

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

Defense Appellate Division, US Army Judiciary
Washington, D.C. 20315

Vol. 1 No. 10

December 1969

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

PREJUDICIAL JOINDER OF OFFENSES: A SUGGESTED APPROACH

Despite the potential prejudice inherent in the joinder of several offenses at a single trial, one rarely finds a motion for severance of offenses made in the military. Severance of offenses is to be immediately distinguished from severance of accused, specifically governed by Paragraph 69d, Manual for Courts-Martial, United States, 1969. The Court of Military Review has recently considered the matter of severance of offenses in CM 420447, Partridge, (27 October 1969), one of the few military cases on the subject. In Partridge, the court held that the law officer did not abuse his discretion in denying a defense request for separate trials of unrelated assault and wrongful appropriation charges. Nevertheless, the successful defense of a client may well require the separate trial of outstanding charges against him and consequently military defense counsel should be alert to this possibility in planning defense strategy.

PROPERTY OF U. S. ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
LIBRARY

The basic military joinder rule, subject of course to the discretion of the convening authority, is that all known offenses should be tried at a single trial, although the Manual does caution against joining minor and serious offenses. Paragraphs 30g, 26c, Manual, supra. One of the principal justifications for liberal joinder is judicial economy. An accused may also benefit by being sentenced only once for his misdeeds. The classic statement against joinder is found in Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964):

[T]he defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses, (2) the jury may use this evidence on one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Unfortunately, Partridge leaves severance of offenses in the military in a state of ambiguity. The decisions turn largely upon the discretionary language of Paragraph 30g, and the court was reluctant to find abuse. The court observed that Rule 8a, Federal Rules of Criminal Procedure permitting joinder of offenses of similar character, based upon the same act or transaction, or acts connected by a common scheme or plan, is the product of distinctly different statutory and decisional history. Characterizing Rule 14 as providing the test for misjoinder, the court noted the standard to be one of prejudice. By casting the problem as one of joinder the court implied that federal case law under Rule 14 is inapposite to military trials where joinder is governed by Paragraph 30g whose standard of discretion is even broader than that afforded the trial judge under Rule 14.

The difficulty with this approach is that Rule 14 is not a test for misjoinder; it assumes the propriety of joinder. Instead, it provides a means for affording an accused a fair trial if the joinder of offenses, otherwise proper, would be prejudicial. See, e.g., Blunt v. United States, 404 F.2d 1283 (D.C. Cir. 1968), cert. denied, 394 U.S. 909 (1969); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968).

The 1969 Manual embodies no similar provision, and since Rule 14 as a procedural rule is incompatible neither with military law nor with the special requirements of the military establishment, it should be applicable to military trials insofar as it pertains to severance of offenses. See United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954). The military has long permitted liberal severance of accused in order to assure fairness and it would seem anomalous to deny similar relief on the same grounds where there is prejudicial joinder of offenses. The Court of Military Appeals has recognized a special need for vigilance to protect accused soldiers from possible prejudice flowing from the military's unrestricted joinder rule and denial of a fair trial is a traditional basis for military appellate relief.

Familiarity with factors considered in Rule 14 cases is consequently of logical relevance to military severance of offenses even assuming, as the Court of Military Review does, that the rule itself does not apply. It is clear that a general claim that the defense is embarrassed or confounded will not require a severance of offenses. There is no right to such relief merely because it increases the chance for an acquittal. Tillman v. United States, 406 F.2d 930 (5th Cir. 1969). Nor is an accused entitled to separate trials simply in order to present inconsistent defenses. United States v. Blunt, supra. What is necessary is a clear showing of how prejudice arises. See United States v. Gardner, 347 F.2d 405 (7th Cir. 1965). Illustrative of this is the case where the accused wishes to testify as to only part of the unrelated

but joined offenses, Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964). It has been said that before severance will be required, the defense must make a convincing showing through an adequate disclosure of information that the accused's dilemma is real. Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968).

Important to any motion for severance is that evidence of one joined offense would not be otherwise admissible in a separate trial on the other. Bayless v. United States, 381 F.2d 67 (9th Cir. 1967). "Bad man" evidence is normally excluded, but there are certain specific exceptions with which counsel should be intimately aware. See Paragraph 138g, Manual, supra. Typically such evidence is factually quite similar to the conduct at issue. Thus where independent admissibility is a close question on a severance motion, the possibility of confusion, and cumulation of evidence is likely to be high. In other words, cross-admissibility can create its own prejudice. In Drew v. United States, supra, the accused was charged with a robbery and an attempted robbery of separate neighborhood stores of the same chain, both occurring on summer afternoons two and a half weeks apart. The perpetrator in each instance was described as a Negro wearing sunglasses. However, the successful robbery was accomplished through the use of force, while the unsuccessful robbery failed through an unwillingness to use force. The difference was enough for the Court to reject the government's contention of cross-admissibility and it was noted that the basic similarities resulted in confused testimony and summarization of evidence by the prosecution. Severance was required.

