

T H E A D V O C A T E

Newsletter for Military Defense Counsel

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

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Additional Contributory Authors

Al Berry
Mike Caryl

ALTON H. HARVEY
Colonel, JAGC
Chief, Defense Appellate
Division

Editors Note

It should be noted that beginning with this issue, THE ADVOCATE will no longer bear the signature of Colonel Victor A. DeFiori. Colonel DeFiori was promoted to Brigadier General and departed the Defense Appellate Division to assume the position as Judge Advocate, USAREUR and Seventh Army. The editors would like to thank General DeFiori for his guidance, support and suggestions in making this publication possible.

Future issues will be published over the signature of Colonel Alton H. Harvey, Chief, Defense Appellate Division. Colonel Harvey comes to Defense Appellate Division having just completed the course at the Industrial College. It is anticipated editorial policy will remain substantially the same, and every effort will be expended to make THE ADVOCATE useful to Defense Counsel.

A special note of appreciation is extended to Captain David A. Shaw, the past Editor-in-Chief of THE ADVOCATE. It was largely through the persistence and guidance of Captain Shaw that this publication remained viable during the past year. The editors extend their thanks and best wishes to Captain Shaw in his new assignment in the Litigation Division of Office of The Judge Advocate General.

The editors also wish to note that, in addition to the bi-monthly issues of THE ADVOCATE, the editorial board will distribute, in newsletter form, an update on significant court decisions or policy considerations in the area of military criminal law. This newsletter will be disseminated as often as is necessary, rather than on a prescribed time table.

The Defense Appellate Division remains ready to assist trial defense counsel with problems which may arise during any phase of a case while at the trial level. While Defense Appellate Division does not purport to be a normal source of research in routine cases, many issues which appear to be "cases of first impression" within your particular jurisdiction may have been researched at the appellate level, and incorporated into Defense Appellate Division's research files. If individual research and local sources available fail to answer your questions, you are encouraged to contact the Division for any assistance we may furnish.

Post-Trial Duties of Defense Counsel

It has been noted during appellate review that some trial defense counsel are not representing their clients during the post-trial stages as thoroughly as possible. The following is intended to highlight post-trial avenues of relief available to an accused. It is not meant as an exhaustive or definitive work in the area.

1. Upon announcement of the findings or sentence, be prepared to move immediately for a mistrial in the event of an improper, inconsistent, or self-impeaching verdict or sentence.

2. Seek deferment of a sentence to confinement pending appeal, and seek appropriate review from an unlawful denial thereof. Stress appellate issues in the case, as well as financial, medical, or other reasons against confinement. See Paragraphs 88f, and g, Manual for Courts-Martial, United States, 1969 (Revised edition), and Paragraph 2-30, AR 27-10.

3. Where possible, seek clemency recommendations from the trial counsel, military judge, or court members. Where appropriate, request a personal hearing, or at least an interview, before the convening authority. See Paragraphs 48b(1) and 77a, Manual for Courts-Martial, United States, 1969 (Revised edition).

4. Consider preparing a brief pursuant to Article 38(c), Uniform Code of Military Justice. Use it to argue the factual and legal theories of the defense and to introduce into the record evidence discovered after trial or not used at trial. Counsel should also consider using the Article 38(c) brief to enter formal objections which were not articulated at trial. The Article 38(c) brief may also be used to submit additional matters in extenuation and mitigation, post-trial psychiatric reports, etc., for consideration during appellate review. See United States v. Fagnan, 12 USCMA 192, 30 CMR 192, 195 (1961). In short, because the Article 38(c) brief allows such material to become part of "the entire record," it may be used to raise matters which had not been raised elsewhere.

5. Prepare the client for the post-trial interview. Explain its nature, scope and purpose. Explain the extreme importance of his conduct, attitude, and appearance during the interview. Insure that he has been advised that admissions regarding present charges or other crimes, or about the appropriateness of the adjudged sentence, can be damaging to him. Unless the client can be trusted to answer questions on his own, a post-trial interview should not be undertaken in the absence of counsel.

6. Review the staff judge advocate's post-trial review. If any matters therein are misleading or inadequate, make appropriate comments. See United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975).

7. Advise the accused of the meaning and effect of the findings and sentence in his case. Include an explanation of the consequences of a punitive discharge, his appellate rights, and assist accused in securing the appointment of appellate defense counsel if appropriate. Also familiarize the accused with the Army clemency and parole system. See THE ADVOCATE, Volume 6, No. 1, July 1974 at page 10, regarding post-trial sentence relief apart from the judicial process.

