

T H E A D V O C A T E
A Monthly Newsletter for Military
Defense Counsel

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

Vol. 3 No. 8

November-December 1971

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

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A SURVEY OF THE DECISIONS OF THE UNITED STATES
COURT OF MILITARY APPEALS: OCTOBER 1970 TERM

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Note on Citations: For brevity, cases of the October 1970 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 Court of Military Appeals' 1970 term, few decisions on the meaning of the "service connection" required for court-martial jurisdiction by O'Callahan v. Parker, 395 U.S. 258 (1969), were handed down. No sufficient service connection was found in an involuntary manslaughter and assault case where the acts alleged occurred off-post and the only military relationship was that the victims were military dependents, one of whom died in a military hospital.¹ Off-post sale of LSD and marihuana to a civilian by a military member was held not service connected, rejecting the argument that the sale necessarily included the service connecting possession under United States v. Beeber, 40 CMR 275 (1969), on the grounds that the accused was not charged with possession and that possession was not a lesser offense included in the sale charge and specification.²

The Court in 1970 further clarified its decisions in United States v. Mercer, 41 CMR 264 (1970), holding that O'Callahan applied to cases commenced after O'Callahan was decided or still subject to final review as of that date, by restricting the application of O'Callahan to cases still subject to final review if those cases were in fact appealed during the applicable 30-day period for appeal. If the 30 days had elapsed without an appeal, O'Callahan would not apply.³

Trial by Military Judge Alone

Considering the jurisdictional aspects of trial by military judge alone, the Court in Dean, 43/52, construed Article 16, UCMJ, to require that a request for trial by judge alone must be made in writing by an accused. Thus a court composed of a military judge sitting alone would not be lawfully constituted, unless requested by the accused in writing.⁴ The Court also determined that the lack of a written request at an original trial by judge alone invalidated a subsequent rehearing before the judge even though a request for trial by judge alone was reduced to writing at the rehearing.⁵ Also, jurisdiction was lacking where the written request specified a judge originally

1. Snyder, 42/294.

2. Morley, 43/19.

3. Enzor, 43/97.

4. See also Ginaitt, 43/56; Culver, 43/57; Fife, 43/58; Francies, 43/131; Mountain, 43/159; and Smith, 43/284.

5. Foust, 43/96.

designated to hear the case and a new request was not executed in writing by the accused after a new judge was assigned to his case.⁶ The judge could not strike out the name of the original judge and replace it with his own after questioning the accused about his understanding and desires relating to trial by the new judge alone. The accused must execute a completely new statement.⁷ Finally, the jurisdictional requirements of Dean were not satisfied, where the written request was made after the taking of the testimony of one witness.⁸ Without a timely request, the court was without jurisdiction, and the findings and sentence were set aside since no test for prejudice was deemed necessary.⁹

Effect of Federal Writ of Habeas Corpus

In Goguen, 43/367, a conscientious objector, unrecognized as such by Secretary of the Army, began a habeas corpus action in a United States District Court which eventually resulted in a writ being granted directing his release from the Army. The government did not appeal the district judge's ruling. Subsequently, the accused was tried and convicted by court-martial and, upon rehearing, was sentenced to confinement and a bad conduct discharge. Before the convening authority acted on the rehearing, the writ of habeas corpus was granted. Upon appeal of the court-martial conviction, the Court of Military Appeals held that since the federal district court ordered accused's release, knowing of the military criminal proceedings, the implication was that the order served to terminate all military authority over the accused. Since the government did not appeal the grant of the writ of habeas corpus, that ruling was final and the Army was bound to terminate the court-martial proceedings.

Mistrial

Where a recording machine failed during an Article 39a session and the judge declared a mistrial, but then began the trial anew and continued to its conclusion, the Court held that the judge's declaration of a mistrial returned the case to the convening authority and withdrew it from the court. Thus, when the trial commenced anew, a new pretrial advice and reference to trial were lacking. These defects, however, were not considered jurisdictional, and, as pretrial matters objection thereto was waived by accused when not made at trial.¹⁰

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6. Rountree, 44/116.
 7. Id.
 8. Nix, No. 24,532 (22 October 1971).
 9. Id.
 10. Platt, 44/70.

Pleas

Where an accused's plea, through inadvertence, was not taken, but the court proceeded as if he pleaded "not guilty", the failure to enter accused's plea was not a jurisdictional defect. The legislative requirement of entering a plea is not an indispensable prerequisite to the exercise of jurisdiction by the court-martial but is a further safeguard to insure that an accused will receive a trial on the merits even when he fails to enter a not guilty plea. Since the accused received a complete trial, he was not prejudiced.¹¹

PRETRIAL PRACTICE

Convening Authority

During its October 1970 term the Court of Military Appeals reaffirmed prior holdings limiting the authority of service secretaries to delegate their authority to empower certain commanders to convene special courts-martial.¹² The Court reaffirmed its view that the authority to convene special courts-martial under Article 23(a)(7), UCMJ, was personal to the Secretary concerned and that a regulation purporting to delegate that authority to general or flag officers, and the court-martial proceedings convened pursuant thereto, were nullities.¹³

The Court also further defined a convening authority's powers once a trial has begun but before findings. It held that once a military judge at a SPCM pretrial hearing had granted a defense request for a delay to obtain witnesses, the convening authority thereafter could not withdraw the charges and sent them to an Article 32 investigator.¹⁴ The Court held that if the hearing were an Article 39a session, the judge's action constituted an unreviewable decision to grant a continuance, and if it were not a formal 39a hearing, the ruling was a postponement, and the convening authority's response to the defense request for witnesses was inappropriate under Para. 115, MCM.

In Bloomer, 44/82, a disqualifying "interest other than an official interest" (Art. 1(9)) was found where the order disobeyed, although given by a warrant officer, first,

11. Taft, 44/122.

12. See Greenwell, 42/62; Riley, 42/337.

13. Sims, 43/96.

14. Petty v. Moriarty, 43/278.

was identical to one given previously by the CA and, second, where the case was specially singled out for BCD treatment.

Counsel

Citing a congressional intention to provide a limited opportunity to waive representation by qualified counsel before BCD SPCM's, the Court sanctioned the somewhat anachronistic practice of first detailing non-qualified counsel to a case in which qualified counsel ultimately must be detailed, and then replacing them, upon request or otherwise, with qualified counsel.¹⁵ To the extent such a practice was defective, it was held to be nonjurisdictional.

In two cases, the Court set limits on an accused's right to individual counsel in pretrial proceedings. First, no denial of the right to such counsel was found where, at trial, the accused pleaded guilty after unsuccessfully challenging the denial of his request for a particular counsel at the Article 32 investigation.¹⁶ That counsel did represent him, however, after the investigation and at trial. In a second case, an accused's objection to representation at a deposition by a counsel other than the one requested was properly denied where the counsel requested was a member of another command, was subsequently determined to be not reasonably available, and where the counsel detailed was familiar with the case and ultimately represented the accused at trial without objection.¹⁷

Double Jeopardy

Upon retrial, the Court found no denial of an accused's fifth amendment or Article 44 rights where, at the original trial, after findings and before sentencing, the MJ declared a mistrial because of trial DC's alleged incompetence.¹⁸ First, a trial does not become final (under Article 44a) until completion

15. Moschella, 43/383.

16. Courtier, 43/118.

17. Johnson, 43/199.

18. Richardson, 44/108.

of appellate review and notwithstanding the embarrassment of retrial, the declaration of the mistrial may be presumed to be in the accused's best interests given the original findings of guilty.

Speedy Trial

In two cases, the Court made success on speedy trial denials more difficult. First, the Court refused to overturn an ACMR ruling against the accused as to a nine-month delay and then sanctioned the lower court's decision ordering a rehearing limited to the speedy trial issue. At trial, the MJ had accepted the unconsented offer of proof of the TC as evidence which would excuse the delay.¹⁹ In the second, an unexplained 57-day delay between the accused's apprehension in New York and return to California and a further unexplained delay of 21 days between the forwarding of the charges to the SJA and his receipt of them was held not violative of accused's sixth amendment right when the remainder of the 147 day delay was "reasonably accounted for", the accused had been advised of the offense when apprehended, his counsel had not demanded trial, the accused had not been hindered in the preparation of his case, and the military judge asserted that he considered the delay in his deliberations on sentence.²⁰

Pretrial Confinement

In Mitchell v. Laird, 43/35, on a petition for a writ of habeas corpus, the Court refused to order petitioner's release from pretrial confinement where it appeared that confinement was ordered because the petitioner had absented himself without leave subsequent to the original convening of the special court-martial (which was continued pending an action in federal court), and because of his habitual unauthorized absences in the past.