Prejudice may also arise from the joinder of an offense supported by tenuous evidence with a charge founded on convincing evidence. Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966). Therefore severance should be granted where successful prosecution of one offense in a separate trial is doubtful notwithstanding the lack of possible confusion.

Upon determining that there is a need and basis for severance, counsel should first request the convening authority not to refer the offenses jointly, stating the reasons and the prejudicial nature of the joinder. It is clear that the convening authority has the discretion to refer charges separably, and Partridge, supra suggests that this discretion is reviewable for abuse. An unsuccessful request should be renewed to the military judge prior to arraignment with an offer of proof to support the claimed prejudice. This offer should be made out of the hearing of the court. In camera and ex parte presentation may be appropriate if prejudicial disclosure of defense tactics is required. The motion should again be renewed after the taking of evidence, and special emphasis at this time should be laid on the confused nature of the testimony. See Bayless v. United States, supra. Here, the appropriate relief would probably be a mistrial. Paragraph 56e, Manual, supra. Indeed the Navy Court of Military Review has recently ordered a rehearing on one charge where the conviction was tainted by confusing testimony on the charge of which the accused was acquitted. NCM 69 1936, Chilcote, (22 October 1969). Finally, appropriate limiting instructions should be requested. United States v. Quinn, 365 F.2d 256 (7th Cir. 1966).

PREPARATION FOR THE POST-TRIAL INTERVIEW

The broad powers granted the convening authority by Article 64, Uniform Code of Military Justice, provide one of the best "opportunities of having his sentence tempered with mercy." United States v. Bennett, 18 USCMA 96, 98, 39 CMR 96 (1969). Since the convening authority relies in part on the post-trial review, the post-trial interview is fast becoming a critical stage in the appellate process. Although the post-trial interview is not provided for by either the Code or the Manual, it has been justified as a means of furnishing the convening authority with sufficient information to assess intelligently an appropriate sentence. United States v. Barrow, 9 USCMA 373, 26 CMR 123 (1968).

The accused should be advised always to tell the truth, but that there are some questions he may respectfully decline to answer. Unless counsel properly prepare an accused for the post-trial interview, a wealth of unfavorable information may be revealed which will lessen the chance of clemency from the convening authority or Court of Military Review. Further, an accused may unknowingly waive an issue of ineffective assistance of counsel by stating that he was satisfied with his trial defense counsel. Clearly the accused lacks the knowledge to assess his counsel's adequacy in this regard and may properly refuse to answer.

First, the accused should be advised that the purpose of the interview is to seek information on his background, family, training, capacity to conform to the norms of society, military record, mental capabilities, rehabilitation potential, and character so that the convening authority will be provided with information upon which to assess an appropriate sentence.

Second, he should be advised that any unfavorable information elicited will reduce the chance of clemency from both the convening authority and the Court of Military Review. Thus the accused should be advised not to volunteer any unfavorable information. See United States v. Bugros, 9 USCMA 276, 26 CMR 56 (1958). In addition, he should be advised that stating that he does not desire restoration to duty is an open invitation to the approval of a punitive discharge even though other means of elimination may be available, United States v. Rehorn, 9 USCMA 487, 26 CMR 267 (1958).

Third, the accused should be alerted to questions designed to elicit waiver. An appropriate response to questions of this nature should be that the accused is simply not qualified to express an opinion. Although an accused should under no circumstances conceded the appropriateness of the adjudged sentence, this occurs with alarming frequency.

Finally, an accused should be advised of the importance of his demeanor. An accused who is resentful, spiteful, or disrespectful can rarely count on clemency. He may courteously refuse to answer any question which will elicit unfavorable information, and it is probably improper for the staff judge advocate to comment on such a courteous refusal to answer in his review.

Counsel may also wish to consider his own participation in the post-trial interview although the properly prepared accused will probably create a better impression by himself. Complex situations or mentally dull clients may be factors to consider here. In all cases counsel should insure that he sees the entire post-trial review before terminating his involvement in a case since he may want to rebut it or note an error for appellate review.

