Martial, United States, 1969 (Revised), paragraph 21d; Reed v. Ohnean, 19 USCMA 110, 41 CMR 110 (1969). We deem it appropriate that the guideline be the same as that applicable when the accused is in arrest or confinement before trial, as was provided in United States v. Burton, supra at 118, 44 CMR at 172. To paraphrase Burton, 30 days after the date of this opinion, a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial. In the language of Burton, 'this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.' Id. See also United States v. Marshall, 22 USCMA 431, 47 CMR 409 (1973); cf. United States v. Johnson, 23 USCMA ___, 48 CMR ___ (May 24, 1974)."

Since appellate defense counsel do not represent military accused until so detailed by The Judge Advocate General under Article 70, Uniform Code of Military Justice, and then normally for purposes of representation before the Court of Military Review and Court of Military Appeals, trial defense counsel are the only individuals capable of safeguarding the client's right to a speedy post-trial disposition of his case. Under the provisions of Article 38(c), trial defense counsel may advise the convening authority of the Dunlap decision in a post-trial brief and request a dismissal of the charges where post-trial action has not been taken within ninety days. As in the speedy trial area, the burden is on the Government to show exceptional circumstances for the delay. The cases interpreting the Burton presumption should be argued as fully applicable to the presumption created by Dunlap. Trial defense counsel is in the best position to challenge a claim of exceptional circumstances and insure that all relevant factors appear in the Article 38(c) brief. Having informed the convening authority of the Dunlap rule and requesting an action or dismissal, a petition for extraordinary relief to the Court of Military Appeals, seeking dismissal of the charges, could be in order if the convening authority further delays his action. Where the convening authority has acted within ninety days or has acted prior to the filing of a petition for extraordinary relief, the issue of post-trial delay will probably be resolved in the normal course of appellate review. Information and assistance regarding the time and proper form of such petitions for extraordinary relief can be obtained from the Defense Appellate Division, United States Army Legal Services Agency, Autovon 289-1807. A sample extraordinary relief petition was printed in Volume 5, Number 3, The Advocate (July-October 1973).

RECENT CASES

Armour v. Salisbury (CA 6, 2/20/74) 14 Cr L.R. 2504
(Prosecutor's claim that key witness had nothing to gain was fatal error.)

Prosecutor in final argument stated that its chief witness in the drug case had nothing to gain by his testimony when in fact this witness' chances for probation were directly tied to his testimony. He was facing a sentence of up to 20 years and was awaiting word in a probation petition. The court relied on Giglio v. United States, 405 U.S. 150 (1971); Brady v. Maryland, 373 U.S. 83 (1963) and Napue v. Illinois, 360 U.S. 264 (1959) to say that such was improper argument as the jury must be informed of such agreements in order to weigh credibility. Reversal and remand.

United States v. Thomas, (CA 5, 12/19/73) 42 L.W. 2369
(Search and Seizure - Warrant)

In dealing with dual allegations of possible intentional misrepresentations and material misrepresentations in a warrant, the Court puts forth a corollary to the exclusionary rule. If affidavits contain misrepresentations, they will be invalid if the error was (1) committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause; or (2) made nonintentionally, but the erroneous statement is material to the establishment of probable cause for the search. The Court develops the rule in attempting to deal with the situation where even after excising the misrepresentations probable cause may still exist.

Smith v. United States (D.C.C.A. 12/14/73) 14 Cr. L.R. 2332
(Bruton violation)

In a robbery case with a joint trial for two defendants, the Court holds that a codefendant's threat to a witness overheard by a policeman which incriminated both defendants should have been masked, or a severance granted. In the case the only evidence against the defendant was an eyewitness identification by the victim-complainant. The Court felt that the admission of such a statement in a case involving such a small quantum of independent evidence was significantly prejudicial to bring it within the purview of Bruton v. United States, 391 U.S. 123 (1968). As such, a mere instruction on the part of the judge to consider the statement against only one co-defendant was insufficient to overcome the "powerfully incriminating" aspects of such evidence. The proper course is, if possible, to mask the evidence or to grant a severance if such is not feasible.

State v. Jones (Ohio Sup Ct. 1/23/74) 14 Cr. L.R. 2395
(Miranda)

The Court reversed a murder conviction and ordered a new trial based upon evidence that a suspect may not have had full understanding of his warnings. The Court stated that it will not require police officers to probe a suspect's motives if after his Miranda warnings have been clearly explained, he indicated a willingness to speak. However, where, as in the instant case, the suspect's conduct would reasonably alert the officer that the warning was misunderstood, the officer must stop interrogation for a new Miranda warning to insure that the defendant fully and correctly understands his Fifth Amendment Rights. This defendant participated willingly in a conversation until the policeman picked up a pencil and pad, at which point the defendant refused to talk further; the policeman put away pencil and pad, resumed conversation and during this later action, the defendant made the incriminating statement. The Court felt the policeman should have undertaken steps to insure knowing and full understanding and his failure to do so required reversal. A similar issue is pending before the Court of Military Appeals in United States v. Girard, CM 429468, Doc. No. 28,152 (to be argued October 1974).