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TRANSITION

JONES DEPARTS

The members of the Editorial Board wish to extend their thanks to Robert D. Jones upon his departure from DAD. Bob served as Editor-in-Chief of the The Advocate for over two years, and was one of those persons primarily responsible for solidifying the status of this journal. During his tenure, The Advocate was established on its bi-monthly rate of publication, and has consistently published high-quality articles of interest to military defense counsel everywhere. The increased circulation and frequent requests for copies is indicative of the value of the journal that Bob helped to create. Bob has completed his tour of duty in the Army, and recently joined the General Counsel's Office of the Interstate Commerce Commission. We wish him the best.

MARON NEW EDITOR

The Advocate would like to announce the appointment of Andrew W. Maron as Editor-in-Chief. Andy came to DAD in October 1977 from Fort Lewis, Washington, where he served as a defense counsel and chief defense counsel for two years.

ARTICLES INVITED

The purpose of The Advocate is to provide a forum for communication between military defense counsel. It is published by the Defense Appellate Division, but it is not necessary that DAD attorneys write the articles. We actively and seriously solicit articles from any other authors, especially trial defense counsel. To save time and effort, we encourage the forwarding to us of Article 38c briefs, written motions, rough unedited articles, and even outlines of proposed articles. We will examine these papers and outlines and return them to you with our comments. Our early involvement, we hope, will permit you to share your thoughts and experiences with our readers without causing you an inordinate amount of inconvenience. Please contact the members of our editorial board at any time to discuss prospective articles.

TENTH ANNIVERSARY ISSUE

Volume X, Number 1 will be published in late February or early March 1978. This issue will celebrate the Tenth Anniversary of The Advocate. To recognize this milestone, we will publish a "Symposium of Military Defense Counsel." Contributing to the issue will be many distinguished authors, including Chief Judge Albert B. Fletcher, Jr. of the United States Court of Military Appeals and Major General Wilton . Persons, Jr., The Judge Advocate General of the Army.

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EQUAL PROTECTION AND DRUG CASES

OR

The Grass is Greener on the Other
Side of the Fence (i.e., the Navy).

CAPTAIN STEVEN E. NAPPER, JAGC

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In United States v. Courtney, 24 USCMA 280, 51 CMR 796 (1976), the Court of Military Appeals (CMA) held that it was a violation of the equal protection clause to subject a soldier convicted of possession of marijuana to a maximum of five years confinement under Article 134, UCMJ, while other such offenders faced only a two year maximum under Article 92 for the same offense. The scope of this decision also included heroine and cocaine, which are classified as narcotic drugs and are punishable by ten years confinement under Article 134.

In an attempt to avoid the impact of this decision, the Army published an interim change, dated 15 January 1977, to paragraph 4-2A(7), Army Regulation 600-50, Standards of Conduct for DA Personnel (April 1972 with Change 2 and 3), which excludes marijuana and cocaine from the scope of the regulation. The effect of this change was to make possession of those two drugs punishable only under Article 134, and make the maximum punishment for marijuana offenses five years and for cocaine offenses ten years. In United States v. Jackson, 3 MJ 101 (CMA 1977), while deciding that Courtney was not retroactive, CMA intimated that the change in AR 600-50 might not be dispositive of the equal protection issue. In United States v. Dillard, 4 MJ 577, (ACMR, en banc, 1977), the Army Court of Military Review, (ACMR) decided that the change in AR 600-50 did, in fact, resolve the equal protection issue. The Air Force Court of Military Review reached a similar result in United States v. Hoelsing, 3 MJ 1058 (AFCMR 1977).

The purpose of this article is to aid the trial defense counsel in overcoming the effect of Dillard. The suggested approach involves a two-pronged attack. First, there should be an attack on the validity of the change in AR 600-50 itself on constitutional grounds. The courts, in

both Dillard and Hoelsing, appear to assume the validity of the change in the regulation. Trial defense counsel should not. Second, the rationale in Dillard and Hoelsing is suspect and should be vigorously attacked.

In order to understand fully the basis of the argument proposed in this article, it is necessary to analyze the reasoning behind the aforementioned decisions and the change to AR 600-50. The basis for the Court's decision in United States v. Courtney was that the government had "unbridled discretion" as to which Article, 92 or 134, a drug offense would be charged under. The purpose of the change to AR 600-50 was to eliminate that discretion. The change requires that marijuana and cocaine, as well as other narcotic drugs, be charged under Article 134 by removing those drugs from the scope of AR 600-50. In footnote two of United States v. Jackson, CMA stated that the change to AR 600-50 might not solve this issue, as the UCMJ "was meant to afford equal treatment for servicepersons in all branches of the armed forces". Id. 3 MJ at 102, n.2. With that, the Court changed its emphasis.

While in Courtney the Court had been interested in the classification of persons created by discretionary charging, in footnote two of Jackson the emphasis was on the class of persons created by an Army regulation. The change in AR 600-50 made the fact that a person was in the Army the sole determinative of the maximum punishment he would face for a drug offense. Footnote two suggests that the proper class is not all-Army or all-Navy, but "all servicepersons". In United States v. Dillard, the ACMR declined to follow this suggestion, and held that the class was restricted to soldiers in the Army.

The discussion that follows expands upon footnote 2 in Jackson. The first part, which attacks the constitutionality of the change to AR 600-50, focuses not on the class of persons, but on the classification of drugs in relation to the maximum punishment. For this purpose, the classification of the drug is as significant as the class of people. The second part of the article analyzes the effect of the narrowing of the class of people involved in Dillard and puts forth the constitutional infirmities of that narrowing.

ATTACKING THE CONSTITUTIONALITY OF AR 600-50

A. MARIJUANA CASES

The equal protection issue in marijuana offenses is derived from those cases, discussed *infra*, which hold that to classify marijuana as a narcotic violates the equal protection clause. In the change to AR 600-50, marijuana is not classified as a narcotic per se, but is relegated to its own category.

The suggested argument is that the distinction drawn by the drafters of the change in the regulation has no rational basis for it excludes marijuana from the class in which it belongs. This can be established, first, by demonstrating that marijuana is a mild hallucinogenic drug with some stimulant and depressant characteristics, thereby bringing marijuana within the definition of those drugs to be prosecuted under Article 92. The next step, then, is to show that the separate classification of marijuana offenses is unreasonable and without a rational basis.

The practical problem in the field is to get the evidence of marijuana's effects before the trial court. People v. McCabe, 275 NE 2d 407 (Ill. 1971) and People v. Sinclair, 294 NW 2d 878 (Mich. 1972) are good cases for this purpose. Both held that it was a violation of the equal protection clause to classify marijuana as a narcotic and each contains a detailed discussion of the effects of marijuana vis-a-vis other drugs. Both reach the same conclusion that marijuana is similar to those drugs that the Army has chosen to punish under Article 92.

Other cases which discuss marijuana and its effects in a favorable light for the defense are English v. Miller, 341 F. Supp 714 (E.D. Va 1972) reversed sub nom., English v. Virginia Probation and Parole Board, 481 F.2d 188 (4th Cir. 1973). (This was dictum and the case was reversed on other grounds. The Circuit Court criticised the dictum, however), Ravin v. State, 537 P.2d 494 (Alaska, 1975); and State v. Zornes, 475 P.2d 109 (1970). The dissenting opinions in State v. Kanter, 493 P.2d 306 (Hawaii 1972) and People v. Summit, 517 P.2d 850 (Colo. 1974) also lend support to the defense argument. In addition, the majority opinion in Summit is useful for it recognizes that there is no scientific basis for classifying marijuana as a narcotic. The majority in Summit "reluctantly" upheld the classification and was, in effect, telling the legislature that it should change the law. In Kanter, the court split three to two, upholding the classification of marijuana as a narcotic, but one judge in the majority did so on the grounds that the issue was not properly before the court, while at the same time expressing doubts as to the validity of the law.

After putting forth his authorities, the trial defense counsel must be prepared for the government's argument that these cases represent the minority view. However, careful examination of the cases put forth by the government will show that those cases can be divided into several categories which weaken their precedent value, or make them inapplicable to the defense argument.

The first group of cases relied on by the government deals with the constitutionality of making marijuana illegal, while such drugs as alcohol and tobacco are legal. As such, they do not reach the issue presented

here. The defense argument proposed here concedes that marijuana can be made illegal, the question is how it is done. See State v. Donovan, 344 A.2d 401 (Me. 1975).

A second group of cases arise from jurisdictions in which all drugs are subjected to the same maximum punishment. See Boswell v. State, 276 So. 2d 592 (Ala. 1973). These cases are not really applicable either. The thrust of the proposed argument is that marijuana offenses have been improperly excluded from the class in which they belong. In those jurisdictions where all drug offenses are subjected to the same maximum punishment, this has not been done. The fact that the legislature involved has included in the class drug offenses that might have been properly excluded does not violate the equal protection clause.

The third group of cases interprets federal law which classifies marijuana as a narcotic under Schedule I, but punishes it as a hallucinogen. See, United States v. Maiden 355 F. Supp 743 (D. Conn 1973). In that case the defense contended that the classification of marijuana with narcotics violated the equal protection clause. The court disagreed stating that there was no violation of the equal protection clause because marijuana was punished as a hallucinogen. The court went on to indicate that the defense argument "might well have force if the classification ... was the real determinant of the penalties" that were faced. Id., 355 F. Supp at 748. Thus, even though the court found no violation, the case is somewhat supportive of the defense argument.

The fourth group of cases are those which hold that there is no denial because the legislature can, in effect, call marijuana anything it wants. See Hunter v. State, 481 S.W. 2d 806 (Tex. 1972). These cases must be attacked as being wrong and not well reasoned.

In alleging a violation of the equal protection clause, the trial defense counsel should be aware of the cases of United States v. Johnson, 3 MJ 1071 (ACMR 1977) and United States v. Bartram 4 MJ 510 (ACMR 1977). These cases expand upon the Courtney rationale and hold that where an accused is charged with a drug offense under Article 92, the maximum punishment is only one year. The reasoning, based on footnote 10 in Courtney, is, in effect, Courtney in reverse. The District of Columbia Code provides for a one year maximum for the drugs involved in Bartram (Phencyclidine) and Johnson (LSD and marijuana). The defense's argument in those cases was that if the PCP and LSD were charged under the "crimes not capital" clause of Article 134, the D.C. Code maximum would apply. The Army Court of Military Review agreed and ruled that the maximum was one year. These cases are most important to a trial defense counsel in a marijuana case, for when he argues that marijuana ought to be punished the same as other hallucinogenic drugs, such as LSD and PCP, he should also contend that the correct maximum punishment is only one year.

Given the reluctance of most military trial judges to be innovative, the trial defense counsel must expect that his argument will not be considered favorably by the court. If the plea has been not guilty, the issue will be before the court and will be preserved for appeal. A problem to be aware of in guilty plea cases occurs when the judge asks the accused if he would still plead guilty if the maximum were only one or two years. Most accused say yes. Trial defense counsel should see this for what it is -- an attempt by the trial judge to remove from the record the effects of his possible error in determining the maximum punishment. If the appeal is successful on the equal protection grounds and the accused has said that he still would have plead guilty, the appellate courts will hold his plea provident.