Selection of Court Members

In Greene, 43/72, Article 25 was found violated in the manner in which a court-martial was selected where it appeared that (1) the court consisted entirely of colonels and lieutenant colonels; (2) such a composition was contrary to past practice; (3) the convening authority originally had convened a panel including lower ranking officers; (4) the Chief of Military

19. Ray, 43/171.

20. Marin, 43/272.

Justice proposed that the first panel be rejected and one of senior officers be substituted; (5) the basis of such a suggestion was an SJA memo; (6) upon defense objection to the manner in which the panel was selected, the military judge directed that the convening authority reconsider, which he did, but still adhered to the original panel; and (7) the questionable memo was later withdrawn because of the objection at trial.

Specifications

In Suggs, 43/30, a divided Court found "particular enough" an assault specification alleging an assault on "Armed Forces Policemen, persons then having and in the execution of military duties." Although the specification failed to name the persons or the manner of the assault, its mention of date, place and time, in addition to the foregoing was held sufficient to apprise the accused of the offense against which he would have to defend. Of special significance was a pretrial agreement calling for a plea of guilty in exchange for a limitation on punishment and a failure to demand a bill of particulars.

In Krebs, 43/327, a specification alleging larceny of "goods . . ." similarly was held sufficient when the accused, during a hearing on the providence of his guilty plea, indicated he knew what the "goods" were.

In Pitasi, 44/31, the Court upheld a conviction under Article 134 for fraternization with an enlisted man under such circumstances as to violate a custom of the service. This "unwritten common law" of the military recognizes that a custom, the observance of which may be compelled by the criminal law, "imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law. . . ." Para 213b, MCM. Apparently, this "common consent" is manifested by acceptance of a commission and the attendant obligation to maintain an appropriately decorous relationship with enlisted men. The fraternization was in the context of a sodomy charge.

Counsel

Right to Counsel. The Court clarified several questions concerning what constitutes compliance with the requirements of Donohew, 39/149. First, it is now clear that a personal inquiry by the judge to the accused must occur. A written form signed by the accused setting forth his rights to counsel and his awareness thereof is not an acceptable substitute.²¹ This is true even where the military judge elicits from the accused's defense counsel that he has explained the contents of the form to the accused, counsel summarizes that explanation for the record, and the accused states that he understands his rights and desires to be defended by his appointed military defense counsel.²² The Court has thus flatly rejected the argument that a discharge of the obligations of a defense counsel under the provisions of Para. 46d, MCM, 1969 (Rev. ed.)²³ satisfies the requirements of Donohew, supra.²⁴

On the other hand, the Court appears more interested in the form of compliance with Donohew, supra, as opposed to the substance of such compliance. It is not error to fail to advise an accused that if he requests civilian counsel, his appointed counsel will continue to act as associate counsel if the accused desires.²⁵ Nor is it error to fail to advise him that, if he desires, appointed counsel will continue on his case even if he requests individual military counsel.²⁶ It then naturally follows, that the omission of advice concerning both of the foregoing is not error.²⁷ Judge Ferguson dissented in each of the foregoing cases.

21. Davis, 43/193; Bowman, 42/311.

22. Woodall, 43/294; Wagner, 43/155; Johnson, 43/130; Carter, 42/338.

23. This paragraph requires defense counsel to advise his client of his rights under Art. 38, UCMJ.

24. Mosley, 43/25; Gooden, 42/352; Bowman, 42/311. It will satisfy, however, in trials held before the effective date of Donohew. Prater, 43/179.

25. Smith, 43/284.

26. Ogden, 43/33.

27. Turner, 43/7. Accord, Perry, 43/23; Stansberry, 43/17; Baker, 43/15.

An extension of the majority holding was manifested in Falls, 44/48. In that case, a Court of Military Review found that the advice given was "confusing, misleading, and erroneous," in that the accused was told he waived his rights to civilian and individual military counsel by stating that he desired to be represented by appointed counsel. The accused was not told that he could retain appointed counsel if he desired civilian or individual military counsel. The Court of Military Review further found that the accused was prejudiced. The case was certified to the Court of Military Appeals which found error but no prejudice because the accused had stated that he desired to be represented by appointed counsel.

Appointment, qualification, and replacement of counsel. The Court held that the requirements of Article 27c, UCMJ, are not jurisdictional. Thus, although an accused pending special or general court-martial must be afforded an opportunity to be represented by legally qualified counsel (or, if not, in the case of a special court-martial, the convening authority must attach to the record an explanation of a failure to do so), the Court does not lack jurisdiction to proceed if there is no compliance. There was no error, therefore, where a special court-martial case was initially referred to a court to which non-lawyer counsel were detailed, where no explanation therefor was attached, but where lawyer counsel were added to the court before the case was tried.²⁸

Citing McFadden, 42/14, the Court held that, to the extent that there is a conflict between Para. 47, MCM, 1969 (Rev. ed.) and Article 38(e), UCMJ, the latter must prevail. It was therefore error, in a general court-martial case, where an accused was represented by a counsel certified under the provisions of Article 27(b) and a non-certified lawyer to prevent the non-certified lawyer from participating as the accused's assistant defense counsel. In light of the outstanding job done by the defense counsel, however, no prejudice was found.²⁹

28. Moschella, 43/383.

29. Flood, 42/340.

The Court has recently dealt with two cases concerning the activities of trial counsel. Where trial counsel had twice advised the accused before trial on one of the charges pending, he is disqualified to act as trial counsel even where the military judge dismissed that charge.³⁰ No waiver will be invoked against an accused who finds himself in this situation, because the government, by its appointment of trial counsel, has precluded the accused from exercising his right to individual counsel. The Court also noted that the accused had requested the individual who later became trial counsel as his counsel at the Article 32 investigation. He was said to be unavailable because he was on leave, but no showing was made that the question of his availability was presented to the convening authority as required. In the other case concerning trial counsel, the Court held that the Code did not prohibit a trial counsel from serving as the military superior and endorser of the defense counsel. The Court stated that each record in which this occurs will be closely scrutinized for subtle restraint, but that a per se error rule would not be adopted.³¹

Arguments of counsel. An argument by trial counsel which urges the court to believe prosecution witnesses because of their high rank and to disbelieve the defense witnesses because of their lack of rank, is prejudicial error per se. Failure to object will not result in a waiver.³²

Trial by Military Judge Alone

Although Para. 53d(2), MCM, 1969 (Rev. ed.) requires that the military judge assure himself that a request for trial by military judge be understandingly made, failure to object to the advice given or lack thereof on this subject has been held to constitute a waiver of having the judge assured. As a result, where the accused has signed a request for trial by military judge alone, which sets out his rights and acknowledges his understanding thereof, it is not prejudicial error for the military judge to fail to conduct any personal inquiry.³³ This is true even where the written form

30. Collier, 43/101.

31. Hubbard, 43/322.

32. Ryan, 44/63.

33. Jenkins, 42/304.

involved fails to mention the enlisted accused's right to be tried by a court, one-third of which is composed of enlisted men. The argument that this omission, by implication, misadvises the accused has been rejected. This is also the rule where the military judge makes no mention of this right elsewhere in the record.³⁴

Questioning of Accused by Military Judge and Court

Where an accused has elected to remain silent, it is reversible error for the military judge to question the accused or allow court members to do so. This is true although the judge leaves the option of answering or remaining silent with the accused, because this procedure has the danger of implying that the accused has some duty to speak or, at the very least, gives rise to the adverse inference that the accused has failed to make all of the facts known to the court.³⁵

Failure to Formally Arraign

The Court held that the failure to conduct a formal arraignment, including a reading of the charges or waiver thereof, affidavit and name of accuser, and description of reference to trial, is not prejudicial error where the court was satisfied, from other portions of the record, that the accused was aware of the charges to which he pleaded.³⁶ It is significant that the case involved guilty pleas and a thorough providency inquiry was conducted and that the record reflected these facts. The record further reflected that the accused was in possession of a copy of the charge sheet.

Guilty Pleas

The controversy of form over substance continued to plague the Court in the wake of Care, 40/247. Thus, in a line of cases beginning with Palos, 42/296, the Court held that, prior to the acceptance of a guilty plea, the military judge

34. Turner, 43/7; Grant, 43/27; Nelson, 43/24; Allen, 43/20.

35. Burgess, 44/67.

36. Napier, 43/262.

does not have to make a formal finding that the accused knowingly, intelligently and consciously waives his rights.³⁷ Although the majority opinion noted that the making of a specific finding was "a good practice," it would be content with a record that showed an accused was informed of his rights and expressly waived them.