8. Monitor the post-trial delay between findings and sentence and action of the convening authority for compliance with the standards announced in Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974). The Dunlap issue may be raised directly with the convening authority in an Article 38(c) brief and, if appropriate, a petition for extraordinary relief may be filed with the United States Court of Military Appeals. A sample extraordinary relief petition is printed in Volume 5, No. 3, THE ADVOCATE (July - October 1973).

9. Maintain a continuing interest in the case. Members of the Defense Appellate Division, USALSA, Autovon 289-1807, are available to provide information and assistance to trial defense counsel.

10. See, Generally, Paragraph 48b, Manual for Courts-Martial, United States, 1969 (Revised edition) and Section IV, Chapter 4, DA Pamphlet 27-10, regarding the post-trial duties of trial defense counsel.

Post-Trial Predicament

Post-trial counseling of the appellant is an integral part of the functions of the defense counsel. Too often, we at Defense Appellate Division find that the appellant is laboring under some gross misconceptions concerning the appellate procedure and that these erroneous beliefs cause a great deal of confusion. The purpose of this article is not to present an exhaustive study on post-trial counseling, but rather to tentatively explore some common areas of mistake and, more important, "to raise the consciousness" of defense counsel as to this function.

One of the more commonly-held beliefs is that the Court of Military Appeals and the Court of Military Review have the power

to transform a punitive discharge into an administrative one. As counsel well know, these courts deal only with military justice and while they do have extensive powers as to the reassessment of sentence, they are not empowered to make an administrative re-classification of a punitive discharge.

Another common misconception is that if a sentence is disapproved or the charges dismissed at the appellate level, then the appellant does not have to return to active duty. This becomes crucial when the appellant has been confined early in his enlistment. Of course the time served in confinement counts as "good time," but the appellant may have to return to active duty to complete his enlistment. If the sentence modification results in the elimination of a punitive discharge, but the confinement is approved, then the term in confinement is not credited towards the enlistment obligation.

One other point which is a consistently overlooked matter is, even if appellant does not desire appellate counsel, it is within the authority of The Judge Advocate General to appoint one. Furthermore, a case without appellate counsel in which there is a mandatory appeal, will still be subject to sua sponte action by the Court of Military Review. The appellant may not want to return to active duty, but the court can, on its own, if it discovers an error, reassess the sentence.

One final point of discussion is something that strikes terror in the heart of appellate counsel. The question arose recently as to whether or not the court could substitute confinement for a punitive discharge. The general consensus in Defense Appellate Division was that the court could not do that as it would seem to be a question of increasing severity of a sentence. The point was researched and, unfortunately, it was determined that the court could in fact make such a substitution. The appellant should be made aware of this possibility.

It would seem that the general tone of this article would be to discourage requests for appellate representation. However, the concern is simply that the appellant is making an informed choice when he requests appellate counsel. Practically speaking, the court will rarely exercise the options described above, but the possibility exists and appellant should know of this. Post-trial counseling should not be a pro forma request for appellate representation; it should be a discussion between client and counsel where there can be a determination of the best course of action on the appellate level.

Funding of Defense-Requested Witnesses

Recently, there has been a shortage of funds for many Army operations. This has been reflected in the reduced availability of travel funds for all purposes. The attached letter to staff judge advocates (also reprinted in The Army Lawyer, March 1975) indicates that it is the policy of the Office of The Judge Advocate General to more stringently assess the necessity and materiality of defense requested witnesses. While the letter stops short of putting a dollar value on defense evidence, it is clear that funding shortages will be used to justify denials of defense requested witnesses. (See The Army Lawyer, April 1975, page 17).

Counsel are reminded that Paragraph 115, Manual for Courts-Martial, United States, 1969 (Revised edition) requires that counsel for the accused submit to the trial counsel a request for a particular witness in writing, containing

- (1) a synopsis of the anticipated testimony;
- (2) full reasons which necessitate the personal appearance; and
- (3) any other information demonstrating that the testimony is necessary to the ends of justice.

Failure to comply with the requirements of Paragraph 115 may effectively prevent the litigation of the legality of the denial of a defense requested witness. Such requests should be made in a timely manner and forwarded to the convening authority in the event the trial counsel fails to agree as to necessity or materiality.

The trial counsel's discretion to call live witnesses in order to obtain conviction is unfettered. While the judgment of the defense counsel is subject to question by the trial counsel, the convening authority and ultimately the military judge, the Government has the duty "to assure to the greatest degree possible, . . . equal treatment for every litigant before the bar." Coppedge v. United States, 369 U.S. 438, 446 (1962) (cited in United States v. Manos, 17 USCMA 10, 15, 37 CMR 274, 279 (1967)). The right to compulsory process is an essential right which inheres in the nature of the adversary system as well as the definition of due process. The Court of Military Appeals has readily recognized this right. United States v. Jones, 21 USCMA 215, 44 CMR 269 (1972); United States v. Sears, 20 USCMA 380, 43 CMR 220 (1971). This right extends to witnesses whose testimony relates only to extenuation and mitigation. United States v. Manos, supra.