The problem for the trial defense counsel is, if the accused states that he would not plead guilty if the maximum were only one or two years, the trial judge may refuse to accept the plea. Arguably, this would be an improper abuse of discretion (See, United States v. Williams, 43 CMR 579 (ACMR 1970) and United States v. Perez, 43 CMR 649 (ACMR 1970)), provided the reason the accused gives for not pleading does not include a denial of guilt; for example, he states that he would stand upon his right to make the government prove the case even though he feels he is guilty. This does not, however, solve the trial defense counsel's practical problem. The judge may be wrong in rejecting such a plea, but his rejection of the plea, will, for all practical purposes, deprive the accused of the benefit of the pretrial agreement. Trial defense counsel will thus find himself on the horns of a dilemma. He must choose to either advise the accused to state that he would still plead guilty, thereby possibly giving up a reversal on appeal if the maximum is only one or two years; or he must advise the accused to state that he would not plead guilty and thereby lose the practical effect of the pretrial agreement, but preserve the issue for appeal in the best possible way. The choice is at best a difficult one and should be made on a case-by-case basis after full consultation with the accused.

B. Cocaine Cases

A similar argument to that discussed above may be made in cocaine cases, although with greater difficulty, as the courts have been hesitant to hold that the legislature cannot classify cocaine as a narcotic. This, however, appears to be founded more on judicial reluctance than on the facts; for example, See United States v. Castro, 355 F. Supp 120 (N.D. Ill, E.D. 1975). Castro holds that cocaine is not by definition a narcotic but can be so classified by the legislature. This decision also contains a good discussion of other relevant cases. There are several military cases reported which deal with cocaine classification. In United States v. Zenor, 51 CMR 842 (NCOMR 1976) the court noted that cocaine did not fit the definition of either habit-forming or narcotic and then

redefined these terms so that it did. In United States v. Dean, SPCM 10941 (ACMR 15 January 1976) (unpublished), the court, in dictum, stated that cocaine was not habit forming.

The way to attack the classification of cocaine is to show that it is not a habit-forming narcotic drug. Zenor indicates that cocaine is not. The argument is then that the statutes should be strictly construed in favor of the accused. See 28 C.J.S. Supp. Drugs and Narcotics 105; and People v. Sakofsky, 257 N.Y.S.2d 240, 45 Misc 2d 456 (1965). Another prong of this argument is that there is nothing in the UCMJ itself that prohibits possession of cocaine. The only mention made of drugs, other than under Article 92, is in paragraph 213b of the Manual for Courts-Martial. The only language there concerns marijuana and habit-forming narcotic drugs. The argument is that since it is not mentioned therein, and in light of the Supreme Court dictum that Article 134 should be narrowly construed, the definition of habit-forming narcotic drugs should be strictly construed.

Another way to argue that there is not a rational basis for defining cocaine as a narcotic is to take the definition given by the court in Zenor and expand upon it. A careful reading of the way the court there defined habit-forming and narcotic shows that that definition includes such things as caffeine, tobacco, and alcohol. Since this is clearly not the case, the reasoning and the result in Zenor must be flawed.

The only case located which holds that it is a violation of the equal protection clause to classify cocaine as a narcotic is Commonwealth v. Miller, 20 Crim. L. Rptr 2331 (Mun. Court Roxbury No. 7734). In the index the Crim. L. Rptr cites this case as being reported at 349 N.E.2d 362. This is an incorrect citation. The author has been unable to locate the case in any other publication. In that case, the trial court ruled that cocaine is not a narcotic and therefore it is irrational to classify it as such. The reasoning used in Miller is the same as that put forth in the marijuana cases discussed above. Trial defense counsel should use this rationale, combined with the logical weakness of Zenor to attack the classification of cocaine as a narcotic.

ATTACKING THE DILLARD RATIONALE

In both marijuana and cocaine cases, after the initial attack on the regulation, the trial defense counsel should also contest the rationale of Dillard. In Dillard, the court defined the classification for equal protection purposes as all-Army. The way to attack this is to cite footnote 2 in United States v. Jackson, supra, and to argue that this is not the right class. In support of this position is the dissent in Dillard which makes a strong argument as to why that footnote is applicable. The next

tack to take is to cite those cases that hold it a denial of equal protection to punish persons subject to the same law differently. See United States v. Meyer, 143 F. Supp. 1 (D. 1956). Reference should be made to the fact that under Article 17 and 22(a) (7), UCMJ, an Army court-martial could try a sailor.

Counsel should then submit to the court a hypothetical case wherein a soldier and two sailors are arrested for possession of either marijuana or cocaine. One sailor is attached to the Army post and subject to the same convening authority as the soldier. The other is not. The soldier tried in the Army court will be subject to a five year maximum under Dillard. The sailor tried in the Navy court will be subject to a two year maximum, See United States v. Dillard, supra, while the other sailor will be tried in the Army court by the same convening authority as the soldier. If the sailor tried in the Army court is subjected to the two year maximum, then the soldier will have been denied equal protection of the laws. If that sailor is subjected to a five year maximum, then he will have been denied equal protection of the laws. In either case, the result of Dillard is a denial of equal protection of the laws to somebody. Any decision that can result in a denial of equal protection cannot be well founded. It should also be stressed to the trial court that this is the only crime under the UCMJ for which this could happen. All other crimes under the UCMJ have the same punishment for all the services.

CONCLUSION

The foregoing is offered as a guide to the trial defense counsel. The area is one that is a fertile area for an aggressive trial defense counsel. The trial defense counsel should be alert to this and similar issues and act at the trial level in order to best preserve the issue for appellate action. This is particularly crucial where the area of the law is new and developing and the chances for success at the trial level are minimal. It should be noted that the decision in Courtney was reached after the trial defense counsel first raised the issue in a motion at trial.

GREAT MOMENTS IN THE COURTROOM

In 1976, a BCD Special Court-Martial convened at Ft. Meade, Md. After several members of the Court were excused by the convening authority, 23 court members were assembled. After voir dire and challenges by both sides, the court sat with 18 members.

The accused, a noncommissioned officer, was charged with unlawfully removing a public record, to wit: an Article 15. He was acquitted.

IN THE WAKE OF ALEF: A RETURN TO McCARTHYISM

Captain Malcolm H. Squires, JAGC

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On 11 October 1977, the Court of Military Appeals, in the High Court's continuing effort to clarify for lower courts the indicia of military jurisdiction, decided United States v. Alef, 3 MJ 414 (CMA 1977). At the time of the Alef decision, over eighty cases involving service connection in off-post offenses were pending decision at the Court of Military Appeals. The vast majority of these cases involved the off-post possession, use, sale, transfer, and distribution of prescribed drugs.

The Alef majority reiterated that, despite apparent reluctance by lower courts, military tribunals are required to follow the mandates of the Supreme Court in the area of service connection. The Court went on to say that theories devised and embraced by the Courts of review to avoid the dictates of the Supreme Court and Court of Military Appeals and sustain military jurisdiction will not be tolerated. Alef, supra.

However, before the impact of Alef had been completely felt, the Court of Military Appeals began to issue summary dispositions in the remaining service connection cases in light of Alef. In the majority of the cases on appeal from the Army Court of Military Review, the High Court sustained the lower court's finding of military jurisdiction over the offense. As some of these cases which were affirmed had factual patterns very similar to the facts in Alef and at least one was affirmed in which the Army Court of Military Review had predicated jurisdiction on the "commuting distance" rule found unacceptable in Alef,¹ an analysis of what factors constitute service connection necessary to sustain military jurisdiction is in order.

Alef: Some Answers But More Questions

To begin the analysis, it is useful to recite the facts surrounding Sergeant Alef's confrontation with law enforcement officials. In Alef, the Court found (1) the sale of a drug, (2) cocaine, (3) occurred off-post in Florida, (4) during off-duty hours, (5) as a result of a controlled purchase, (6) instigated by an informant, (7) through off-post underlying negotiations. Furthermore, (8) Dade County (civilian) authorities participated in the apprehension. Balancing these facts against the oft-quoted Relford criteria for determining the appropriate jurisdictional forum,² the Court had no difficulty finding military jurisdiction to be totally lacking.

Examining the opinion in Alef in light of the previous opinions by the Court of Military Appeals and decisions by the Courts of Military Review

on the subject of military jurisdiction, two previously unsettled factors were finally determined. First, the kind of drug plays no part in determining whether military jurisdiction vests over the offense. Second, the civilian interest in the case (Relford Factor 8) is demonstrated by presence and assistance of the local constabulary. However, the fact that civilians adopt a "hands off" approach to military offenses will not automatically vest military jurisdiction. United States v. McCarthy, 25 USCMA 30, 35, 54 CMR 30, 35 MJ, (CMA 1977) and cases cited therein.

Despite the apparent conclusive nature of the Alef decision, many factors were left undecided. Although the commuting distance rule and its corollary were summarily rejected, the proximity of the drug transaction to the post remains a valuable factor in determining the existence of military jurisdiction. See, Alef, supra, n. 12; McCarthy, supra. In determining whether the drug involved posed a threat to the military post, the Court rejected the automatic conveyance of military jurisdiction by the type of drug involved, but did not mention whether the quantity of the illicit drug would be a factor in determining the presence or absence of military jurisdiction.³ Since the Court noted that in controlled-buy situations there was no chance that the drug would be circulated in the military community, it might have been assumed this fact in and of itself negated Relford factor 10 and automatically dismissed the potential threat to a military installation. Of greatest importance, however, to the future handling of the jurisdictional question was the meaning of the phrase "essential underlying negotiations" to a drug transaction. Alef, supra, n.6.

Summary Dispositions by Coma

Turning to the cases decided by summary disposition, it is possible to glean insight into what factors will sustain military jurisdiction. In almost every case sustaining court-martial jurisdiction, there was no evidence to show the buyer of drugs was a drug dealer. Rarely, if ever, was evidence found in the records of trial that indicated the drugs would have been returned and distributed to the military community.

If Alef failed to answer the question of the significance of the drug quantity, those cases decided in the wake of Alef dispose of this point. Even though the quantity involved in the transaction exceeded that of normal personal usage,⁴ the quantity alone raises no permissible conclusion that the purchaser was a distributor of drugs. United States v. Ryals, CM 433757 (ACMR 1976), rev'd and dismissed, MJ (CMA 1977), involved the distribution of \$300 of heroin off-post. The Court of Military Appeals found military jurisdiction lacking. United States v. Johnson, 54 CMR 864, MJ (ACMR 1977), rev'd and dismissed, MJ (CMA 1977), involved distribution of over \$400 worth of marijuana. Again, the Court found no military jurisdiction. Consequently, it appears to be settled that neither the kind nor the amount of drug involved will, in and of itself, vest military jurisdiction.

Where negotiations for the drug transaction began on post, it appears that military jurisdiction will lie. United States v. Ortiz-Negron, 54 CMR 362 MJ (ACMR 1976), aff'd, MJ (CMA 1977); United States v. Valles-Santana, 54 CMR 383, MJ (ACMR 1976), aff'd, MJ (CMA 1977); United States v. Freeman, 54 CMR 853, MJ (ACMR 1976); aff'd, MJ

(CMA 1977); United States v. Jouett, SPCM 12058 (ACMR 1976), aff'd, MJ (CMA 1977); United States v. Ruff, SPCM 12493 (ACMR 1977), aff'd, MJ (CMA 1977); United States v. Pelletier, supra; United States v. Fox, 54 CMR 1215, MJ (AFCMR 1977), aff'd, MJ (CMA 1977); United States v. Gash, 54 CMR 463, MJ (AFCMR 1976), aff'd, MJ (CMA 1977); United States v. Murphy, 54 CMR 454, MJ (AFCMR 1976), aff'd, MJ (CMA 1977); United States v. Benkovich, NCM 76 1790 (NCMR 1976), aff'd, MJ (CMA 1977); United States v. Carroll, NCM 76 2124 (NCMR 1977), aff'd, MJ (CMA 1977); United States v. McCallister, NCM 77 0234 (NCMR 1977), aff'd, MJ (CMA 1977). The question needing resolution in this area of negotiations was the formation of "criminal intent." See, McCarthy, supra at 34. United States v. Sandy, NCM 76 1308 (NCMR 1976), rev'd and dismissed, MJ (CMA 1977). It was urged by the defense on appeal in several cases that the sale of a controlled substance is not a specific intent crime and, consequently, the situs of the formulation of intent to commit the crime had little jurisdictional significance. As a corollary, it was contended that if any intent was formed on post, it was to sell, distribute or transfer the drug off post to people who were presumed to be civilians (undercover procurers of the drugs invariably passed themselves off as civilians). While the Court of Military Appeals did not specifically reject these arguments, the arguments obviously did not outweigh the service connection impact of face-to-face, on-post negotiations.