Judge Ferguson, who dissented in Palos, supra, also dissented when the Court sustained a Care hearing which did not specifically include advising the accused of his right to a trial of the facts by a court-martial and the accused's waiver of such right.³⁸ The majority was satisfied that the substance--although not the form--of the information which the military judge imparted made the accused aware that his guilty plea waived a trial of the facts by a court-martial. When, however, Judge Darden felt that the form required by Care had been violated, he joined with Judge Ferguson to reverse a guilty plea hearing in which the defense counsel--not the military judge (as required by Care)--led the accused through the factual basis determination of 14 bad check offenses, a wrongful appropriation offense, and an AWOL charge.³⁹ Judge Quinn dissented, claiming form had been exalted over substance when the record disclosed a complete advisal of rights and valid plea of guilty. In Kilgore, 44/89, however, all the judges concurred in the adequacy of the Care hearing where the military judge failed to mention the elements of the offenses. The record was substantially clear that all the elements had been covered when the military judge discussed with the accused in detail the factual basis of his guilty pleas. In another case, the Court rejected any improvidency in a guilty plea where the judge erred by one month in advising the accused on the maximum punishment for the offenses to which he was pleading guilty.⁴⁰

The Court continued its rule that facts raised inconsistent with the guilty plea make the plea improvident and invalidated the conviction. Thus, firing a rifle because "I thought they were firing at us;"⁴¹ delayed compliance with an order three

37. Beasley, 42/314; Marsala, 42/316; Hill, 42/317; Katz, 42/318; Sprague, 42/319; Buklerewicz, 42/320; Vasques, 42/321; Mize and Waywell, 42/322; Villard, 42/323; Salesman, 42/323; Crowell, 42/340.

38. Bingham, 43/361.

39. Hook, 43/356.

40. Darusin, 43/194.

41. Woodrum, 43/369.

times given;⁴² believing that he was shooting at enemy soldiers;⁴³ not intending to deprive permanently an alleged robbery victim of certain property;⁴⁴ and, being equivocal about the intent of an alleged communicated threat,⁴⁵ all destroyed the providency of the guilty pleas. When a matter inconsistent with the guilty plea is raised, the military judge is required to inquire further into factual basis of the plea. If an accused persists in maintaining the inconsistent fact, a plea of not guilty should be entered.

On the other hand, when nothing is raised inconsistent with a guilty plea, an accused's plea may be accepted even though he remembers nothing concerning the offense.⁴⁶ The factual basis for the guilty finding is provided by the plea alone once the military judge determines that the accused has assured himself that the available evidence would prove his guilt. In Butler, the Court was also impressed that "all the evidence available to the Government was known to, and considered by, the accused and his counsel." Also, there was "no hint of coercion or improper inducement in the decision to plead guilty."

In one further case, the Court ruled a guilty plea improvident because the accused was wrongfully charged and his conviction was "unjustified."⁴⁷ The case involved a naval officer who failed to obey a transfer order shipping him to Japan. Two hours and twenty minutes after he was due to depart, he turned himself in at another location, claiming conscientious objection. There he was ordered to come back for work the next day. He did so, working until his general discharge was approved. The Court ignored the technical point that the accused failed to report as scheduled and decided that since his orders stated a later due date for actual arrival in Japan, he was never AWOL. Since he received a countermanding order to stay and work, it was wrong to charge him with failing to obey the transfer order.

In Brooks, 44/57, the military judge erroneously accepted the accused's plea to the lesser included offense of wrongful

42. Woodley, 43/197.

43. Bernier, 44/53.

44. Juhl, 43/16.

45. Dunbar, 43/318.

46. Butler, 43/87; Luebs, 43/315.

47. Clausen, 43/128.

appropriation. The accused claimed, inconsistent with his plea, that he took the victim's stereo just to teach him not to leave things unsecured. However, in the trial of the case, the judge found him guilty of larceny based on evidence that the accused told others he bought the stereo. While the acceptance of the guilty plea was error, the Court found no prejudice and sustained the conviction for larceny. In the process, a contrary rationale in United States v. Cleveland, 35 CMR 93 (1964), was distinguished to the point of overruling its holding.

The principle of waiver of issues by a guilty plea received another confirmation in Johnson, 44/22, where the accused's plea of guilty to the lesser included offense of wrongful appropriation waived the issue of the legality of the search which discovered the fruits of the crime (in spite of the fact that the accused pled not guilty to the larceny charge). Judge Ferguson's opinion for the Court quoted heavily from United States v. Hamil, 35 CMR 82 (1964). In another case, waiver was not imposed because the military judge fostered the accused's civilian counsel's impression that the issue had been preserved for appeal despite the guilty plea.⁴⁸ The issue involved appellate review of the Secretary's denial of the accused's application for discharge as a conscientious objector. The Court cited precedent that an accused ordinarily bears the risk of his counsel's error but was amenable to reviewing the merits of the issue since the record indicated that all believed erroneously that the issue had been preserved for appeal.

Witnesses, Grants of Immunity, Absence of Accused

In Sears, 43/200, the Court supported the trial judge's original determination that since "there's no dollar sign on justice", two character witnesses should be brought from the United States to Vietnam to testify on the merits as to the accused's reputation for truth and veracity. When the judge finally acquiesced in the convening authority's unequivocal refusal to spend the money, the Court found substantial error, strongly maintaining the importance of character witnesses and an accused's right to an equal opportunity to obtain witnesses.

48. Stewart, 43/112.

In Maxfield, 43/336, the Court found no error in the trial counsel's failure to inform the court that a key government witness had been given a grant of immunity in order to testify against an accused. By appellate affidavit, the trial counsel stated that he had discussed the witness' immunity many times with the defense counsel. Judge Ferguson dissented, however, stating that the witness' immunity should have been revealed at trial and the defense counsel's failure to do so bordered on neglect. And where a prosecution witness surprised trial counsel by asserting his right to remain silent while on the witness stand, the Court held that an instruction that witness' silence could not be held against the accused was sufficient to dispel any adverse inference created by the incident.⁴⁹

Finally, the Court ruled that the trial judge had failed to make proper inquiry into the voluntariness of an accused's absence from trial where there was evidence that the accused may have suffered from a psychiatric disorder which destroyed the voluntariness of that absence.⁵⁰ The judge should have explored the issue beyond just the facts that the accused was gone and could not be found.

EVIDENCE

Search and Seizure

This term the Court of Military Appeals reaffirmed the principle that a search following an arrest not based on probable cause will be held unreasonable. In Weshenfelder, 43/256, the Court held that an arrest based upon information supplied by a previously unknown informant was not based upon probable cause where the arresting agent had not established the reliability of the informer, and that evidence seized as a result thereof was inadmissible.

The Court also held that mere presence in the vicinity of contraband is not probable cause to arrest where no probable cause existed to believe the individual was in possession of such contraband.⁵¹ The principle that arresting

49. Gilliard, 43/374.

50. Cook, 43/344.

51. Myers, 43/109.

officers cannot use a "sham" arrest for one offense as a pretext to conduct a search for another suspected crime was applied in a situation in which the Court found that an arrest ostensibly for AWOL was only a pretext for an unauthorized search for suspected drugs.⁵²

In the area of inventory searches, it was held that a purported inventory of an absentee's property was an illegal search, not based upon probable cause, where the alleged inventory was accomplished with unusual thoroughness, including the use of wire cutters to enter a wall locker and the summoning of detectives.⁵³ Where an accused was found in possession and use of drugs in a bunker in Vietnam, a subsequent search of his living area was held illegal, since discovery of drugs in the bunker furnished no probable cause to search the living area.⁵⁴

Where a commander believed there was a "possibility" that stolen goods were located in a suspect's locker, marihuana found therein was held to be the result of an unreasonable search. Further, a later search of suspect's clothing resulting in discovery of more marihuana was also held unreasonable as tainted by the prior unlawful search.⁵⁵

In Maglito, 43/296, the Court apparently extended the rule that searches of prison inmates to insure the security of a confinement facility need not be based upon probable cause to apply equally to a "restricted barracks" in which the accused was undergoing nonjudicial punishment.

This term the Court again adhered to its rule that a guilty plea following a motion to suppress illegally seized evidence waives the right to contest the adverse ruling on appeal.⁵⁶

Depositions

The Court opened the door slightly to the possibility of courts-martial convened in foreign countries subpoenaing

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- 52. Santo, 43/134.
 - 53. Mossbauer, 44/14.
 - 54. Racy, 44/78.
 - 55. Alston, 44/11.
 - 56. Johnson, 44/22.

civilian witnesses located in the United States. In Hodge, 43/252, the prosecution admitted the depositions of departed witnesses into evidence over objection by the defense. The Court held that even though no actual unavailability was shown, there was no prejudice because of other overwhelming evidence of guilt. The Court assumed without deciding that a civilian witness located in the States could be compelled to testify at a trial held overseas. In another decision,⁵⁷ it was held to be prejudicially erroneous to admit into evidence the deposition of a prosecution witness who had been returned from Vietnam to the United States and discharged, without a showing of actual unavailability. In the same case, it was also held that a witness still in the military must be made available at trial.

Fresh Complaint

The Court seemed to construe the fresh complaint rule narrowly this term. In the only case decided on this issue, although the victim of an alleged sexual assault by a Navy lieutenant made a complaint within a reasonable time, which would otherwise corroborate the victim's allegations, the Court ruled it was only "barracks gossip" and not admissible.⁵⁸

Confessions

Several decisions relating to the admissibility of confessions were handed down by the Court this term. In Jordan, 44/44, the accused, a prime suspect in an assault case, was called into his battalion commander's office where he was informed of his Article 31 rights but not his rights to counsel. Determining that a custodial interrogation had in fact taken place, the Court held that the confession was inadmissible for any purpose because of the battalion commander's failure to delineate the accused's rights to counsel. The Court held that the use of the statement at trial for the purpose of impeaching the accused is prohibited by Paras. 153b(2)(c) and 140c(2) of the Manual, the ruling in Harris v. New York, 401 U.S. 222 (1970), to the contrary, notwithstanding.