Proposed Legislation of Interest to Defense Counsel

SENATE PROPOSES TO ESTABLISH SEPARATE TRIAL COMMAND

In a bill introduced into the United States Senate on 5 November 1969, Senator Tydings of Maryland proposed to amend the Uniform Code of Military Justice to establish a Military Trial Command composed of military judges, defense counsel, and court administrators. These members would be independent, under the sole control of their superiors within the Trial Command, and would perform judicial and nonjudicial duties only when so assigned by these superiors.

The bill, S. 3117, 91st Cong., 1st Sess. (1969), also proposes that the members of a general court-martial will be chosen by the Circuit Judicial Officer at random from eligible officers and enlisted men within the circuit. Finally, the bill provides that neither the convening authority nor any member of his staff shall prepare any report concerning the effectiveness, fitness or efficiency of a military judge or a defense counsel which relates to his performance of duty as military judge or defense counsel.

In his remarks upon introduction of the measure, Senator Tydings noted that "this arrangement whereby the defense counsel is under the control of a military officer who is likened to a prosecuting attorney [referring to the staff judge advocate] is clearly at odds with the basic philosophy of our adversary system of justice. Understandably, it frequently produces serious conflicts of interest between the defense counsel's duty to his client and his duty to the command." The bill has been referred to the Senate Committee on Armed Services for further study.

RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

CONSCIENTIOUS OBJECTION--ARMY REGULATION 635-20: A United States District Court held that Army regulations which withhold the right of an in-service conscientious objector discharge from those whose opposition to war is based on a mere personal or moral code are a denial of due process. Relying on United States v. Sisson, 297 F. Supp. 902 (D.C. Mass. 1969), the court found that the religious basis employed in Army Reg. 635-20 for the classification of conscientious objectors violated the fundamental principles of constitutional law because it discriminated against the non-religious (persons who hold moral convictions not identifiable with an official tenet of an established religion.). Goguen v. Clifford, F. Supp. ___ (D.C.N.J. 14 October 1969), 6 Crim. L. Rep.3139.

ESCAPE FROM CUSTODY--SUFFICIENCY OF SPECIFICATION: Accused was charged with escape from the lawful custody of the "First Battalion Legal Office." A Navy Court of Military Review, citing Paragraph 174d, Manual for Courts-Martial, United States, 1969, held that custody is a status imposed and maintained by a person rather than an "office" or other inanimate object or structure. A valid allegation of escape from that status must, therefore, allude to the person whose control is overthrown rather than the place from which the escape occurred. NCM 69 3063, Hobbs, (10 October 1969).

FAIR TRIAL--PROSECUTION ARGUMENT: A Second Lieutenant was convicted of absence without leave, failure to obey a lawful order to clear post for shipment to jungle training in the Canal Zone, and failure to report to the jungle training school. A prosecution exhibit indicated that the jungle training was a temporary duty assignment prior to assignment to a combat unit in Vietnam. The accused, in extenuation and mitigation, stated that he would now like to go to Vietnam. In his argument on sentence, the trial counsel indicated that the accused would demean himself poorly in a combat situation and would possibly cause the death of members of his command. The court held this to be prejudicial error as the accused was on trial for offenses he had committed, not for a course of future conduct. In addition, the trial counsel improperly attempted to cause subjective identification with the offenses on the part of members of the court-martial by stating, "Would you want him leading a son of yours, someone you love, in battle? I don't believe so." The law officer's instructions on uncharged misconduct were brief and did not purport to reach the trial counsel's improper and inflammatory argument, and in any event instructions would not have been sufficient to overcome the prejudice. CM 419537, Rodgers, (14 November 1969).

FAIR TRIAL--PROSECUTION ARGUMENT: A murder conviction was reversed by the Maryland Court of Special Appeals because the prosecutor during his argument to the jury stated that "there is really no self-defense here. It is fiction manufactured by the defense counsel." The court found that this remark could have been interpreted by the jury to mean that the defense counsel suborned perjury or that he fabricated the defense, or that the defendant himself had committed perjury in testifying that he committed the homicide in self-defense. In addition, the trial judge's denial of the defense counsel's request that the prosecutor apologize, and his finding nothing improper in the prosecutor's remarks, may have been considered by the jury as tantamount to judicial approval of the propriety of such argument. Reidy v. State, __ A.2d __ (Md. Ct. Spec. App. 24 November 1969), 6 Crim. L. Rep. 2169.