It is axiomatic that, if on-post negotiations will sustain military jurisdiction, then actual agreement to a drug transaction on the enclave is strong indicia of military interest overriding that of civilian society. See, United States v. Curtis, 54 CMR 784, MJ (AFCMR 1977), aff'd, MJ (CMA 1977); United States v. Padilla, SPCM 12494 (ACMR 1977), aff'd, MJ (CMA 1977); United States v. Stevenson, CM 434577 (ACMR 1977), aff'd, MJ (CMA 1977); United States v. Edwards, CM 434591 (ACMR 1977), aff'd, MJ (CMA 1977); United States v. Armstrong, PSCM 12658 (ACMR 1977), aff'd, MJ (CMA 1977). See also, United States v. Burston, 54 CMR 315, MJ (ACMR 1976), aff'd, MJ (CMA 1977), where the intent to use heroin off-post was apparently formed on post and where the accused left post with the narcotic he later used at a friend's off-post trailer.⁵ When the trip off-post to consummate the drug transaction originates on post, military jurisdiction will lie, apparently regardless of who is in the driver's seat. See, United States v. Burney, CM 435523 (ACMR 1977), aff'd, MJ (CMA 1977); United States v. Mayberry, SPCM 11941 (ACMR 1976), aff'd, MJ (CMA 1977); United States v. Mullins, SPCM 12478 (ACMR 1977), aff'd, MJ (CMA 1977).

A showing of prior on-post drug involvement, United States v. Freeman, supra, as well as prior offpost sales with service connection, United States v. Calloway, SPCM 11585 (ACMR 1976), aff'd, MJ, (CMA 1977), are strong indicators of military jurisdiction. The facts in Calloway bear examination. The accused was approached by a fellow soldier (undercover agent) at work about the acquisition of marijuana. Calloway agreed to get the

marijuana and later that evening went to the agent's off-post residence. The two took a short drive during which marijuana and money were exchanged. During this drive, arrangements were made for another marijuana transaction which occurred later that evening. The following day, a third sale, negotiated on-post during duty hours, was consummated off-post after duty hours. The Army Court of Military Review found military jurisdiction over the second entirely off-post transaction, as well as the first and third transfers, because it "was a direct result of the initial transaction which had occurred only hours before." Calloway, supra, ms.op. at 3. It is apparent that "essential underlying negotiations" are not to be viewed in a vacuum, but in a continuing chain of events.⁶

Two additional cases require discussion as they do not fit into any category previously delineated. In United States v. Smith, CM 435154 (ACMR 1976), aff'd, MJ (CMA 1977), the accused was convicted of possessing and attempting to sell marijuana off post, ten miles from Fort Bragg, North Carolina, on the theory that he was a principal in the commerce between an undercover agent and two other soldiers. The only evidence of service connection adduced at trial was that a confidential informant had made arrangements on post with one of the sellers (not Smith) to have this potential seller meet an undercover agent off-post later that evening to buy marijuana. To sustain jurisdiction it is surmised that the on-post negotiations by one of the sellers must have been attributed to Smith since he was convicted as a principal, even though the record is completely devoid of any on-post activity by Smith. United States v. Mitchell, SPCM 12067 (ACMR 1976), aff'd, MJ (CMA 1977) presents an even more tenuous base for military jurisdiction. An undercover informant was planted in Mitchell's company with a list of names of suspected drug traffickers. Mitchell's name was not on the list. At the initial meeting between the two, general discussion turned to the topic of drugs. Mitchell supposedly offered to aid the informant in getting to meet "cool people" with "dope" connections. Later, Mitchell, pursuant to instructions from his company, was driving the informant to an in-processing building when the informant suggested they go off-post for a prearranged meeting with an undercover agent. At this off-post meeting, actual negotiations took place for the first time. Two days later, the informant, using an on-post telephone, contacted Mitchell at his off-post residence and made final arrangements for a marijuana sale.

If the crux of military jurisdiction is predicated upon "essential underlying negotiations," then Mitchell belies any rational definition of "essential" and "negotiations" in the Alef context. A general discussion of drugs among young people today is more the norm than the exception. If the "essential underlying negotiations" are allowed to be perfected by the use of a government telephone by the installation constabulary, while the potential seller is off-post and off-duty, then the impact of Alef has been completely eroded.

One additional area of the service connection dilemma bears analysis. Does drug commerce between members of the same unit constitute such a flouting of military authority and threat to the installation that military interest automatically outweighs that of civilian authorities? In United States v. Wright, 54 CMR 897, MJ (ACMR 1976), aff'd, MJ (CMA 1977), the conviction of an off-duty military police noncommissioned officer who sold phencyclidine to a member of his unit off-post, was upheld. The Court of Military Review had based its holding on its earlier decision in United States v. Eggleston, 54 CMR 634, MJ (ACMR 1976), reversed and remanded, MJ (CMA 1977). As the Court of Military Appeals vacated the lower court's decision in Eggleston, ordering a rehearing on the jurisdiction issue, the importance of rank and the accused's duty position can best be explained by Judge Felder's dissent in Eggleston and concurrence in Wright. Whereas there was no evidence of record to suggest that Staff Sergeant Eggleston used either his rank or position to sell LSD to a subordinate in his unit who was not under Eggleston's supervision, in Wright, Judge Felder opined "the off-post sale of illicit drugs to a subordinate military policeman by a noncommissioned officer, who was also entrusted with the responsibility of law enforcement, is distinctively embarrassing to the United States Army and constitutes the flouting of military authority." United States v. Wright, supra, at 899.^c

The Key to Jurisdiction: Impact on the Military

In the wake of Alef, it is now clear that while the Court of Military Appeals requires the slavish application of the Relford factors to weigh service connection, it is a question of impact on the military service that ultimately determines whether court-martial jurisdiction will vest. Relford involved the application of the O'Callahan standard. McCarthy, supra, at 31 citing United States v. Hedlund, 54 CMR 1, 25 USCMA 1, MJ (CMA 1976). However, it was Schlesinger v. Councilman, supra, that clearly enunciated the meaning of service connection in O'Callahan:

...of course, if the offenses with which he is charged are not "service-connected," the military courts will have had no power to impose any punishment whatever. But that issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. 420 US at 760.

While trial by civil authority is preferred under O'Callahan, the Supreme Court has consistently recognized the principles of military discipline and effectiveness within the Armed Forces. Military significance of the crime is not the proper test. It is hard to imagine any crime committed by a serviceman without some significant effect on the good order and discipline of the military establishment. However, when the crime's degree of impact on the military's order and state of effective readiness is so substantial that, by comparison, civilian concern with vindicating society's interests is lacking, and, having shown its interests to be paramount, the military can demonstrate that its interest cannot be adequately vindicated in a civilian tribunal, then military jurisdiction over the serviceman will lie. United States v. McCarthy, supra, at 33 citing Schlesinger v. Councilman, supra.

It is interesting that nowhere in the Alef decision is there found the words "service impact" or any detailed discussion of service impact as fashioned by O'Callahan and further clarified by Schlesinger. The absence of positive guidance in Alef as to what factors might be sufficient to sustain service impact could lead one to believe that any criminal venture, with the preponderant elements occurring off-post, would negate court-martial jurisdiction. It is only through the summary disposition of numerous drug-related cases that a position has been formulated by the Court. That position is found in McCarthy. Where drug related negotiations or arrangements are made on post during duty hours, there is an impact on military discipline and effectiveness. Perhaps this is "the misuse and abuse of... military duties" found adequate to sustain jurisdiction in United States v. Gladue, 4 MJ 1 (CMA 1977). Perhaps such negotiations present a threat to the post or flout military authority. What is clear is that the impact on the military is sufficient to override the O'Callahan preference for civilian adjudication. Likewise, the involvement of a military policeman with his subordinates in a drug transaction presents a clear picture of the flouting of military authority with a correspondingly negative impact on military discipline.

On the reverse side of the coin, it is clear that the government will have to prove service impact, and speculative, unwarranted conclusions by lower courts as to what might have transpired between the parties to the alleged crime in times past is impermissible. See, United States v. Johnson, supra. It is also clear that when a serviceman is approached off-post during off-duty hours by government agents seeking to procure drugs, the impact on the military is not of such magnitude as to vest military jurisdiction. See, United States v. Ryals, supra, United States v. Wills, SPCM 11510 (ACMR 1976), rev'd and dismissed, MJ (CMA 1977); United States v. Cader, NCM 76 0284 (NCMR 1976), rev'd MJ (CMA 1977).

Similarly, when a serviceman approaches an undercover agent off-post, when no contact between the two has previously transpired on post, court-martial jurisdiction does not exist. United States v. Merchant, 54 CMR 737 (AFCMR 1976), rev'd, ___ MJ ___ (CMA 1977); United States v. Henderson, 54 CMR 523 (AFCMR 1976), rev'd, ___ MJ ___ (CMA 1977).

While some of the "jurisdictional victories" envisioned by defense counsel have evaporated in the aftermath of Alef, counsel should be especially attentive to the impact the transaction and its "essential underlying negotiations" have on military discipline and effectiveness. No longer can the government contend that the nature or amount of the drug, the proximity of the drug transaction to a military post, or that the drug recipient was a serviceman, in and of itself gives military jurisdiction. The fact that the accused was "blended into the civilian populace" will not automatically divest military jurisdiction. A detailed, thorough analysis and careful balancing of the Relford jurisdictional factors is still mandated. However, a mere mathematical exercise, adding and subtracting positive and negative Relford factors to arrive at a particular number, is not the solution.¹⁰ Instead, the impact of the alleged crime on military discipline and effectiveness must be assessed to determine if the constitutionally preferred disposition by civil authorities, to the exclusion of military tribunals, can occur.

FOOTNOTES

¹See, e.g., United States v. Pelletier, CM 434475 (ACMR 1976), aff'd, ___ MJ ___ (CMA 1977).

²See, Relford v. Commandant, 401 U.S. 355 (1971).

³Alef, supra, n.13. It is noteworthy that the Court of Military Appeals has never quoted or cited those cases, often relied on by the Courts of Military Review, and frequently found in appellate briefs that argue the merits of the military drug problem. See, Peterson v. Goodwin, 512 F.2d 479 (5th Cir. 1975); G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975); Schlesinger v. Councilman, 420 U.S. 738 (1975); United States v. Tinley, 54 CMR 255, ___ MJ ___ (AFCMR 1976), aff'd, ___ MJ ___ (CMA 1977). United States v. Burston, 54 CMR 315, ___ MJ ___ (ACMR 1976), aff'd ___ MJ ___ (CMA 1977).

⁴See, United States v. Williams, 25 USCMA 176, 54 CMR 284, ___ MJ ___ (CMA 1976).

⁵The Court of Military Appeals affirmance of *United States v. Tinley*, *supra*, appears inconsistent with its decision in *Alef* at first blush. However, when read with *United States v. Baker*, 54 CMR 1018, MJ (AFCMR 1977), *aff'd*, MJ (CMA 1977), it appears Airman First Class Tinley's drug involvement, both on and off base was substantial, thereby giving rise to military jurisdiction. However, it is submitted that the Air Force Court of Military Review's rationale for sustaining military jurisdiction over Tinley was erroneous.