Article 31 warnings were not required in Ziegler, 43/363. In that case, a warrant officer suspected an accused of being

57. Gaines, 43/397.

58. Pitasi, 44/31.

an unauthorized civilian. The Court found that after the accused gave two false answers regarding his identity, the officer acted properly in detaining the accused and later examining his wallet for an identification card.

In Johnson, 43/160, a naval intelligence agent advised accused that he was suspected of desertion. At trial the agent admitted that he also thought accused might have been guilty of defection to the enemy, but he did not know at the time that this act was an offense. The Court reversed accused's conviction. Judge Ferguson expressed the majority opinion that it was self-evident that the suspected conduct was illegal and that the accused should have been advised that he was suspected of the additional offense.

The Court also addressed the question of whether the government has a duty to give notice of an interrogation to suspect's counsel. The accused in Flack, 43/41, made an incriminating statement after being advised of his rights to counsel. No notice, however, had been given to counsel who had been appointed earlier to represent accused at a forthcoming deposition proceeding but who had never seen or contacted accused. The Court held that in this case no notice to counsel was needed. However, dictum in case indicates that the government may never have a duty to inform counsel of questioning, provided that accused is properly informed of his rights to counsel and elects to waive them.

Questioning of an accused by his platoon sergeant who suspected that he was illegally bringing beer into a prohibited area was improper absent Article 31 warnings.⁵⁹

The accused in Attardi, 43/388, was advised of his rights and subjected to several hours of questioning by a number of CID agents. At one point, he indicated that he did not want to answer any more questions, but after a few general questions, said he wanted to speak to a particular agent. The Court rejected appellate defense counsel's contention that the interrogation should have terminated when the accused said he did not want to answer any further questions. The Court also found no error in the military judge's failure to instruct on

59. Harvey, 44/39.

voluntariness, where the agents had made reference to the alleged impregnation of accused's wife by another man, in light of accused's testimony that this allegation had not really upset him. No voluntariness issue was raised by the six-hour duration of the questioning as accused had declined the opportunity to sleep.

The Court employed the waiver doctrine in several cases. The defense was held to have waived possible objections to a statement by the accused when the statement was part of a stipulation agreed to by the defense.⁶⁰ Waiver was also found where the defense stipulated to the testimony of two security policemen that accused had shown them the scene of the alleged crime and had identified a shirt found there.⁶¹

A military judge's questioning of the accused about the basis of a speedy trial motion was reversible error when accused had not elected to testify. Even though nothing "incriminating" on the merits of the case was elicited, there was a violation of the accused's rights to remain silent.⁶²

In three cases, the Court considered the need for corroboration of a confession. Testimony relating to the acts of the person to whom the accused allegedly sold marihuana was not only held admissible but was found sufficient to corroborate accused's own confession that he had possessed and sold the substance.⁶³ The Court reaffirmed the rule that for offenses committed before the effective date of the 1969 Manual, independent evidence must corroborate every essential element of the offense, except for the identification of the perpetrator. For this purpose, a statement of the accused contemporaneous with the alleged offense was admissible as independent evidence corroborative of a subsequent confession.⁶⁴ In Shider, 43/187, the Court found the trial judge's instruction regarding corroboration so confusing that reversal was required.

Right to Witnesses

The Court reaffirmed its position that Para. 115 of the Manual relating to securing of defense witnesses has the force

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60. Gilliard, 43/374.
 61. Hernandez, 43/59.
 62. Turnipseed, 42/329.
 63. Stricklin, 44/39.
 64. Coates, 42/324.

of law. In Petty v. Moriarty, 43/278, after a defense request for witnesses was submitted following a postponement of the special court-martial to which the case had been referred, the convening authority determined that the testimony of defense witnesses would not be well founded and ordered an Article 32 investigation. Petitioner was granted a writ of prohibition enjoining the Article 32 investigation.

COURT PERSONNEL

Military Judge

In an administrative matter, the Court found that the detailing of two military judges on a single convening order was not prejudicial where the accused knew beforehand the identity of the military judge in his case, but noted that such a practice should be discontinued.⁶⁵

Convening Authority

In Maxwell, 43/336, the Court ruled that it was improper for a convening authority to review a case where a temporary successor had granted immunity to a prosecution witness, because it would be "asking too much of human behavior to expect the CA to be wholly free of the influence of his temporary successor's actions."

Staff Judge Advocate

In six cases this term the Court maintained its customary close scrutiny of SJA activities. In Boatner, 43/216 and Eller, 43/241, the Court followed Rivera, 42/198, decided last term, and ordered new post-trial reviews because the SJA review omitted the recommendation of an intermediate commander that the accused be retained in the service.

In Hamilton, 43/359, the Court found a SJA review to be prejudicially erroneous where the convening authority was advised that the sentence had been mitigated by a lower convening authority when, in fact, the lower convening authority approved the sentence as adjudged. In Scott, 43/104, the Court found that an accused was afforded an opportunity in the post-trial

65. Sayers, 43/302.

interview to rebut adverse matters contained therein concerning post-trial misconduct despite the fact that at the time of the interview he was in a D-cell at the MP station for the misconduct, was not advised of his rights by the interviewer, and had, in effect, exercised his Article 31 rights at that time by refusing to discuss the alleged misconduct.

In two cases involving the same defect in the SJA review the Court reached opposite results, for no obvious reasons. In Lopes, 43/335, the SJA review erroneously stated that an accused had been convicted of an offense, where in fact he had been found not guilty. The recommendation that the sentence be approved was followed by the convening authority. The Court (Ferguson, J.,) ordered a new review and action, holding that the error was prejudicial per se. However, in Stricklin, 44/39, the Court (Quinn, CJ.,) held that where a SJA review advised appellant had been found guilty of 7 specifications when in fact he was found guilty of only 3 specifications was not error because the error did not result in approval by the convening authority of a sentence that it would not otherwise have been approved. In a strong dissent, Judge Ferguson noted that error was prejudicial per se in Lopes, decided two months earlier. Hopefully, the inconsistency will be resolved in the current term of the Court.

SUBSTANTIVE OFFENSES

Drugs

Mere association with those possessing drugs or narcotics, or in the contemporary argot of Judge Quinn, "being where the action is," is not sufficient to show the necessary dominion and control of the alleged possession over the thing allegedly possessed to make the necessary probable cause connection.⁶⁶

The Court continues to place the burden of going forward in drug-related cases upon the accused. In a case involving a charged violation of Article 92 wrongful possession of "an instrument that may be used to administer habit forming narcotic drugs, to wit: one inch syringe," appellant's suggestion that possession of a syringe alone may be for innocuous use, e.g. household or disease treatment purposes, was rejected because

66. Myers, 43/109.

"the interest of the armed forces in prohibiting wrongful narcotic use is enough to justify the transfer of 'this obligation of going forward' to an accused."⁶⁷ Appellant's contention that Para. 4 of Fort Bragg Reg. 22-11, proscribed only the possession of syringes and hypodermic needles, used as one unit, the Court reasoned that, regardless of the conjunctive "and", it is enough that a syringe alone may be used with a needle to administer or dispense habit-forming drugs.

In another drug case, the accused was charged with the sale of marihuana in violation of Article 134, but the evidence adduced at trial established no more than that the accused procured marihuana for another at that other person's request and with \$25.00 supplied by him. In finding the evidence insufficient to support the charged sale, the Court cites the well-established principle of law that one who acts in a given transaction solely as a procuring agent for another person is not a "seller" to that person.⁶⁸

Orders and Regulations

Private Stewart was charged with willful disobedience of an order of a superior commissioned officer, and at trial contended (1) that at the time of the offense he was conscientiously opposed to war in any form as a result of religious training and belief, and (2) that his application for a C.O. discharge under AR 635-20 had been unlawfully, arbitrarily, and capriciously denied.⁶⁹ The law officer refused to hear evidence on either of the two contentions, and Private Stewart pleaded guilty pursuant to a pretrial agreement.⁷⁰

Although the Court affirmed Stewart's conviction, the majority opinions differed in reasoning and Judge Ferguson dissented. Judge Darden's opinion expressed his view that there exists no constitutional right to refuse military orders because of conscientious objection and that even the erroneous denial of an in-service application for a C.O. discharge does not "operate to end the obligation of a member of the armed forces to obey orders that are otherwise lawful." Chief Judge Quinn

67. Tee, 43/246.

68. Fruscella, 44/80.

69. Stewart, 43/112.

70. The Court departed from its ordinary theory of waiver-by-guilty-plea because remarks by the law officer implying to civilian defense counsel that the appellate issue of arbitrary and unreasonable denial of the discharge application would not be waived by a plea of guilty. Compare United States v. Hamil, 15 USCMA 110, 35 CMR 82 (1964).

concluded in the affirmance of the accused's conviction based, inter alia, on the "waiver-by-guilty-plea" theory, but opined that an illegal denial of a C.O. discharge application by the Secretary of a military department affects the legality of a subsequent military order. In his dissent, Judge Ferguson agrees with Chief Judge Quinn's latter observation, but disagrees with his reliance upon Goguen,⁷¹ distinguishing that case on the wording and consequent legality of the order given.