JURISDICTION--MILITARY PROPERTY: Accused was convicted of possession of a weapon not registered in the National Firearms Registration and Transfer Record as required by Chapter 53 of the Gun Control Act of 1968 (82 Stat. 1234), in violation of Article 134, Uniform Code of Military Justice. The court held that a court-martial was without jurisdiction to try the accused for this offense although the weapon was a U.S. Government automatic rifle which the accused brought from Vietnam to the United States. At the time of possession, the accused was in Seattle, Washington, in civilian clothes, and on leave awaiting a port call. The court held that the unregistered possession of the military weapon did not of itself have military significance since there was no flouting of military authority, attack upon military security, or challenge to the integrity of military property. The court noted that the Gun Control Act was designed to protect the public at large and the offense of possessing an unregistered weapon was an offense against the citizenry of the country, not singularly against the armed forces. [In regard to an attempted sale of the same weapon, the court found military jurisdiction to exist as the integrity of military property was involved] CM 420715, DeMarco, (5 December 1969).

LSD--MAXIMUM PUNISHMENT: Accused was convicted of wrongful possession and wrongful transfer of LSD in violation of Article 134, Uniform Code of Military Justice. The court held that the punishment was not controlled by the maximum punishment for "Drugs, marihuana" contained in Paragraph 127c, Manual for Courts-Martial, United States, 1969. The maximum punishment is to be based on the amendment to the Federal Food, Drug and Cosmetic Act which provided that illegal possession of LSD is punishable by imprisonment for not more than one year, and that illegal sale or transfer of LSD is punishable by imprisonment for not more than five years. 21 U.S.C. § 333 (Supp. IV, 1969) CM 420912, Holston, (24 November 1969).

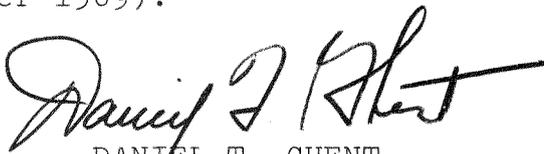
MORNING REPORT--DROPPED FROM ROLLS: The accused was charged with unauthorized absence, four desertions and escape from custody. A morning report relating directly to the first desertion specification contained the entry, "from DFR deserter." The law officer agreed to strike the word, "deserter," but refused to strike the words, "dropped from rolls" because there had to be a showing of where the accused returned from, that the accused "joined from something", and that he did not "join from duty somewhere else." The court cited United States v. Zilke, 16 USCMA 534, 37 CMR 154 (1967), and found the admission of such entry to be prejudicial error regarding each of the four specifications. Although the morning report in question concerned only the first desertion specification, each later allegation of desertion was buttressed by all of the evidence surrounding each of the preceding periods of unauthorized absence. CM 420674, Jones, (25 November 1969).

PRIOR CONVICTIONS--1969 MANUAL: Accused was tried in April 1969 when the 1969 Manual was in effect, for offenses committed when the 1951 Manual was in effect. Two prior convictions were introduced against accused; both were more than three but less than six years old. The Court of Military Review, en banc, held that the convictions were improperly admitted. The court stated that prior convictions are used to increase the sentence imposed on an accused and are not merely subject to a procedural rule of admission. The court relied on the spirit of Executive Order 11430, which prescribed the Manual for Courts-Martial, United States, 1969, CM 420741, Griffin, (22 October 1969)(Certified by TJAG, 2 December 1969).

REPUTATION OF ACCUSED--PERMISSIBLE IMPEACHMENT: A character witness testified as to the accused's reputation for honesty and integrity and for peace and good order. This witness could not be questioned about the accused's twenty convictions for drunkenness, as they were not relevant in

the context of a prosecution for burglary and larceny. The drunkenness convictions were immaterial and irrelevant to the reputation which the accused proposed to assert as a defense to the charges against him. The error was prejudicial as the decisive issue in the case was one of credibility and the evidence of good character may alone create a reasonable doubt. United States v. Wooden, No. 22,773, ___ F.2d ___ (D.C. Cir. 28 November 1969).

WILLFUL DISOBEDIENCE--RESTRICTION TO COMPANY AREA:
Accused was ordered to remain within the limits of the company area and to sign in at the company orderly room on the hour from 0700 hours until 2200 hours daily as long as he was a member of the company or until the order was rescinded. The accused failed to sign in at 2000 hours on the date the order was given and was charged with willful disobedience, Article 90, Uniform Code of Military Justice. The court held that the order in question constituted imposition of restraint upon accused and his subsequent conduct was "no more than a failure to obey a lawful order" in violation of Article 92, Uniform Code of Military Justice, and that the punishment for such offense was limited by footnote 5, Paragraph 127c, Manual, supra, to the punishment prescribed for breach of restriction. CM 421101, Davis, (29 October 1969).



DANIEL T. GHENT
Colonel, JAGC
Chief, Defense Appellate Division