⁶See, *United States v. Smith*, SPCM 12047 (ACMR 1976), *aff'd*, MJ (CMA 1977), where seven of the eight specifications of possession and sale of marijuana occurred on post. The eighth specification arose as a result of finding marijuana in the accused's car, parked off-post at an automobile dealership. No evidence to support military jurisdiction over this last specification was presented at trial, but the Court of Military Appeals affirmed the conviction.

⁷Although the service connection analysis must be made on a case-by-case, offense-by-offense basis rather than the preponderant elements of the total criminal enterprise concept, *United States v. Sims*, 25 USCMA 290, 54 CMR 366, MJ (1977), the Court of Military Appeals appears to have fashioned two standards of service impact, one for drug-related cases and another for non-drug-related cases. In *United States v. Ruiz*, NCM 76 1071, (ACMR 1976), *rev'd and remanded*, MJ (CMA 1977), the accused was charged with off-post larceny, communicating a threat and heroin sale offenses. The facts illicited at trial revealed no Relford factors supporting military jurisdiction. *Brief of Appellant, Id.* The Court of Military Appeals dismissed the larceny and threat charges in light of *United States v. Hedland*, 25 USCMA 1, 54 CMR, MJ (1976), but remanded the case for a limited rehearing into the question of jurisdiction over the drug offense. See also, *United States v. Baxter*, SPCM 11666 (ACMR 1976), *vacated and remanded* MJ (CMA 1977), *United States v. Koon*, SPCM 11996 (ACMR 1976), *vacated and remanded* MJ (CMA 1977), *United States v. Cherry*, CM 432910 (ACMR 1977), *vacated and remanded*, MJ (CMA 1977) where the government presented insufficient facts to allege court-martial jurisdiction, but the cases were returned for a limited jurisdictional rehearing in light of *Alef*.

⁸In a footnote, Judge Felder further defined flouting of military authority as "more than the mere violation of any provision of the Uniform Code of Military Justice or an Army Regulation. It implies a course of criminal conduct that singularly insults or makes a mockery of the military". *Wright, supra*, n.2. *CF, United States v. Pickel*, 3 MJ 501 (AFCMR 1977), *rev'd*, MJ (CMA 1977) where some of the specifications involved the sale of drugs to a noncommissioned officer in the same squadron. Apparently it is only when the transfer of the prescribed drugs to members of his unit is a person of authority that the question of threat to military discipline and flouting of authority arise.

⁹See also, Brief of Appellant, United States v. Calloway, supra.

¹⁰One finds great sympathy with retiring Judge Costello's concurring opinion in United States v. Douglas, 54 CMR 843, 847, MJ, (ACMR 1977), pet. denied, 3 MJ 92 (CMA 1977), pet. for reconsideration denied, 3 MJ 132 (CMA 1977), and his appropo analysis of the mathematical manipulation in which courts have engaged in the speedy trial arena.

CORRECTION

In Volume 9 Number 5, at page 13 line 13, the Article entitled Pretrial Confinement contained a statement that the Court of Military Appeals held that "seriousness of the offense charged" was a ground to impose confinement. This is incorrect. The Court specifically rejected the government's contention that seriousness of the offense per se justified pretrial confinement. See, United States v. Heard, 3 MJ 14, 20 (CMA 1977). We regret the oversight.

COPIES OF APPELLATE BRIEFS

A copy of the appellate briefs that are filed in all cases are sent to the convening authority where the trial occurred. The briefs are then normally forwarded to the SJA for filing. Defense counsels are reminded that they can, if they wish, request to see the briefs so that they may follow the progress of the case on appeal.

DAD is presently working on plans to send a personal copy of each appellate defense brief to the trial defense counsel. This is not final yet, but hopefully such a procedure can be instituted soon.

ACTIONS WHICH DENY AN ACCUSED'S
RIGHT TO COUNSEL

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In 1975, the Court of Military Appeals published an unofficial listing of comprehensive changes which it envisioned for the military justice system. Those portions of the list which have been put into practice (by court decision, in most cases), have enhanced the judiciary's role and simultaneously subjected all trial parties to closer scrutiny and supervision. The focus of this scrutiny is the accused - his constitutional rights and his defense, before, during, and after the trial. This article will address the Court of Military Appeals' treatment of an accused's right to counsel and the various situations which result in a denial of that right.

There are primarily three instances in which an accused is deprived of his right to counsel. These are: (1) inadequate representation by the trial defense counsel; (2) governmental acts which cause a break in the attorney/client relationship; and (3) representation of multiple accused by a single attorney.

ADEQUACY OF COUNSEL

Perhaps the first and most important area of concern when considering a potential denial of the right to counsel is the adequacy of representation by the trial defense counsel. The Court of Military Appeals has consistently demonstrated its concern for competent representation of an accused by carefully evaluating the performance of the defense counsel. The most recent case, United States v. Palenius, 25 USCMA 222, 54 CMR 549, MJ (1977), resulted in the Court of Military Appeals ordering a new review on the basis of inadequacy of the appellant's representation. The practical effect of Palenius was the extension of the trial defense counsel's scope of responsibility.

The facts of Palenius are now rather well-known. After Palenius' court-martial adjourned, and pursuant to the advice of his trial defense counsel, Palenius waived his right to representation by appellate defense counsel before the Court of Military Review. The waiver was made because the trial defense counsel told Palenius that there was a good chance his conviction would be overturned by the Court and that having counsel there would merely slow the reversal. The Court of Military Appeals decided that this erroneous advice, coupled with the lack of post-trial efforts on behalf of Palenius by the trial defense counsel, constituted inadequate representation.

The Court then utilized the Palenius decision to make a seemingly slight adjustment to the military justice system, but one which appears to have profound impact. The Court for the first time, discussed the duties and responsibilities of the trial defense counsel during the post-trial stage of the case. In this regard, the Court of Military Appeals outlined five recommended post-trial steps to be taken by the trial defense counsel. These steps are:

- 1) advise the client thoroughly regarding the appeal process, including review by the convening authority;
- 2) take action on behalf of the client during post-trial intermediate reviews including
 - a- rebuttal to the SJA review with the client
 - b- corrections to the record of trial
 - c- clemency petitions prior to the action;
- 3) isolate and identify the appellate issues, discuss them with the client, and pass them on to the appellate defense counsel when appointed;
- 4) remain available for and attentive to the post-trial needs of the client, as dictated by the exigencies of the case [e.g. deferment of confinement];

- 5) cease all actions which result in the practical termination of the attorney-client relationship.

The end result is that the Court of Military Appeals has made the trial defense counsel responsible for his client's welfare in all phases of the criminal process. The Court emphasized this responsibility by explaining that the trial defense counsel can only be relieved of his duties after an appellate defense counsel has been appointed for the client, and the Court of Military Review has granted a request for release by the trial defense counsel.

Not only has the Court of Military Appeals' decision in Palenius enlarged counsel's scope of responsibility, but in United States v. Larneard, 3 MJ 76 (1977), it reaffirmed the trial defense counsel's authority to act on behalf of his client. Larneard was given "appellate leave" (excess leave) while his case was pending before the Navy Court of Military Review. That Court's affirmance of the findings and sentence was sent to his last known civilian address, but Larneard had since moved without notifying the Navy. The decision was served on his sister on 26 August 1974. Appellant petitioned the Court of Military Appeals on 15 September 1975, explaining that he had "just received the papers." The government moved to dismiss the petition as being untimely filed and argued that constructive service was had on 26 August 1974. In denying the government's petition, the Court made many significant conclusions. Of prime importance to this discussion, however, is the Court's explanation of the role of the defense counsel. The Court reiterated the agency nature of the attorney/client relationship, emphasizing that the defense counsel has authority to act in the client's stead. As such, the Court of Military Appeals held that "service of process" may be made on an accused's attorney (if the accused has executed a valid power of attorney so designating his counsel), and that in all other matters, a defense attorney is obligated to continue all aspects of his representation of an accused despite the present unavailability of the client.

Along with this expanded responsibility and authority to act for a client, the Court of Military Appeals now requires a more stringent standard of competence by the defense attorney. Formerly, the level of competence which defense counsel had to maintain was "reasonable competence", that is, a defense attorney was expected to exercise the customary skill

and knowledge which normally prevailed within the range of competence demanded of attorneys in criminal cases. However, the Court of Military Appeals modified that formula in United States v. Rivas, 3 MJ 282 (1977). In that case, an important witness who testified in rebuttal against Rivas refused to answer the trial defense counsel's crucial cross-examination questions on grounds that they were incriminating. Trial defense counsel made no objection and no motion to strike the witness' direct testimony. The Court held that those omissions constituted inadequate representation. In so ruling the Court held that "a criminal accused is entitled to more than a competent counsel; his right is to one who exercises that competence throughout the trial." Id. at 289. This standard was elaborated, as follows:

We will not second-guess the strategic or tactical decisions made at trial by defense counsel, but where inaction occurs at a critical point where action is compelled by the situation -- where, in other words, defense counsel remains silent where there is no realistic strategic or tactical decision to make but to speak up -- then the accused has been denied "'the exercise of the customary skill and knowledge which normally prevails...'" 'within the range of competence demanded of attorneys in criminal cases.'

This is the test to be met by every defense counsel practicing within our system of criminal justice,.....

Id. at 289.

In light of the greater responsibilities placed on counsel, and the higher standard used by the courts to examine their adequacy of representation, defense counsel should be careful to not take any action in the defense of an accused which does not inure to the benefit of that particular client. Further, it is recommended that, when applicable, the actions by defense counsel be explained in an out-of-court hearing at the trial. For example, the practice of stipulating to obviously

provable aspects of the government's case should gain for the accused some advantage , tactical or otherwise. If the stipulation does not help the client in some measurable way, the representation may be suspect. This is not to say that counsel should avoid stipulations, but only that they should not be entered into without good reason.

Another example concerns defense counsel waiver of rebuttal to the Staff Judge Advocate post-trial review. That waiver is crucial, for it effectively buries (for appellate purposes) any errors contained therein. The only time defense counsel's failure to object to the post-trial review does not constitute waiver of the error is if an manifest miscarriage of justice would result. *United States v. Barnes*, 3 MJ 406 (CMA 1977). Defense counsel should, therefore, carefully scrutinize post-trial reviews to insure that they are not waiving errors. Failure to offer rebuttal, when obvious issues are present, may raise inadequacy of counsel problems.

Trial defense counsel should also be aware that allegations of inadequacy against them may occur sometime in the future. As such, attorneys should consider taking steps to prepare themselves for such an instance. Some suggestions are that counsel keep thorough records, document the reasons for tactical decisions made before and during the trial, and consider reducing to writing crucial attorney-client communications and decisions, e.g., the explanations of constitutional rights and options.

None of these suggestions will be necessary or effective, however, absent full and meaningful communication between the client and attorney during all phases of the prosecution. Such a "shared" defense of an accused, in which the client is explained all facts of the case and actively contributes to all decisions, will do more to prevent allegations of inadequacy than any other action.

GOVERNMENT ACTION

There are two frequent actions by the government which result in counsel denial that are almost institutionalized: 1) denial of the availability of individually requested military counsel; and, 2) breaking an existing attorney-client relationship.

Sometimes, notwithstanding the ability and experience of his detailed counsel, the accused will request representation by military counsel of his own choice. In such a case, the detailed counsel must accede to the client's wish and make the appropriate request. A requested individual military counsel should only be denied if he is not reasonably available. Due to personnel constraints, the government is understandably reluctant to approve requests for individual counsel and its determination of reasonable availability may not be completely objective. It is suggested that denials of requested counsel be litigated before the military judge when appropriate. Reasonable availability is a question of fact which is most appropriately reviewable by an impartial arbiter (the military judge) by means of a motion for appropriate relief. For a more detailed discussion of the techniques of such litigation, see "The Advocate", Volume 8, No. 3.