In another C.O. application case,⁷² the Court held that an accused was not denied administrative due process in the processing of his application for discharge as a conscientious objector because the chaplain who interviewed him pursuant to AR 635-20 did not have his completed application before him during the interview, as required by the regulation.

The Court, in Woodley, 43/197, found the accused's plea of guilty to an aggravated assault provident where the accused admitted taking a grenade from his pocket, pulling the pin, and holding the grenade in one hand and the pin in the other.

The Court also found that a specification alleging the accused's violation of a "lawful general order, to wit: Paragraph 4, I Corps Coordinator Instruction 1050.5D dated 2 February 1969 with Change 1 dated 29 April 1969, by being in an off-limits area, not on official business" failed to allege an offense because the instructions are directed to commanding officers for implementation and not directed to individuals.⁷³

Sufficiency of the Evidence

The Court considered a number of cases involving the legal sufficiency of the evidence to sustain a conviction.

Where a truck driven by appellant collided with the victim's automobile, where the collision occurred on the victim's side of the road, where appellant was under the influence of alcohol, where the truck had defective brakes, and where the appellant

71. No. 421998 (ACMR 2 September 1970), a case not then finally reviewed under Article 67(b), UCMJ; 43/367.

72. Larson, 43/405.

73. Woodrum, 43/369.

was driving on a narrow, winding, two-lane road in inclement weather, the evidence was found to be sufficient to support the "culpable disregard" necessary for an involuntary manslaughter conviction.⁷⁴

An accused's claim that he failed to make a physical training formation because, unbeknown to him, his watch had stopped, was found to be immaterial to his remaining at the PX.⁷⁵ Because his failure to make formation did not result from a reasonable belief that he had sufficient time, the evidence was sufficient to sustain the Article 86 conviction.

Where the accused struck the alleged robbery victim, where bystanders heard the victim offer his money to avoid physical contact, where there was pushing and shoving, which ceased when the victim's money was removed, and where appellant was identified by the victim and bystanders as a member of a group attacking the victim, the intent of the group to steal and the accused's knowledge of that intent were "reasonably inferred" and the evidence was held sufficient to sustain the appellant's robbery conviction.⁷⁶

In a case of wrongful handling of classified documents, the Court sustained the sufficiency of evidence showing (1) that the accused had knowledge that the individual to whom he gave a copy of a classified document had no authority to receive it, and (2) that the delivered document was related to national defense.⁷⁷

Where the accused was charged with communicating a threat to a petty officer with the words "I have more muscle in my little finger than you have in your whole body and if you take this restraining gear off, I'll show you what I will do to you," the Court reasoned that the words alleged were insufficient to constitute a threat because the variable upon which the threat was contingent, removal of the restraining gear, could not reasonably occur because no reasonable guard would remove the restraining gear.⁷⁸

74. Caplinger, 43/146.

75. McCown, 43/249.

76. Frierson, 43/292.

77. Attardi, 43/388.

78. Shropshire, 43/214.

Where official records concerning use of a government truck on the date in question reflected the truck's dispatch to one other than the accused and its subsequent return, and no competent testimony was introduced to contest the accuracy of these official entries, other evidence tending to establish that the appellant had wrongfully appropriated the truck was held to be insufficient to sustain the appellant's conviction.⁷⁹

Evidence that two of three co-accused had paint on their boots and that the third had paint on his finger, and that the paint was similar to that sprayed on the floor of the company commander's office, was held insufficient to establish beyond a reasonable doubt the presence of each accused in that office where a fire occurred. Other evidence showed that the spray can was in the orderly room outside the office both before and after the fire.⁸⁰

A lieutenant charged with Article 133 conduct unbecoming an officer was authorized to leave his duty station to return to his home and await a port call for Vietnam. He remained at home for nearly a year, willing and available to comply with the port call. The Court found this evidence insufficient to support the ACMR's affirmance of guilty of the lesser included offense of dereliction of duty because, although the appellant failed to make constant inquiries of the military authorities about his port call, there is no indication that he was any place other than where he was authorized to be, at home.⁸¹

Miscellaneous

Although the specifications upon which an accused and his two alleged co-conspirators were tried at separate trials contained different allegations as to victims and overt acts, the acquittal of the co-conspirators at their trials required reversal of the accused's conviction where it compellingly appeared that there was but a single conspiracy to assault three individuals.⁸²

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79. Prott, 43/190.
80. Harvey, et al. 44/93.
81. Hale, 42/342.
82. Smith, 44/19.

Where an accused was charged with making statements disloyal to the United States through the publication and distribution of newsletters containing "references of a disparaging nature to the military and public officials" and where the military judge had instructed the court members that they must find that each publication "taken in its entirety" was disloyal to the United States, the Court found that the instructions avoided the ambiguity described in Harvey, 42/141 and Gray, 42/255 because in their totality they presented no fair risk that the court members predicated their finding that each newsletter "in its entirety" was disloyal to the United States upon a finding that parts of the publication were disloyal to the military or a public official.⁸³

Although an accused's plea of guilty to robbery was rendered improvident by inconsistent statements with respect to the existence of an intent to permanently deprive the victim and the government of a rifle, the providency of the accused's plea of guilty to the lesser included offense of wrongful disposition of the same rifle was unaffected because wrongful disposition requires only a general criminal intent.⁸⁴

In a case involving a confrontation between a Marine private and his commanding officer,⁸⁵ the accused private was called into the commanding officer's office to discuss his rejection of proposed nonjudicial punishment. In the course of the "conversation" the commanding officer charged the accused with not being a man, and asserted that he was a coward with a two-foot "streak of yellow" down his back. In response to the commanding officer's question as to what he would "like", the accused replied that he would "like to see the Marine Corps flat on its back with its heels in the air." The commanding officer retorted "let's see you put me on my back." The accused complied and, as a result, was charged with assault. The Court reversed the findings of guilty because the commander had, by words and actions, abandoned his position and rank as an officer.

83. Priest, 44/118.

84. Juhl, 43/167.

85. Struckman, 43/333.

AFFIRMATIVE DEFENSES

The possible defenses of insanity and diminished capacity received attention in Hernandez, 43/59 where the Court held that although both defenses were raised by the evidence, the two could not be connected to produce a lack of mental responsibility when neither defense alone serve to exculpate the accused. Restating established principles, the Court indicated in Martinez, 43/68, that voluntary intoxication standing alone does not reduce an act of premeditated murder to manslaughter, and that "alcoholic amnesia" is not a defense. In Morris, 43/286, the Court found the record "devoid of any evidence which permits an inference of sanity." where a psychiatrist had testified for the defense that the accused was engrossed in a voyeuristic fetish to touch female clothing when he robbed two Navy nurses. Masking his true feelings with a desire for money, the accused was described as not being able to adhere to the right at the time of the offense. Because of a lack of prosecution evidence to rebut the defense contention, the Court found that a jury could not infer the existence of mental responsibility.

In other cases involving the issue of mental responsibility the Court reviewed two combat zone situations. In Thomas, 43/89, the accused testified that a "voice" told him to "frag" two fellow soldiers sleeping in a nearby tent. The Court held this testimony raised the defense of mental responsibility. In Walker, 43/81, the Court returned the case to the Court of Military Review for further psychiatric examination of the accused and further fact finding as the accused had shown erratic behavior while on field operations, and later shot his best friend while threatening to duel with others. A psychiatrist was unable to determine whether the accused was sane at the time of the incident. Doubting the accused's ability to premeditate, the Court of Military Review had reassessed the sentence. While recognizing the dangers inherent in retrospective psychiatric evaluations, the Court determined that more facts were needed, and remanded the case.

The Court held in United States v. Noyd, 40 CMR 195 (1969), that an order to perform duties could be held illegal if it was premised upon an erroneous determination by the Secretary of the Air Force that the accused should not be discharged as a

conscientious objector. Thus if the substance of the C.O. decision was erroneous under the applicable regulation, the service member could not be ordered to perform duty based upon that decision. During this term, the Court decided two conscientious objector cases, revealing a split in the judges' position on this issue. In Stewart, 43/112, Judge Darden wrote that even if the Secretary's decision was erroneous, a soldier still has an obligation to obey orders which are otherwise lawful, holding that conscientious objection is not a defense to violations of Articles 90, 91, or 92, and that there is no provision for military judicial review of the Secretary's action. Concurring in the result, Judge Quinn protested this emasculatation of the Noyd principle, but held that the record revealed the propriety of the Secretary's decision, just as it had in Noyd. Dissenting, Judge Ferguson wrote that the military judge should be required to inquire into the propriety of the Secretary's ruling. Thus, it appears that each judge maintains a different view of the application of Noyd to the substance of the Secretary's decision in discharge of C.O.'s.