The second situation in which the government deprives an accused of his counsel occurs when the attorney-client relationship is broken by the physical separation of the client from his defense counsel. This situation usually happens subsequent to the actual court-martial when either the trial defense counsel or the convicted accused leaves the situs of the trial. The law in this area is uncertain, as three cases dealing with various aspects of the forced separation of attorney and client are presently pending before the Court of Military Appeals. United States v. Herndon, Docket No. 32,684, petition granted 12 November 1976; United States v. Iverson, Docket No. 31,962, petition granted 9 June 1976; United States v. Vick, Docket No. 34,241, petition granted 6 July 1977. A brief review of these cases illuminates the scope of the problem, and the breadth of impact the Court's decision may have on defense counsels in the future.

In Herndon, appellant's request for the presence of his appellate defense counsel at a limited hearing ordered by the Court of Military Review was denied. Appellant appealed, claiming the denial of his Sixth Amendment rights because the government refused to allow the presence of his attorney of record at the limited hearing.

Iverson involved a situation in which the Staff Judge Advocate post-trial review was served on a substituted counsel rather than the trial defense counsel. This occurred when the record of trial was forwarded to another post for action by a difference convening authority after disqualification of the original convening authority. The substitute counsel never formed an attorney-client relationship with the accused, and made no rebuttal to the post-trial review. The accused appealed and asserted that the government's action in serving the post-trial review on a substitute defense counsel improperly severed his existing attorney-client relationship.

In Vick, the accused was transferred to the Disciplinary Barracks prior to the convening authority's action. Appellant argued that he was deprived of his opportunity to personally participate in post conviction procedures and that the separation from his counsel was in violation of the right to counsel under Palenius. After oral argument in Vick and the granting by COMA of petitions in a large number of other cases which involved the same issue, the Court vacated the grant without opinion. United States v. Vick, 4 MJ ____ (CMA 23 January 1978). In Vick, there was no allegation of specific prejudice to the accused which resulted from the transfer and no requests were made by counsel or the accused to remain at the situs of the trial. Therefore, it is still uncertain whether the Court will consider it to be error when an accused is transferred from the trial situs against his stated desires. Counsel should watch with interest any further decisions by COMA in the many other cases which involve this same issue.

How the Court of Military Appeals will decide these issues is not clear, but it is obvious that each of the three issues involve crucial constitutional rights of the accused service member. It is incumbent, therefore, that trial defense counsel be aware of situations like these which involve the severance of an attorney-client relationship, and be prepared to resist the government's action if contrary to the best interests of his client. In the Vick situation, where the client is to be transferred to the Disciplinary Barracks against his desires and before the convening authority's action, defense counsel should make a written request to the convening authority to stay the client's transfer. Such a request would probably be most successful if the counsel can show how his client's situation falls within the purview of Chapter 4, Army Regulation 190-47, U.S. Army Correctional System (15 December 1975). If that fails, the appropriate action then might be a petition/motion for appropriate relief to the military judge who presided at trial. [Whether the trial judge has the authority to hear such a motion is not settled, but in the absence of case law, counsel can rely on the military judge's inherent authority under Article 39, UCMJ. Counsel can argue that because the sentence does not have legal effect until approved by the convening authority, the trial court's jurisdiction remains until the action of the convening authority. Thus, the military judge still has authority under Article 39 to hear motions for appropriate relief]. The motion should be styled as a mandamus ordering the convening authority to retain the client in the command, citing United States v. Palenius, 25 USMCA 222, 54 CMR 549 MJ ____ (1977); United States v. Carpenter, 24 USCMA 210, 51 CMR 507 (1976); and Halfacre v. Chambers, Misc. Docket No. 76-29 (13 July 1976), and set out the improper breach of an existing attorney-client relationship, consequent deprivation of the client's Sixth Amendment right to counsel, and the reasons for the request. If the military judge

refuses to hear the motion, counsel may then request the same relief in an extraordinary writ to the Court of Military Review or Court of Military Appeals under 28 U.S.C. §1651 (a) and the All Writs Act. See United States v. Frischoltz, 16 USCMA 150, 36 CMR 306 (1966). Prior to taking the steps suggested above, trial defense counsel should discuss with his client what action will most benefit him. In many cases a quick transfer to the Disciplinary Barracks is best. In others, remaining at the situs of trial to actively participate in the post-trial process may appear to be most beneficial to the client. It is to aid in the latter instance that the above suggestions are offered.

The Iverson situation affects two defense counsel --the departing trial defense counsel and the substituted defense counsel who is served with the review. The departing trial defense counsel should alert his review of the record and rebuttal of the Staff Judge Advocate's Review wherever he may be, or of his willingness to brief a new attorney should the client so desire. The substituted counsel should, if at all possible, resist acting on the new client's behalf. He should cite the difficulties in establishing a new, long-distance attorney-client relationship, and in adequately familiarizing himself with the new case. At a minimum, the substituted defense counsel should establish, on the record, any limitations placed on his representation of the accused.

REPRESENTATION OF MULTIPLE ACCUSED

The last instance which frequently leads to the deprivation of the effective assistance of counsel has been fairly well settled by case law and, as affects military counsel, been resolved by Army Regulation. However, one situation (when civilian counsel represents multiple accuseds) continues to persist frequently enough so as to cause the issue to remain in the limelight.

The most recent direction regarding the representation of multiple clients in the same case came from the Department of Army in Change 17 to AR 27-10 at Appendix D. Change 17, dated 15 August 1977, establishes a policy that prohibits military attorneys from undertaking or being detailed to represent more than one client in cases involving multiple accused, except in unusual circumstances. Even if an attorney finds himself in such an "unusual circumstances," he is not permitted to undertake the representation of multiple accused without first seeking

and gaining approval from the appropriate convening authority. Having secured such approval, the regulation then requires a military attorney (and civilian attorneys) representing several co-accused to fully inform the military judge. The military judge will then evaluate the representation issue and insure compliance with United States v. Evans, 24 USCMA 14, 51 CMR 64, MJ (1975), United States v. Blakey, 24 USCMA 63, 51 CMR 192, MJ (1976), and United States v. Piggee, 51 CMR 653, MJ (ACMR 1976).

Blakey, Evans, and Piggee are the genesis of the Department of Army policy outlined in Appendix D of Change 17, AR 27-10. While this regulation primarily controls the military attorney, Blakey, Evans, and Piggee govern the conduct of all counsel (including civilian attorneys) who practice before courts-martial.

In United States v. Evans, supra, the Court of Military Appeals ruled that an accused had not knowingly consented to the subordination of his interests to those of his co-accused by their retention of common counsel, and ordered a rehearing. In United States v. Blakey, supra, the Court of Military Appeals reiterated the Evans' holding, explaining that "it is not the rule, but rather the exception that one attorney may represent multiple accused at a joint or common trial." Id. at 193. The import of Evans and Blakey is that unless it can be demonstrated that there is no conflict, counsel cannot represent more than one accused at a joint or common trial.

The Army Court of Military Review then dealt with this issue in Piggee, holding that an accused could make a knowing, intelligent and voluntary waiver of the impediments caused by an apparent conflict of interest of his trial defense counsel. In so ruling, the Court established the following procedure to be used by military judges in situations where conflicts of interest appear:

- 1) address each defendant personally,
- 2) forthrightly advise him of the potential dangers of being represented by a counsel with a conflict of interest and the consequences of such representation,
- 3) elicit from each defendant a narrative response:

- a) that he has been advised of his right to effective representation;
- b) that he understands the details and perils of the conflict of interest;
- c) that he has discussed the matter with his attorney or an independent counsel; and
- d) that he voluntarily waives his Sixth Amendment protections.

As a practical matter, representation of multiple co-accused by a single military counsel is now a rarity. However, civilian counsel appear, with disturbing frequency, as a defense attorney representing several co-accuseds. In most cases the military detailed defense counsel for the individuals clients remain on the case. The result is military counsel representing individual co-accuseds, while the civilian counsel represents all the co-accuseds. When such a situation occurs, it is incumbent upon that military counsel to advise his client in the same particulars required of a military judge in Piggee. It is important to note that this is required even if the military counsel is subsequently excused.

CONCLUSION

The Court of Military Appeals has and is showing intolerance for the deprivation of an accused's right to counsel, whether the deprivation is through governmental action or defense counsel error. There are benefits which accrue to the defense counsel as well. The effect of Palenius and Larneard, was to elevate the trial defense counsel from that of an educated "clerk" at a processing station to that of an attorney responsible for his client in all aspects of the judicial process. However, the prestige of full professional responsibility has a price - competence without omission. The price of an accused's representation will not be borne by him nor will he bear the consequences of deprivation of counsel. Those burdens belong to counsel, the judiciary, and the government.

CLEMENCY, PAROLE, AND RESTORATION TO
DUTY FOR THE MILITARY PRISONER

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For the vast majority of military prisoners with sentences to confinement of four years or more, and for many prisoners with shorter sentences, release from confinement occurs not upon expiration of the sentence originally adjudged or reversal of the prisoner's conviction, but through clemency or parole. A much smaller number of prisoners with punitive discharges are restored to active duty, usually in conjunction with reduction of the sentence to confinement. Despite the importance of these forms of sentence relief, little is generally known by accuseds or their counsel outside of the confinement setting about the mechanics of the process for obtaining clemency, parole, and restoration to duty. The availability and probability of clemency and parole are, and should be, of vital concern to the accused even before his trial, not only because of his desire to know as nearly as possible how much time he will probably have to spend in actual confinement, but also because considerations of sentence relief have a great deal of impact on the desirability or undesirability of a given pretrial agreement. ▸

The purpose of the following article is to describe eligibility requirements for the various types of sentence relief available in the military, to identify the sources of such relief, to trace the process whereby a prisoner (and in particular, a prisoner at the U.S. Disciplinary Barracks) is considered for clemency and parole, and to discuss the factors which are taken into account in the decisionmaking process. Much of the information, especially the material relating to the manner in which various aspects of the inmate's confinement record and prior military service affect consideration for sentence relief, is derived from interviews with members of the United States Disciplinary Barracks (USDB) correctional staff,¹ as well as from the experience of the author as defense counsel assigned to the USDB.

I. AUTHORITY TO GRANT SENTENCE RELIEF

The first and most obvious source of "clemency" for the military prisoner is his original court-martial convening authority, who has in effect the power to grant total or partial clemency by disapproving all or part of

an adjudged sentence.² In addition, any convening authority authorized to convene the same type of court as that which imposed the original sentence and who later exercises jurisdiction over the accused has the authority to mitigate, remit, or suspend, in whole or in part, any unexecuted portion of a sentence.³ The notable exception to this rule is the convening authority exercising jurisdiction over prisoners at the USDB or institutions in the Federal Bureau of Prisons system.⁴ Since under current Army regulations all but a handful of prisoners with a term to confinement plus punitive discharge as part of their sentences serve their confinement time at the USDB,⁵ the practical effect of the clemency power just described occurs in the case where a prisoner finishes serving his sentence to confinement prior to completion of appellate review in his case. In such cases, the former prisoner has the option of returning to active duty pending the outcome of his appeal, and the convening authority at his newly-assigned post may during this interim period take clemency action with respect to him.

At any time prior to completion of appellate review, The Judge Advocate General of the Army may mitigate, remit, or suspend any unexecuted portion of a sentence.⁶ It would appear that, at least in the case of inmates confined at the USDB, this authority is rarely if ever exercised. The clemency authority of The Judge Advocate General and that of convening authorities subsequent to the original authority does not apply to cases involving dismissals, the death penalty, or general officers.⁷

With respect to USDB inmates and military prisoners in federal civilian penal institutions, clemency authority is generally restricted to the Secretary of the Army with a few significant exceptions. As might be expected, the fact that a prisoner is transferred to the USDB prior to the time the original convening authority takes his action in the case in no way deprives that convening authority of his power to disapprove all or any part of the adjudged sentence.⁸ Although it is not generally known, the Commandant of the USDB has some significant clemency authority of his own with respect to both USDB inmates and those inmates confined in federal civilian prisons. Probably the authority most frequently exercised by the Commandant is the power to mitigate, remit, or suspend all uncollected forfeitures, regardless of the length of the sentence.⁹ This type of clemency is normally afforded to inmates with good institutional records as an incentive to earn assignment to certain key industrial and service jobs within the USDB.¹⁰ It should be noted, however, that once a prisoner passes his date of expiration of term in the service (ETS), or once his appeal is final and his discharge is executed, he is no longer in a pay status and cannot receive military pay whether or not he has forfeitures in effect.¹¹

The Commandant, USDB, also has total clemency authority with respect to the sentence of any summary or special court-martial, except that in cases where the prisoner has a bad conduct discharge as part of his sentence

and applies for and is denied favorable action by the Commandant, such denial must be reviewed by the Secretary of the Army.¹² The Commandant's clemency authority as to sentences of general court-martials is considerably more limited. If a prisoner is convicted of a "solely military offense" and he has less than six months to serve (after deduction of good conduct time) upon arrival at the USDB, the Commandant may suspend the unexecuted portion of confinement and may also, if the prisoner shows potential for rehabilitation, transfer him to the U.S. Army Retraining Brigade, the Commander of which will in turn make a determination as to whether the prisoner should be restored to duty.¹³

The Secretary of the Army has total authority to remit or suspend an unexecuted part of a court-martial sentence, with the single exception of a sentence approved by the President.¹⁴ The Secretary has, however, delegated to the Army Clemency and Parole Board the power to make determinations as to parole of prisoners, including the power to waive various regulatory requirements for parole eligibility.¹⁵ Adverse decisions of the Clemency and Parole Board, however, can be, and frequently are, appealed to the Special Assistant to the Under Secretary of the Army.¹⁶ In addition, the Board is charged with responsibility for recommending for or against clemency (including changes in types of discharge) in individual cases, as well as the responsibility for developing uniform policies for the clemency and parole of prisoners.¹⁷ The Board consists of a permanent chairman, who is a civilian, and two field grade officers, of whom one must have legal training or experience in corrections.¹⁸

II. ELIGIBILITY CRITERIA

All USDB prisoners, all military prisoners in federal institutions, and all former USDB prisoners on parole are eligible for clemency and, in fact, must be considered for clemency at least once a year by the Army Clemency and Parole Board.¹⁹ Eligibility for restoration to duty is defined largely in the negative -- Army regulations provide that in the absence of "exceptional circumstances" conviction of one of a number of classes of crime will disqualify a prisoner from consideration for restoration. Included among the disqualifying offenses are crimes generally recognized as felonies in civil law, serious crimes evidencing disregard for the "rights or feelings of others" which are "willfully malicious, brutal, heedless, and lacking in serious provocation", desertion or AWOL with intent to avoid hazardous or important duty, or a history of repeated drunkenness, narcotic addiction, or "continued difficulty in adjusting to military life."²⁰ Largely as a result of the narrowness of the category of remaining eligible prisoners, the percentage of prisoners with punitive discharges who are restored to active duty is very small--approximately 2 percent.

In order to be eligible for parole, a prisoner must meet several quantitative requirements. He must first of all have a sentence to confinement of at least one year and a day.²¹ In addition, if his sentence is

three years or less, he must have served at least one-third of his term or six months, whichever is greater. If the sentence is longer than three years, the inmate must have served at least one year of the sentence.²² Beyond this requirement, it is up to the Clemency and Parole Board to determine the prisoner's parole eligibility date, but the Board cannot postpone that date for longer than one-third of the sentence.²³ In the case of a sentence in excess of 30 years, the Board cannot postpone parole eligibility past 10 years.²⁴ Of course, there is no obligation on the part of the Board to grant parole at any point in time merely because the prisoner is eligible. In addition to meeting the above requirements, the prisoner must have as part of his sentence an unsuspended punitive discharge, as no inmate is paroled back to duty. A lower federal court has recently held in equal protection grounds that military prisoners confined in civilian institutions are entitled to be considered for parole in accordance with the military's parole eligibility rules rather than the less lenient rules established by the Federal Parole Commission.²⁶

There are two forms of parole which do not involve a permanent departure of the prisoner from the USDB. In cases of critical illness or death of an immediate relative, the Commandant may authorize temporary parole, normally for periods no longer than one week.²⁷ For prisoners in minimum "A" custody (i.e., local parolee status), there is an annual Special Temporary Home Parole authorized for approximately one week.²⁸ This parole is frequently granted on or near the Christmas holidays, and is provided in order to strengthen the prisoner's family ties, provide an incentive for positive behavior, and provide an opportunity to examine the inmate's performance outside of confinement.²⁹ The quantitative requirements for Special Temporary Home Parole eligibility are somewhat complex, and are contained in AR 190-47.³⁰

III. PROCEDURE FOR CONSIDERATION

A. General.

Clemency actions which are taken directly by the Commandant, USDB, are normally granted or denied only upon special written request from the inmate concerned to the Commandant. One exception is restoration of military pay, which is normally recommended by an Assignment Board at the USDB when it makes a recommendation to place an inmate in a key industrial or service work detail.³¹ Requests for clemency from The Judge Advocate General or a subsequent convening authority following return to duty pending appeal may be addressed directly to that authority.

For inmates being considered for clemency, parole, or restoration to duty by Secretarial action or action of the Army Clemency and Parole Board, there are basically four procedural steps involved in processing the case. They are: (1) Recommendation by the Disposition Board, USDB; (2) Recommendation by the Commandant, USDB; (3) Recommendation or (in the case of Parole) action by the Army Clemency and Parole Board; and (4) Action by the

Secretary of the Army (in the case of clemency or restoration to duty) or on appeal of parole denial to the Special Assistant to the Under Secretary of the Army. Each of these steps is discussed in more detail below.

B. Disposition Board.

Each inmate is entitled to consideration of his case by a Disposition Board at least once a year.³² In addition, special boards may be requested and granted between annual boards if the prisoner demonstrates a compelling reason for such a board, such as a recently-arisen family problem or other major change in the inmate's status.³³ The purpose of a Disposition Board is to make recommendations concerning four methods of removal of the inmate from the USDB -- clemency, parole, restoration to duty, and transfer to a civilian federal prison.³⁴ No prisoner is considered by a Board until the USDB has received his convening authority action. The length of time between the arrival of the inmate's convening authority action and his Disposition Board depends on the length of his sentence, with "short-timers", (i.e., inmates with sentences of eight months or less) given priority over others. Those with sentences of two years or longer can usually expect to meet the first Disposition Board six to eight months after the adjudged date.³⁵

A Disposition Board is composed of at least three officers, of whom one is a permanent member and a field grade officer.³⁶ All Board members are part of the USDB permanent staff, and most are either Military Police officers or Medical Service Corps officers. Each member is assigned certain cases on which he must brief the other members. The Board also views admissions and progress summaries prepared by psychologists and social workers working within the Directorate of Mental Hygiene. The Board views the inmate's correction record, including disciplinary reports and work evaluations. Normally the only information the Board sees regarding the offense is from the admission summary, although frequently the Correctional Treatment File contains a copy of the Staff Judge Advocate's review. The members do not have a copy of the inmate's record of trial, and would not normally be aware of (for example) testimony in extenuation and mitigation unless the inmate brought it to their attention.³⁷

The inmate is entitled to appear before the Board and to present any written matter (including letters of recommendation or portions of his record of trial) which he desires. In order to be considered for restoration to duty a prisoner must submit a written application in which he acknowledges that if his request is accepted, he will submit to a period of retraining and that failure to complete such training may result in imposition of the remainder of his court-martial sentence.³⁸ At the Board hearing, the inmate is not entitled to legal representation and few inmates even seek legal advice prior to the proceeding.³⁹

Prior to the convening of the Board, the inmate is interviewed by the Program Officer, USDB, or, if he is requesting and is eligible for parole, the Parole Officer. During these interviews, the inmate receives an opportunity to express his desires and to be counseled as to the most appropriate program for him. These officers also explain the eligibility requirements and the Parole Officer together with the inmate will formulate a parole plan to present before the Board.⁴⁰ In cases where the inmate has requested parole, the Parole Officer makes a recommendation.

After the Board meets, it makes a recommendation as to clemency, parole, restoration, or transfer to a federal institution, or some combination of these actions. This recommendation is by regulation secret⁴¹ and cannot be revealed to the inmate. The recommendation is forwarded to the Commandant, USDB, who makes a recommendation of his own and forwards the case to Washington. The average time from the convening of the Disposition Board to final action from the Secretary or the Clemency and Parole Board is about six weeks.

C. Army Clemency and Parole Board; Secretarial Action.

The Army Clemency and Parole Board employs professional correctional analysts to brief and summarize the prisoner's record and the recommendations made by the Commandant and the Disposition Board. These are forwarded to the Board members who (in the case of consideration for clemency or restoration to duty) make a recommendation to the Secretary of the Army or (in the case of parole) make a determination as to parole eligibility and as to whether or not to grant parole.

Army regulations prohibit personal appearances by a prisoner or his counsel before the Clemency and Parole Board.⁴² However, the Board is required to consider all written material submitted by the candidate for clemency or parole, and this may, of course, include statements from counsel as well as recommendations from cadre personnel at the USDB.⁴³

Adverse decisions on parole are appealable, and the Parole Officer, USDB, and his staff frequently assist inmates in filing their appeals. Although exact statistics are not available, the Clemency and Parole Board and the Secretary of the Army ultimately follow the recommendations of the Disposition Board in approximately 85 percent of the cases processed. About one in five appeals of parole denial is successful.

IV. EFFECT OF VARIOUS FACTORS ON SENTENCE RELIEF

A. General.

While many factors affect the determination whether an inmate will receive favorable action on his sentence, there can be no doubt that the two most important considerations are the seriousness or lack of seriousness

of the offense and the nature of the inmate's record in confinement. Beyond these considerations, there follow, in approximate order of importance, the relative length of his sentence vis-a-vis typical sentences for similar offenses,⁴⁴ the prior military and civilian record of the prisoner, demonstrated family need or other compassionate considerations, recommendations of the military judge or Staff Judge Advocate, recommendations of professional staff (especially officers) of the USDB, recommendations of former commanders and supervisors, and recommendations by others.

A poor disciplinary record at the USDB usually blocks favorable consideration regardless of the strength of the other factors present in the case. It is rare, for example, for an inmate to receive any favorable recommendations from a Disposition Board when at the time of consideration he has forfeited good conduct time outstanding. It would be even more rare for an inmate domiciled in maximum custody grade to receive favorable consideration (other than a federal transfer, which may be viewed as favorable in the inmate's eyes).

The necessity for a clean institutional record is especially acute in the case of long-term inmates, consisting primarily of those with sentences of five years or more. A typical pattern for an inmate with a sentence of (for example) thirty years and a good confinement record is to receive no favorable action other than custody elevation at the first two or three annual boards. On the third or fourth board, he may receive a clemency cut in his sentence -- perhaps five years or less. Subsequent annual Boards would increase the size of the cuts, and advance the inmate's parole eligibility date. Eventually he would be paroled. In the case of the hypothetical inmate with the thirty year sentence and a perfect or near perfect record at the USDB, he might well be released on parole after serving five to seven years actual confinement time. However, any misconduct on his part would postpone the consideration he might otherwise receive -- so that he would be getting his initial (smaller) sentence cuts only after serving several years in confinement, and the entire timetable would be pushed back. The figures given are, of course, hypothetical and approximate, and there are often significant differences from one case to the next.