After Stewart, the Court considered the plight of a conscientious objector in Larson, 43/405. In technical violation of the regulation, Larson had been interviewed by a chaplain before, rather than after, his application for discharge had been submitted. At trial, the defense did not contest the substantive ruling by the Secretary of the Army that the application was not meritorious. Rather, it was claimed that the accused had been denied his right to procedural due process in the determination of his application based upon the ill-timed chaplain's interview. Judge Quinn held that since the substance of the chaplain's recommendation and the ultimate adverse determination of the application were not challenged, no prejudice could have resulted from a purported denial of due process. Relying upon Stewart, Judge Darden concurred in the result and wrote that the military courts had no power of review over the Secretary's determination in any event. Once again, Judge Ferguson dissented. In this case, however, he relied upon United States v. Phifer, 40 CMR 220, (1969) indicating that since the Court of Military Review had determined that the military judge had

restricted the scope of the examination of the chaplain, such a factual determination could not be overturned by the Court unless "arbitrary or capricious." pointing out that the Court of Military Review's factual determination, coupled with the erroneous limitation of testimony by the military judge, should dictate a rehearing. It is clear that this question of applicability of conscientious objector regulations to disobedience of orders remains confused.

Reinforcing an old principle, the Court noted in Fruscella, 44/80, that where one is merely the agent of a buyer, he cannot be convicted of selling drugs to that buyer. Thus, it appears that such agency may be set up as an affirmative defense. In Yabut, 43/233, the Court discussed self-defense, holding that the issue of available retreat is raised even where the incident happens in the accused's own "home" or berthing area contrary to a long line of civilian and military cases.

FINDINGS INSTRUCTIONS

Issues involving the propriety and necessity of certain instructions on findings received ad hoc treatment. The Court decided several cases concerning instructions on the admissibility and weight of confessions. In a case arising under Para. 141 of the Manual, 1951, the Court approved an instruction to a jury that "unless independent evidence corroborate essential facts . . ." the confession could not be considered.⁸⁶ The Court indicated that the instruction referred to "all" essential facts, because the members were also instructed at length on the elements of the offenses. Significantly, this case would not arise under the rule in the current Manual.⁸⁷ In another confession case, the military judge had instructed the court that they must disregard the accused's in-court testimony unless they found his confession to be truly voluntary. The Court held that this extension of the rule in United States v. Bearchild, 38 CMR 396 (1968), prejudiced the accused's right to defend himself because the court members would thus have to disregard his exculpatory as well as his incriminatory testimony.⁸⁸ In another confession case the majority approved a waiver by trial defense counsel of an instruction on voluntariness of his client's confession, although normally the judge is required to instruct sua sponte on that issue.⁸⁹ In Attardi, 43/373, the accused had confessed

86. Coates, 42/324.

87. See Para. 140a(5), MCM, 1969 (Rev. ed.).

88. Carey, 44/87.

89. Meade, 43/350.

to disposing of classified documents. During an all-night interrogation by military intelligence agents, he indicated at one point that he did not wish to make a statement; the interrogators mentioned his wife's affair with a Navy officer and told him his confession would remain in intelligence channels, "as far as they knew." The judge instructed the court only on coercion concerning the accused's impression that his confession would be kept in military intelligence channels. The majority of the Court upheld this instruction.

On the issue of disloyal statements, the Court held that an instruction to find that statements "in their entirety" were disloyal, avoids the ambiguity of Gray, 42/255 and Harvey, 42/141, holding that an instruction on disloyalty to the Marine Corps or the "military" did not properly frame the issue of disloyalty to the United States.⁹⁰ Trial defense counsel had requested an instruction that the alleged disloyalty must have been to the United States and "not to a person or institution such as the Secretary of Defense or the United States Navy." Distinguishing Harvey and Gray, the majority held that the jury could not have been misled by a definition of disloyalty which indicated that it must be "to an authority to whom respect, obedience, or allegiance is due."

The offense of simple arson is described by Article 126(b), UCMJ as being done "willfully and maliciously." Holding that these terms import specific intent, the Court decided that an instruction on voluntary intoxication as an intent-diminishing factor must be given.⁹¹ Judge Darden dissented, noting that the common-law crime of arson is a crime of general intent.

SENTENCE AND PUNISHMENT

Sentence Evidence

In a handful of cases decided during the 1970 term, the Court applied the rules it had set forth during the 1969 term relating to the evidentiary changes incorporated in both of the 1969 Manuals. Following Morley, 42/46, the Court held

90. Priest, 44/118.

91. Greene, 43/137.

that evidence of a prior civilian conviction for housebreaking and the accused's acknowledgement of a fraudulent enlistment required a limiting instruction in his trial for an offense committed prior to 1 January 1969, the effective date of the 1969 Manual, even though trial itself was conducted after that date.⁹² In three other cases, the issue involved the admissibility of records of Article 15 punishment in trials for offenses occurring prior to the effective date of the revised Manual, 1 August 1969. Two were reversed as to sentence,⁹³ and a third was affirmed, the Court determining (over Judge Ferguson's dissent), that the inadmissible evidence "could not have played a part in the determination of this sentence," in view of the seriousness of the offense of which the accused stood convicted.⁹⁴

The problem concerning the maintenance of records of nonjudicial punishment in an accused's military personnel records jacket was litigated in Cohan, 43/309. There, the Court resolved the division in the Army Court of Military Review as to the operative effect of AR 27-10, which requires destruction of the Article 15 record in certain circumstances, rendering improperly retained documents inadmissible as evidence.⁹⁵

In Cohan, Judge Quinn, writing for the Court, noted that, under AR 27-10, transfer alone does not, at the instant thereof, vivify the duty to remove and destroy records of nonjudicial punishment, but that three factors must conjoin for transfer to operate as a mandate for withdrawal: (1) a lapse of one year from imposition of punishment; (2) complete execution of all aspects of punishment; and (3) finality of any action on appeal from the Article 15. The only factor absent in Cohan's case was the first: he had been transferred before the lapse of one year. The Court rejected a contention that a two-year time limit was thus required under AR 27-10, since the accused had not perfected a case for removal by his early transfer. Holding that "when transfer occurs, it is that fact that sets the stage for destruction . . . whether the act of destruction is accomplished at transfer or after transfer depends upon whether all the conditions are satisfied;" thus, when the one-year period lapsed, the record should have been removed from the accused's file. The failure to do so rendered it inadmissible.

92. Ogden, 43/33.

93. Marsala, 42/316; Beasley, 42/314.

94. Baker, 43/15.

95. Para. 75d, MCM, US, 1969 (Rev. ed.).

In other cases in the area of sentence evidence, the Court held that the attempted introduction of a Secretary of the Navy directive regarding drug abusers was improper, even though thwarted by timely objection from the defense. The Court found the directive to be a form of command influence and held that the effect of the error was not purged by the military judge's limiting instructions: "in such circumstances, we have not hesitated to apply the doctrine of general prejudice." The sentence was reversed.⁹⁶

In Garza, 43/376, testimony as to the accused's political beliefs was improperly admitted, and the trial counsel's remarks in argument as to the political affiliations of the accused and his family was held to be error. "What should have been a routine hearing on sentence . . . was turned into a political trial by the prosecutor's repeated and impermissible efforts, over defense objection, to parade before the judge the allegedly heinous political philosophy of the accused and his family." Thus, even though the sentencing function was performed by the judge alone, the Court found a fair risk that he was improperly influenced, and reversed as to sentence.

Finally, in Green v. Wylie, 43/231, petitioner sought extraordinary relief in the form of an order directing respondent convening authority to defer or suspend his sentence to confinement. In denying petitioner's original deferment application, the convening authority had relied in part on appellant's juvenile record of truancy, notwithstanding an Ohio statute (where the earlier difficulties arose) prohibiting the use of such records in judicial proceedings. This prohibition, said the Court, did not apply to the considerations to be made by the convening authority or subsequent reviewing officials charged with the responsibility of assessing the appropriateness of any penalty imposed by a court-martial. Thus, the convening authority could properly consider the accused's juvenile record in denying his deferment application.