B. Clemency.

Although the term "clemency" encompasses any type of reduction in sentence, in practice clemency action by the Secretary of the Army almost invariably takes the form of a shortening of the confinement term. Clemency action by the Commandant of the USDB, however, comes most often in the form of a suspension of forfeitures of pay.

The Correctional Classification Program Handbook, used as a guide for Disposition Board members at the USDB, lists the following factors as weighing favorably for clemency; youth at time of offense, situational nature of offense, clear prior military and civil record, length of military service, verified family need, development of occupational skills, increased maturity, length of confinement, meaning clemency has for offender, effect of clemency upon inmate population, and psychiatric recommendation. On the other side of the coin, the handbook recognizes the following as factors militating against clemency: serious nature of the offense, relatively short sentence, prior civil and/or military offenses, effect of release upon military service, short period of military service, short period of confinement served, poor adjustment to confinement, remaining portion of sentence can best be served under parole supervision, effect upon inmate population, and meaning clemency has for the offender.⁴⁵

C. Parole.

When a prisoner is released on parole, he is allowed to serve the remainder of his sentence under the supervision of a U.S. Probation Officer outside a penal institution. Parole does not involve a reduction of the confinement term. In fact, a parolee must agree, as a condition of parole, to forfeit his accrued good conduct time, so that the date on which he obtains "freedom" is actually postponed beyond what it would have been had he remained in confinement.⁴⁶ Parole involves some significant deprivations of freedom, including restrictions on travel, occupation, and personal association, and a violation of parole conditions can result in return to confinement (following a parole revocation hearing) for service of the remainder of the term without credit for the time spent on parole.⁴⁷ While on parole a parolee continues to receive annual clemency consideration which frequently results in reduction in the time to be served on parole.

The Correctional Handbook includes as factors favorable to parole the "optimum time" for release, good response to the institutional program, first offender, clear civil record, extensive honorable service, stable family or marital status, meaning parole has for offender, adequate parole plan submitted, postrelease supervision is considered desirable, and capable of complying with parole requirements. Also included in the list is family need. Parole is less likely to be granted if the following appear: further confinement would be beneficial, poor response to institutional program, previous offenses, civil criminal record, personality disorder (alcoholism, drug addiction), unstable employment record, lack of family ties, adverse effect upon the community or military service, unrealistic parole plan, and "Nomadic tendencies".⁴⁸

D. Restoration to Duty.

The Correctional Handbook recites the following as circumstances pointing toward favorable consideration for restoration: demonstrated capability for further service, favorable prior service record, possession of skills

needed by the service, meaning restoration has for the individual, strong motivation, evaluation of inmate by former commanding officer and SJA, stable personality, evidence of willingness to accept responsibility, nature of offense, youth at time of offense, and first offender. On the other hand, any of the following would lessen the likelihood of restoration: failure to meet physical and intellectual standards, poor prior service adjustment, relatively short period of prior service, lack of aptitude, lack of motivation, unstable personality, disturbed family situation likely to affect service, civil criminal record, serious nature of offense, and poor response to institutional program.⁴⁹

E. Protestations of Innocence.

Perhaps the mistake most frequently made by inmates in appearing before Disposition Boards is to belabor protestations of their innocence. This does not and cannot help the inmate, as the Board members are in effect directed by USDB policy to assume that the prisoner is, in fact, guilty of the offense of which he was convicted.⁵⁰ Furthermore, due to the surprisingly large number of inmates (including a number who pled guilty at trial) who do protest their innocence at these Boards, it is impossible and inappropriate for the Board members to try to redetermine the facts of each case as though they constituted a second court-martial. Consequently, to the extent that an inmate may affect the decision of his Board at all by attempting to convince the members that he is innocent, he may succeed only in destroying his own credibility.

If anything, a penitent attitude normally makes a more favorable impression on the Board than persistent cries of innocence. This is not to suggest that an inmate who sincerely feels himself wrongfully convicted should lie to the Board and admit guilt. It does mean, however, that to the extent such an inmate chooses to discuss his offense at all with the Board, it is normally in his own best interest to confine his comments concerning the case to matters in extenuation and mitigation and to answering specific questions posed by the Board members.

F. Assistance of Counsel.

While the military defense counsel cannot represent his client at the various administrative board hearings in the sentence reduction process, in appropriate cases there is a valuable role which he can play. First of all, he can advise his client, especially in the difficult time immediately following imposition of sentence, of the availability and probability of clemency and parole in his case. Secondly, if his client has made a favorable impression on the military judge or Staff Judge Advocate, he may request letters from them recommending clemency or restoration to duty. The same applies to recommendations of former company commanders. Counsel can also inject a greater element of certainty and

confidence in his client by showing a familiarity with the clemency and parole system on which the client will soon be heavily dependent for his early freedom. Finally, a word to the intelligent client about the manner in which his conduct in confinement will affect clemency determinations may save the client from having to learn the importance of a good institutional record the hard way.

FOOTNOTES

¹Most of the information relating to procedures and policy considerations in the administration of the Army Clemency and Parole Program is derived from the staff of the Programs Office, U.S. Disciplinary Barracks, which is charged with responsibility for processing recommendations for clemency, parole, and restoration.

²Article 64, Uniform Code of Military Justice, 10 USC §864 (1970) (hereinafter cited as UCMJ); Manual for Courts-Martial, U.S., para. 86a (Revised 1969) (hereinafter cited as Manual).

³AR 190-47, para. 6-21a (Change 1, 3 March 1976).

⁴Id., para. 6-21b.

⁵AR 190-47, para. 4-2a (Change 1, 3 March 1976) provides that prisoners with unsuspended punitive discharges who would have more than 30 days confinement remaining to serve (after deduction of good conduct time) upon arrival will be transferred to the USDB. Other prisoners with unsuspended punitive discharges serve their sentences at the facility where confined at the time of trial.

⁶AR 190-47, para. 6-21 (Change 1, 3 March 1976).

⁷Id.

⁸Id., para. 6-21b(1).

⁹Id., para 6-21(b) (3).

¹⁰Correctional Classification Program USDB Memorandum, para. 15-1, para 3-2b (1 December 1976) (hereinafter cited as Memorandum).

¹¹Department of Defense Pay Manual, para. 1031b(19)).

¹²AR 190-47, para. 6-21(b) (3), (Change 1, 3 March 1976).

¹³Id.

- ¹⁴Article 74, UCMJ: AR 190-47, para 6-21(b) (Change 1, 3 March 1976).
- ¹⁵AR 15-130, para. 2b(1) (6 August 1975); AR 190-47, para. 12-5a (15 December 1975).
- ¹⁶AR 15-130, para. 2b(1) (6 August 1975).
- ¹⁷Id., para 2b(2).
- ¹⁸Id., para. 2a.
- ¹⁹AR 190-47, paras. 6-15e, h (Change 1, 3 March 1976).
- ²⁰Id., para 6-16a.
- ²¹AR 190-47, para 12-5a(1) (15 December 1975).
- ²²Id.
- ²³Id., para. 12-5a(2).
- ²⁴Id.
- ²⁵Id., para 12-5a
- ²⁶King v. Federal Bureau of Prisons, 406 F. Supp. 36 (E.D. Ill. 1976).
- ²⁷Id., para. 6-14a.
- ²⁸Id., para. 6-14b.
- ²⁹Id.
- ³⁰Para. 6-14b.
- ³¹Memorandum, para. 3-2.
- ³²AR 190-47, para. 6-15e (Change 1, 3 March 1976).
- ³³Id., para. 6-15g.

- ³⁴Memorandum, para. 4-1.
- ³⁵AR 190-47, para. 6-15f (Change 1, 3 March 1976).
- ³⁶Memorandum, para. 4-1.
- ³⁷Id., para. 4-6, 4-7.
- ³⁸AR 190-47, para. 6-17 (Change 1, 3 March 1976).
- ³⁹Id., para. 4-7c.
- ⁴⁰Id., para. 4-5.
- ⁴¹AR 190-47, para. 12-8, Chap. 6; Memorandum, para. 4-7c.
- ⁴²AR 15-130, para. 5f (6 August 1975).
- ⁴³Id., para. 5e.
- ⁴⁴AR 15-130 (6 August 1976).
- ⁴⁵Memorandum, para. 4-11a.
- ⁴⁶AR 190-47, para. 12-7a (15 December 1975); USDB Memorandum 600-100, para. 2-19a (15 January 1976).
- ⁴⁷AR 633-30, para. 2h(2) (6 November 1964); AR 190-47, para. 12-27c (15 December 1975).
- ⁴⁸Id., para. 4-18.
- ⁴⁹Id., para. 4-13a.
- ⁵⁰See Memorandum, para. 4-8. "(I)t must be remembered that (the prisoner) was not an innocent man who was arbitrarily convicted but rather a soldier... who had actually committed the offense, whose rights were fully protected by the provisions of the Uniform Code of Military Justice, and who...could not have received a penalty greater than allowed by law."

TRIAL AND APPELLATE STATISTICS

The attorneys in the Defense Appellate Division (DAD) and Field Defense Services Office are frequently asked questions such as, "What is the Army's conviction rate?", "How many trials are by military judge alone?", "How long does it take before DAD files a brief in a case?", or "How often does the Army Court of Military Review (ACMR) grant relief?" Answers to these questions and many others are available in the various administrative offices of the ACMR Clerk of Court and DAD. The Advocate thought that such information would be of interest and potential value to trial defense counsel.

Listed below are statistics which concern three separate areas of the military justice system. Tables I and III sum various factors from courts-martial received by the ACMR Clerk of Court during the period 1 April 1977 - 30 September 1977. Table II is a comparison of court-martial data involving trials before military judge alone and a court with members. Table III is the 1977 average caseload of the Defense Appellate Division. Table IV summarizes the actions of the Army Court of Military Review during 1 April 1977 - 30 September 1977. Sources of this data are the Statistical and Coding Branch, Office of the Clerk of Court, Army Court of Military Review, and the Defense Appellate Division.

TABLE I: COURT-MARTIAL SUMMARY

1 April 1977 - 30 September 1977

	<u>GCM</u>	<u>BCD Special</u>	<u>TOTAL</u>
Persons Tried	567	329	896
Military Judge Alone	61%	76%	
Enlisted Members on Court	19%	7%	
Guilty Plea	52%	56%	
Negotiated Plea	85%	67%	
	<u>EM</u>	<u>Officers</u>	<u>TOTAL</u>
Persons Tried	889	7	896
Convictions	811 (91%)	5 (71%)	816 (91%)
Discharges	89%	100%	
Dishonorable Discharge	16%	---	
Bad Conduct Discharge	73%	---	
Convening Authority Suspension of Discharge			
Dishonorable Discharge	2%	---	
Bad Conduct Discharge	12%	---	

	<u>GCM</u>	<u>BCD Special</u>
Median Confinement Adjudged		
Negotiated Guilty Plea	12-17 Mo.	3-5 Mo.
Non-Negotiated Guilty Plea	9-11 Mo.	Under 3 Mo.
Not-Guilty Plea	12-17 Mo.	3-5 Mo.