Sentence Instructions

In the realm of presentencing instructions by the military judge, the Court held that the use of a printed sentence work

96. Allen, 43/157.

sheet and written instructions on voting procedures as a substitute for complete oral instructions by the judge was improper.⁹⁷ Speaking for the majority, Judge Darden emphasized the Court's concern about the importance of oral instructions covering procedures for determining sentence: "We consider it preferable that the judge's instructions to the Court be given 'orally in the presence of counsel and the defendant.'" Nevertheless, the majority found no prejudice, reaching the conclusion that the court members did make use of the entire instruction form in their consideration of sentence, and thus the accused was not harmed. Judge Ferguson, dissenting, vigorously assailed the majority, opining that the Court's earlier holding in United States v. Pryor, 41 CMR 279 (1970), required reversal, because "the benefits accorded the accused by paragraphs 76b(2) and 76d of the Manual are an essential part of military due process," and that the majority's decision was "an invitation to a further disregard of rules of procedure."⁹⁸

The Court also held that a guilty plea is a matter in mitigation and an instruction to that effect is not inappropriate, even though the accused contested some of the charges.⁹⁹ The Court felt that such an instruction would not be likely to paint the not guilty pleas as aggravating, and that the absence of such an instruction may have been error.

Sentence Procedure

While a defense counsel's argument on sentence, including a remark that his client did not deserve another chance, may have been simply an oratorical tactic, the Court felt it may have amounted to a concession that a punitive discharge was appropriate punishment for the accused.¹⁰⁰ Thus, with "some misgivings", and recognizing that it was resting its decision only upon a bare reading of the record, the Court nevertheless reversed and ordered a rehearing on sentence.

In another vein, the Court found error in the military judge's actions in reading the Article 32 record and pretrial advice without the knowledge and consent of the accused during

97. Muir, 43/25.

98. Compare Garza, 43/381, where reversal was deemed the appropriate remedial action to make clear that the Court would not "wink at the type of conduct displayed by trial counsel."

99. Prater, 43/179.

100. Holcomb, 43/149.

his deliberations on sentence. "Military law requires," said the Court, "that adverse matter considered in the determination of a sentence at trial must be presented in open court, with the accused having the right to object to its consideration or to rebut it." However, consideration of improper matter did not necessarily constitute reversible error, and the Court applied the test as to "whether there is a fair risk that as a result of such consideration the accused is burdened with a sentence more severe than that which might have otherwise been imposed."¹⁰¹ Thus, feeling certain that the accused was not prejudiced, the Court affirmed.

In Palos, 42/296, the military judge made some erroneous remarks during the presentencing portion of the proceedings, but the SJA noted the error and commented upon it in his post-trial review. The convening authority re-assessed the sentence in light of the error, and the Court felt his action cured any risk of prejudice.

Multiplicity for Sentencing Purposes

Only three cases decided during the term dealt with questions involving the multiplicity of offenses for sentencing purposes. In one the Court held that wrongful appropriation and wrongful disposition of the same property were separately punishable when there was a "substantial hiatus between the time of the taking . . . and the time of . . . disposition."¹⁰² Similarly, wrongful appropriation of a truck used to transport property stolen from the government was not multiplicitious with the larceny as not part of "a single integrated transaction."¹⁰³ In a third case, the Court, as so often before, held escape to be multiplicitious for sentencing purposes with an AWOL commencing at the same time. The record, however, failed to show that the military judge, trying the case alone, considered the offenses multiplicitious when he imposed sentence. The Court allowed that if a court with members had determined sentence, the uncertainty in the record might have required a rehearing. But since trial was by judge alone, they engaged in a presumption that the military judge knew the offenses should be treated as multiplicitious; nevertheless, they cautioned

101. Carroll, 43/152. In a footnote to its opinion, the Court lamented the fact that defense counsel did not move to reopen the trial as soon as he became aware of the judge's improper actions. "Full inquiry, on the record, into the circumstances of the alleged irregularity would have contributed more to an informed judgment as to the probable influence of the allegedly improper materials on the sentence determination . . ."

102. Juhl, 43/167.

103. Burney and Aiken, 44/125.

judges to make their views on the subject a part of the record to avoid the speculation and uncertainty inherent in inexplicit transcripts.¹⁰⁴

Maximum Punishment

In Darusin, 43/194, the Court was faced with the issue of calculating the maximum sentence authorized upon a rehearing. At the original trial, the sentence adjudged was a bad conduct discharge and confinement at hard labor for five months. Before accepting a plea of guilty at the rehearing, the military judge advised the accused that the maximum punishment authorized was a bad conduct discharge and confinement at hard labor for five months, or no punitive discharge and confinement at hard labor for twelve months. Holding that United States v. Brown, 32 CMR 333 (1962) authorized the substitution of confinement at hard labor for six months for a punitive discharge, the Court held in Darusin that, at most, the maximum punishment was overstated by one month's confinement, and that the voluntariness of appellant's plea of guilty was not affected by this misadvice.

In Walter, 43/207, the Court was faced with deciding the maximum authorized punishment for the offense of wrongful sale of LSD, in violation of Article 134, UCMJ. The Table of Maximum Punishments, Para. 127, MCM, does not list this offense, and the defense argued that since AR 600-50, Change 4, dated 18 August 1969, prohibited the conduct, the maximum punishment for Article 92, UCMJ offenses (confinement at hard labor for two years) should govern. The government argued that the punishment authorized was that allowed for the wrongful sale of LSD under federal law, 21 U.S.C. 331(b), and that confinement at hard labor for five years should govern. Expressing great sympathy for unknown sailors, airmen and marines who would be subject to five years confinement if their services did not promulgate a regulation comparable to the Army's, the Court authorized a five-year maximum for this soldier, too, notwithstanding AR 600-50.

104. Stein, 43/358.

RECORD OF TRIAL AND APPEAL

Record of Trial

In Napier, 43/262, the Court held that a failure to have the charges and specifications set out in the record at the place designated in the trial procedure guide was not prejudicial, at least where the accused pleaded guilty before a military judge alone. This was so since (1) the transcript showed that the defense had a copy of the charges and specifications, (2) they were described in detail in the transcript because of the inquiry into the accused's plea of guilty, and (3) the accused indicated his understanding of the elements of each offense. The Court even stated that it would appear to be appropriate to omit the reading aloud of the charges just before the plea since they would already have been fully discussed during the judge's inquiry into the voluntariness and providence of the plea. The Court in Napier also dealt with a certificate of correction, holding that such a certificate is, in the absence of fraud or mistake, presumed to be true. The fact that a certificate of correction contains an error does not mean that it is automatically stricken so that the record appears as though no certificate had been filed. A certificate may be completely disregarded only if it refers to an event that did not actually take place at trial, for that kind of document is not a certificate of correction.

The Court also dealt with alleged errors in a convening order, holding that an amending special court-martial convening order signed "By direction" will be presumed to have been signed pursuant to a proper delegation of authority by the original convening authority to the junior officer whose signature appears on the amended order.¹⁰⁵ The failure of the defense to challenge the regularity of an amended order at trial constitutes a waiver. In addition, although the record copy of the original convening order failed to indicate that the convening authority's signature appeared upon the original, a presumption of regularity attaches, especially where trial counsel announced, without challenge, that charges were referred to trial by the named convening authority.

105. Moschella, 43/383.

In a case dealing with the all-important written request for trial before military judge alone, the Court held that where an amendment to the court-martial order substituted a different military judge for the one named at the time the accused elected to be tried by judge alone, the failure to require a new written request for trial by the judge alone was reversible error despite the accused's post-trial indication he was satisfied with the trial.¹⁰⁶ In Rountree, 44/116, the substituted military judge had stricken the first name of the initially-detailed military judge from the request and inserted his own first name (both judges had the same last name) after satisfying himself that the accused understood the significance of the request for trial by judge alone.

Where a recording machine failed to operate during an Article 39(a) session, the accused was not prejudiced because the proceedings were begun anew and what had transpired was then recorded at least in substance, if not in detail. Platt, 44/70. After discovering this failure, the military judge had declared a mistrial and the proceedings were begun anew. The Court found that the declaration of a mistrial puts the accused in the same position he was in before trial and that it is not a judgment of acquittal nor does it result in a dismissal of the charges. Even assuming that such a declaration operates to withdraw the charges from the court-martial, the record in Platt demonstrated that the accused affirmatively elected to proceed anew without formal return of the charges to the convening authority for a new advice and reference for trial. The accused was fully apprised of the defect in the proceedings and he not only failed to object, he reaffirmed his desire to be tried by the particular judge and expressed his willingness to proceed with the trial.

Trial Delays

With regard to pretrial delays, the Court held that where an issue as to the government's compliance with Articles 10 and 33 was litigated at trial and determined adversely to the accused, if the Court of Military Review finds the evidence

106. Rountree, 44/116.

insufficient to permit it to make an informed determination on the issue, it is within that Court's authority to order a post-trial hearing for the purpose of receiving all available evidence and to provide the Court with a record of such a hearing for consideration in further review of the case.¹⁰⁷

With regard to post-trial delays, it was held that in the absence of any errors to be corrected, delay in the action of the convening authority, although excessive, is not a sufficient basis for reversal and dismissal of charges.¹⁰⁸ Inordinate appellate delays do not "ipso facto" demonstrate prejudice and where an accused fails to identify an error that might have been redressed by a prompt review, allegations that delay in the review of his case deprived him of military due process present "no wrong to be righted."¹⁰⁹

Where errors at the trial have occurred or where errors appear in the record, however, an unduly long appellate process may result in extraordinary relief. In Fortune, 43/133, where the government conceded that instructions at a rehearing on sentence were erroneous and that a deficiency in administrative procedures had resulted in a 20-month delay in service upon the accused of the decision of the Court of Military Review affirming the sentence at the rehearing and, in the meantime, the accused had otherwise separated from the service, the Court held that no useful purpose would be served by continuing the proceedings. The plea of guilty and the sentence were set aside and the charges were dismissed. Dismissal of the charges was also found to be appropriate where a deficiency appeared in the record since there had been a delay of over a year in serving the Court of Military Review decision on the accused and since both the period of confinement and the probationary period for remission of the bad conduct discharge had expired.¹¹⁰ Where the delay in serving the Court of Military Review's decision was 19 months, the same result occurred.¹¹¹

Post Trial Sanity

Inquiry into an accused's mental condition is encouraged whenever it appears from the record that such inquiry is

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- 107. Ray, 43/171.
 - 108. Prater, 43/179.
 - 109. Davis, 43/381.
 - 110. Adame, 44/3.
 - 111. Sanders, 44/10.

warranted in the interest of justice, regardless of whether the question of sanity was raised before, and determined by, the fact finders. In Walker, 43/81, the Court of Military Appeals returned the record for further inquiry into the accused's sanity even though the record contained no medical testimony as to the accused's mental condition at the time of the offense. Various lay witnesses had testified to peculiarities of conduct by the accused, and a Court of Military Review had reduced findings of premeditated murder to unpremeditated murder because it was not convinced beyond a reasonable doubt that the accused was mentally capable of premeditating.

Court of Military Review

Article 66 of the UCMJ does not authorize reconsideration of a decision of a panel of the Court of Military Review by that Court sitting en banc.¹¹² Although Article 66(a) permits the review of and decisions in cases by panels or by the entire court, the same case may not be decided by two different groups of judges within a Court of Military Review. The Army practice of permitting, upon a majority vote of all the judges of the Army Court of Military Review, reconsideration en banc of a decision reached by a panel of judges was in conflict with the Article 66(a) provision that review was to be either by a panel or by the whole court.¹¹³ Since an accused is entitled to have his case reviewed in the manner prescribed by statute, and since review by an improper procedure is beyond the power of the unit conducting it, the Chilcote decision was retroactively applied.¹¹⁴ The applicability of Chilcote is not affected by the fact that the determination to reconsider is made by a majority of the judges of the Court of Military Review on their own motion rather than on application of the government.¹¹⁵

Miscellaneous Post-trial Matters

The right to bail pending appeal from a conviction is not of constitutional dimensions but is statutory only, and in the military there is no statutory provision therefor.¹¹⁶

112. Chilcote, 43/123; Cronney, 43/132; Mazzurco, 44/69.

113. Wheeler, 44/25.

114. Maze, 44/29.

115. Goldman, 44/76.

116. Green v. Wylie, 43/231.

The prohibition against the use of a juvenile conviction in the course of a trial does not apply to the considerations of a convening authority or subsequent reviewing officials charged with the responsibility of assessing the appropriateness of any penalty imposed by a court-martial. The convening authority's consideration of such a conviction in acting on an accused's application for a deferment of his service of confinement pending appeal is proper.¹¹⁷

Where accused had been convicted of involuntary manslaughter and the Court of Military Review incorrectly noted a conviction of voluntary manslaughter while affirming the findings and sentence, a new review of the sentence by the Court of Military Review was required.¹¹⁸

Although the Court of Military Review is generally the appropriate tribunal for reassessment of sentence found faulty by the Court of Military Appeals, where the only unexecuted portion of an accused's sentence is a punitive discharge, meaningful relief could be afforded only by returning the record with instructions that the Court of Military Review either reassess and approve a sentence not including a punitive discharge¹¹⁹ or order a rehearing on the sentence.¹²⁰

The Court of Military Appeals does not possess fact-finding power. It may not overturn a truly factual determination based upon the evidence of record made by intermediate appellate bodies possessed of fact-finding power. Where an accused was convicted and sentenced to a dishonorable discharge after he had submitted his resignation in lieu of trial and the Secretary of the Army accepted his resignation, a Court of Military Review determination that an agreement existed between the accused and the Secretary that acceptance of the resignation would constitute an action in lieu of trial constituted a factual finding within the power of that Court.¹²¹

If the Court of Military Appeals finds that the military judge failed to conduct an adequate inquiry into the voluntariness of the accused's absence from trial before proceeding

117. Id.

118. Dixon, 44/55.

119. Garza, 43/376.

120. Allen, 43/157.

121. Gwaltney, 43/328.

to try him in absentia, a rehearing at the trial level should be conducted, in the presence of the accused and counsel, to determine whether the accused was voluntarily absent from the trial. If his absence is determined to have been involuntary, a rehearing on the merits may be ordered. If found to have been voluntary, the case should be returned for completion of appellate review.¹²²

Where the accused's conviction had been affirmed by a board of review prior to the Supreme Court decision limiting court-martial jurisdiction over offenses cognizable in civilian courts, and there had been no attempt to appeal, the fact that the time within which the accused could have petitioned the Court of Military Appeals for review of his conviction did not expire until after the date of the Supreme Court's decision did not entitle the accused to relief under the Court of Military Appeals' decision holding that the limitation set forth by the Supreme Court would be applied retroactively to those cases not yet final on the date of the Supreme Court decision.¹²³

Where the Court of Military Review found that there was insufficient evidence to support the conviction of a specification alleging that the accused disobeyed an order to come into an office to have a paper bag examined, but where it affirmed the conviction because the accused disobeyed a different order to display the contents of the bag, the Court of Military Appeals held that this affirmance was correct. While the Court of Military Review should have modified the findings to reflect the change, the change itself did not affect the nature or the stigma of the offense or the sentence.¹²⁴

EXTRAORDINARY REMEDIES

Extraordinary relief will not be granted unless there is a showing that the action complained of would tend to deprive the Court of its jurisdiction or that the regular course of appellate review would not provide an adequate remedy.¹²⁵ Thus, the convening authority will not be prevented from

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122. Cook, 43/344.
123. Enzor, 43/97.
124. Maglito, 43/296.

referring charges to trial because of an alleged denial of a right to a speedy trial;¹²⁶ because of an alleged conspiracy to deprive the accused of a fair trial;¹²⁷ because the charges against the accused allegedly arose out of a violation of his constitutional rights;¹²⁸ or because pretrial restraint was allegedly imposed upon the accused solely for purposes of illegally punishing him.¹²⁹ Likewise the Court will not interfere with the Article 32 investigation because of allegations that the investigating officer is unqualified or has considered incompetent evidence.¹³⁰ Nor would the Court review rulings by the military judge refusing to grant a continuance,¹³¹ refusing to require the government to make a specification more definite and certain,¹³² and refusing to dismiss a missing movement charge in spite of an alleged illegal denial of a C.O. application by the Secretary of the Army.¹³³

An abuse of discretion, however, will form a basis for extraordinary relief. Thus, the convening authority's refusal to defer a sentence will be overturned only if the petitioner shows that he abused his discretion.¹³⁴ Even if an abuse of discretion in ordering post-trial confinement were shown, a petitioner would not be entitled to relief unless he had previously exhausted his remedies by requesting that the convening authority defer the sentence.¹³⁵

The relief requested must be necessary to remedy an existing problem. Thus, it has been held that a petition requesting discovery of a document that will be necessary in the event that anticipated future evidence is discovered is premature.¹³⁶

On rare occasions the Court will reach substantive issues in extraordinary proceedings. In Maze, 44/29, the Court held that the rule in Chilcote, supra (holding that the ACMR may not decide a case en banc after one of its panels has already decided the case) would be applied retroactively. In Petty

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126. Lozinski, 44/106.
 127. Medina, 43/243.
 128. Font, 43/227.
 129. Font, supra.
 130. Bowman, 43/255; Doherty, 43/3.
 131. Conmy, 43/122.
 132. Henderson, 44/117.
 133. Hubbard, 43/4.
 134. Green, 43/231.
 135. Lopez, 44/61
 136. Henderson, 43/5.

v. Moriarity, 43/278, the Court enjoined an Article 32 investigation where it appeared that the charges had been referred to a special court-martial and then withdrawn and referred to the Article 32 investigation when the accused requested several witnesses. The witnesses would allegedly have shown that the charges against the appellant arose out of an incident involving serious misconduct on the part of the appellant's superiors. The convening authority felt that these allegations were unwarranted, but that they should be investigated pursuant to Article 32, UCMJ. The Court held that charges can be withdrawn only for a proper reason. This was not a proper reason because the allegations did not indicate that the charges against the petitioner were more serious than originally suspected, and the forum for resolving those charges had already been selected.



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