Offenses	<u>Percentage</u>
Article 92 & 134 (drugs)	24%
Article 121 (larceny)	14%
Article 128 (assaults)	9%
Article 86 (AWOL)	8%
Other	45%

TABLE II: COMPARISON BETWEEN MILITARY JUDGE AND JURY

1 October 1976 - 30 September 1977

	<u>GCM</u>		<u>BCD SPECIAL</u>	
	Court w/ Members	Military Judge Alone	Court w/ Members	Military Judge Alone
Number of Persons Tried	525	716	150*	529*
Number Convicted	404 (77%)	643 (90%)	150	529
Punitive Discharge Adjudged	286 (55%)	562 (79%)	150	520
Forfeitures Adjudged	350 (67%)	605 (85%)	107 (71%)	450 (85%)
Confinement Adjudged	338 (64%)	613 (86%)	127 (85%)	482 (91%)
Period of Confinement Adjudged				
1 - 12 Months	175 (52%)	308 (50%)		
13 - 24 Months	69 (20%)	171 (28%)		
25 - 60 Months	60 (18%)	95 (16%)		
61 -120 Months	21 (6%)	24 (4%)		
120 + Months	9 (3%)	11 (2%)		
Life	4 (1%)	4 (1%)		

As only those cases in which BCDs are adjudged are forwarded to the Court for review, the only two areas for comparison are in forfeitures and confinement.

TABLE III: BACKGROUND FACTORS*

1 April 1977-30 September 1977

	<u>Accused</u>	<u>Army-Wide</u>
<u>Education</u>		
Less than high school graduate	38.5	14.6
High school graduate (GED included)	55.7	61.1
Attended college	4.6	22.1
College graduate	0.9	2.2
Unknown	0.3	---
<u>Age</u>		
17-19	34.3	23.9
20-24	51.7	42.1
25-29	9.2	16.2
30-34	3.3	8.0
35-39	1.2	6.0
40-over	0.3	3.8
<u>Mental Group</u>		
I	2.6	7.4
II	20.5	31.9
III	56.5	46.6
IV	17.9	13.2
V	0.9	0.9
Unknown	1.6	--
<u>Martial Status</u>		
Single	66.3	45.5
Married	31.5	54.5
Separated	0.2	Unknown
Divorced	2.0	Unknown

*Comparison background factors of enlisted personnel whose records of trial were received at the Clerk of Court's Office and all Army-wide active duty personnel.

TABLE IV: DEFENSE APPELLATE DIVISION CASELOAD

1977 Average
1 January - 31 December 1977

Active Cases	1808
Cases Received Each Month	127
Guilty Plea Cases	52
Not-Guilty Plea Cases	75
Cases Closed Each Month	127

ACMR

CMA

Cases Filed Each Month	137	Petition Briefs Filed Each Month	91
Misc. Pleadings Filed Each Month	54	Misc. Pleadings Filed Each Month	20
Oral Argument Each Month	9	Oral Arguments Each Month	3
Days to Brief Filed (G Plea)	50		
Days to Brief Filed (NG Plea)	111		

TABLE V: ACTIONS BY ARMY COURT OF MILITARY REVIEW

1 April 1977 - 30 September 1977

Findings and sentence affirmed	938 (80.1%)
Findings affirmed, sentence modified	72 (6.2%)
Findings affirmed, sentence reassessment or rehearing as to sentence only ordered	1 (0.09%)
Findings partially disapproved, sentence affirmed	9 (0.08%)
Findings partially disapproved, rehearing ordered	4 (0.3%)
Findings & sentence affirmed in part, disapproved in part	20 (1.7%)
Findings & sentence disapproved, rehearing ordered	95 (8.1%)
Findings & sentence disapproved, charges dismissed	11 (0.9%)
Returned to Field for New SJA & C/A action	20 (1.7%)
Miscellaneous decisions disposing of a case	1 (0.09%)
TOTAL	<u>1171</u>

ANCILLARY ACTIONS BY COURT OF MILITARY REVIEW

Petition for extraordinary relief, denied	1
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"WATCHTOWER"

or

Points to Ponder

1. Conditions in Pretrial agreements. A variety of briefs have been filed by DAD attorneys objecting to various provisions in pretrial agreements. The contention is that the pretrial agreement should be specifically limited to an offer to plead guilty for a set maximum sentence (see, United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968)). In this regard, briefs have been filed contesting conditions in pretrial agreements which permit the convening authority to void the agreement if the accused changes his plea at a later rehearing or if the accused commits an "act of misconduct" between the trial and the action (contra, United States v. Rankin, 3 M.J. 1043 (NCOMR 1977)). Additionally, objections have been made to the requirement that the accused enter into a stipulation of fact, especially where that stipulation contains extensive information of uncharged misconduct (see, United States v. Mendez, CM 435566 (ACMR 9 January 1978) (memorandum opinion)). The law is presently unclear in this area, and, until it is certain, it is suggested that defense counsel resist, if possible, any collateral conditions in pretrial agreements. Counsel should be especially careful that stipulations of fact include only the minimum information that will satisfy the government, and should not agree to stipulations which contain uncharged misconduct. If counsel must agree to a stipulation which he considers improper in order to get the benefits of a pretrial agreement, it is suggested that this fact be put on-the-record.

2. Defense waivers. A number of records of trial have been received at DAD from a jurisdiction which contain numerous waivers of rights by the accused servicemembers. These waivers appear to be prompted by the military judge by apparently requiring that a "waiver form" be offered into evidence by the accused, and by on-the-record questions and injunctions of the military judge. Defense counsel who might be confronted with such a situation should resist, if at all possible, any waiver of rights by his client other than the three rights waived by a guilty plea (see, paragraph 3-1, DA Pam 27-9, Military Judges Guide).

3. Post-trial interviews. As defense counsel should be aware by now, post-trial interviews have been discouraged by OTJAG policy letter. Therefore, it is doubtful that such interviews will be conducted any longer for purposes of the staff judge advocate's post-trial review.

United States v. Hill, 4 M.J. 33 (CMA 1977). However, at various times defense counsel may still desire personal interviews of a convicted accused prior to the convening authority's action, for purposes of reducing the findings and sentence. There is authority to support the request for such an interview, e.g., United States v. Hill, supra; United States v. Palenius, 25 USCMA 222, 54 CMR 549 (1977); United States v. Vick, 3 M.J. 266 (CMA 1977) (order granting petition for review); United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955); Article 38(c), UCMJ. Any request and denial, if applicable, should be documented for inclusion in the allied papers of the record of trial.

4. Military judge's sentencing "policy". A number of cases pending before ACMR involve an allegation that a particular military judge had a sentencing "policy" or "practice", to the effect that a certain sentence would be imposed if the accused plead guilty at arraignment and did not have a pretrial agreement with the convening authority. This issue is, obviously, sensitive and complex and will involve fact-finding by the Court. To date the Court has not rendered any decision. However, it is important that defense counsel remember that DR 7-110B, Code of Professional Responsibility, prohibits any ex parte communication with a judge concerning the merits of a particular case. Additionally, defense counsel must continue to present a vigorous defense during the sentencing phase of a trial, no matter what may be the counsel's feelings, instinct, or understanding of the sentence that the military judge will impose in the case.

5. Search warrants. A civilian magistrate may find probable cause only "from facts and circumstances presented to him under oath or affirmation." Nathanson v. United States, 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159, 162 (1933); Rule 41, Federal Rules of Criminal Procedure. Military law has not mandated this stringent requirement. United States v. Florence, 1 USCMA 620, 5 CMR 48 (1952); United States v. Doyle, 1 USCMA 545, 4 CMR 137 (1952). That position should be reexamined in light of practical considerations and several recently promulgated Army regulations which require written authorization in certain cases. For example, the requirement for written authorization for a search warrant has existed in Europe since 1971. See, USAREUR Supplement 1, Army Regulation 190-22. Also, sworn affidavits and written authorizations are required if the government opts to use a military judge to obtain a search warrant. See Chapter 14, Army Regulation 27-10, with interim change dated 1 January 1976.

Faced with this stringent requirement for military judges, it is not surprising that persons seeking authorization to search will prefer to obtain permission from a legally untrained commander as opposed to

a judge. This situation creates an anomaly - a trained military judge must have the facts presented to him in a sworn affidavit and must sign a written authorization for the search, whereas an untrained commander can authorize a search with no procedural precautions. If anything, the requirement for sworn affidavits and written authorizations should be reversed. It is the legally untrained commander who most frequently is unaware of the necessary legal and factual information required to determine whether or not there is probable cause for the search. A strong argument can be made that the commander should be presented with the written facts before making a probable cause determination. Similarly, it is the commander who should be required to state in writing which facts he relies upon in authorizing a search.

Trial defense counsel should consider raising an objection to commander-authorized searches where a search warrant is required. The military judge may not rule favorably for the defense, but at least the issue is preserved. In this regard, counsel should also attempt to bring out in their examination of the CID agent or other requesting officer any discrepancies between the agents' and the commanders' recollection of the facts. See, United States v. Sparks, 21 USCMA 134, 44 CMR 188 (1971); United States v. Hartsook, 15 USCMA 291, 35 CMR 263 (1965). This will bolster the defense's contention on appeal that the current military practice of not requiring sworn affidavits and written authorizations for search warrants is unreasonable.

6. Booker Revisited. On 16 January 1978, oral argument was again heard by the United States Court of Military Appeals in the case of United States v. Booker. The argument was the result of a government petition for reconsideration which COMA granted. The issue to be considered was "WHETHER SUMMARY COURTS-MARTIAL SHOULD BE LIMITED TO DISCIPLINARY ACTIONS CONCERNED SOLELY WITH MINOR MILITARY OFFENSES UNKNOWN IN CIVILIAN SOCIETY." Government and defense appellate divisions of all the armed forces were invited to participate. On behalf of the government, Army, Navy, and Coast Guard GADs filed briefs and presented argument. The Air Force GAD filed a brief but did not argue. For the defense, Navy and Coast Guard DADs and the ACLU filed briefs and argued. The Army and Air Force DADs chose not to participate.

The narrowness of the discussions in the briefs and arguments, and the specifics of the questions by the judges, implies that COMA will limit the scope of any new decision to the specific granted issue. Therefore, defense counsel should continue to resist the admission into evidence of any records of Non-Judicial Punishments or Summary Courts-Martial which do not comply with the requirements of the original Booker decision (3 M.J. 443).

"ON THE RECORD"

or

Quotable Quotes From Actual
Records of Trial Received in DAD

MJ: Captain X, perhaps you can explain something for me on the Form 20, Item 9, where it says religion, one time it said Protestant, now it says reference Item 22 and Item 22 indicates that the accused is a Vulcan crewman. I was not aware that that was a religion.

DC: I was not either, Your Honor.

(TC while reading personal data from the front page of charge sheet)

TC: Basic pay per month: \$473.10

He does not receive any sea or foreign duty pay for a total pay per month of \$594.60

MJ: How do you get \$594.60?

TC: I can't add.

ACC: I'm over six, sir.

Q. Would you enlighten this Court and the members as to why you chose to take an Article 15 instead of demanding a trial by court-martial?

A. Because I don't want to follow in my father's footsteps. He was on this post and they gave him a court-martial and he was sent to Fort Leavenworth.

(Captain _____ made a gesture for quiet to the military judge.)

MJ: Don't tell me to hush, Captain _____! Now, I asked you to clarify the question! You are not going to put your hand up and tell me to hush! You are making a motion to me, you are not making a motion to a court! I said, make your question clear! Now, you have me so upset, I can't remember, even, what I was objecting to.

(DC during closing argument)

Now, the government has taken great pains to analyze the three rapes, and to point out different similarities. Well, we feel that there are an equal number of — almost an equal number of dissimilarities.

MJ: . . .Well, it seems like quite a waste of time. I guess your client probably has the constitutional right to waste the court's time because that's precisely what it sounds like.

TC: I have no further questions.

ACC: Uh-Oh, spaghetti's.