In the face of an adverse decision, defense counsel should litigate the questions of necessity and materiality before the convening authority and at an Article 39(a) session if necessary. The right to a fair trial, both on the merits and on sentence cannot be circumscribed by funding constraints. Counsel should demand written justifications by the trial counsel and convening authority for denials of witness subpoenas and special findings of the military judge in the event he supports the denial. Counsel should not be satisfied with stipulated testimony when the Government has live witnesses. This is especially so where credibility may be in issue or where the witness may strongly affect the accused's chances for retention.

In litigating these questions at trial, counsel should also endeavor to demonstrate specific prejudice, e.g. that the witness would specifically discuss accused's prior good service in battle and strongly recommend against a punitive discharge. In such a case, be prepared to show exactly why live testimony is necessary.

One staff judge advocate office requires trial counsel to route witness requests into the staff judge advocate for decision. If such is the case, this should be proven at trial, if necessary, by calling the staff judge advocate. The Manual leaves the initial determination of materiality and necessity to the trial counsel. If this discretion is usurped by the staff judge advocate, this too should be litigated.

Digest of Recent Cases

3 April 1975

Miller, 50 CMR 303. A duct in appellant's room which was found to have contained marijuana was properly within appellant's expectation of privacy as it was part of his room. Therefore, he had standing to object to the search of the duct. It is noted that the duct was an integral part of the room. Having resolved that issue in favor of the appellant, the Court then turned to the issue of probable cause. There were two entries into the room made by the company commander; the first was arguably an inspection, the second, despite the contentions of the company commander that it was a mere continuation of the inspection, was a search. This second entry was predicated upon a tip from a lieutenant in the legal office that marijuana was present. The commander did not seek to establish probable cause until after the second entry. The Court distinguishes this case from United States v. Grace, 19 USCMA 409, 42 CMR 11 (1970), where the decision to inspect had already been made and a tip was received. The Court, after deciding that the fruits of the

search were inadmissible, finds sufficiency of the evidence lacking in testing the credibility of the Government witnesses. Findings and sentence set aside and charges dismissed. Certified by The Judge Advocate General.

11 April 1975

Weindling, 50 CMR 240. The military judge failed to instruct sua sponte on the effect of the admission of uncharged misconduct. The appellant was charged with offering a bribe and willful disobedience. Yet throughout the trial evidence was adduced of a proposed plot to murder a CID agent. The military judge gave no limiting instructions and there was a fair risk that the appellant was prejudiced. Findings and sentence set aside.

27 March 1975

Shavers, 50 CMR 298. Speedy trial issue where pretrial delay was 124 days. The Government accountability runs from the date it has in its possession substantial information justifying the prefferal of the charges, not necessarily the date upon which charges were actually preferred. In this case, the company commander had delayed prefferal of one set of charges due to a pending request by the appellant for an administrative discharge. Subsequently, other offenses occurred and the company commander preferred the prior charges along with those later in time. The Burton presumption applies and the Government did not meet its heavy burden. Note the Government attempted to justify the delay by citing that the court-martial was in a foreign country (Korea) and a busy jurisdiction. These circumstances do not constitute extraordinary circumstances required by Marshall. Also, request for administrative discharge is not an extraordinary circumstance.

27 March 1975

Wheeler, SPCM 10421. The charge was communication of a threat. Appellant stated to the XO that he was going to put out a contract on the CO. Both individuals laughed and did not take it seriously. The Court disapproved the finding as to that charge, affirmed the remaining charges and reassessed.

29 April 1975

Dunbar, 50 CMR 358. Trial defense counsel objected at trial to the admission of two DA 188s on the grounds of improper authentication. The two authenticating officers were claimed to be the unit's adjutant and assistant adjutant yet they were both Signal Corps officers and there was no showing that they were authorized to authenticate. Findings and sentence set aside and a rehearing authorized. Held: AR 630-10 which lists authority to authenticate morning reports does not list either adjutant or assistant adjutant. Therefore, improper admission of DA 188s.

29 April 1975

Braloski, 50 CMR 310. Appellant was convicted of a violation of Article 95, but the facts showed he resisted apprehension by a German police officer. The Court held that this was not an offense under Article 92 and that the Court cannot affirm a conviction under 134 citing Jarvis, No. 425308 (ACMR 30 August 1972) and United States v. Hutcherson, 29 CMR 770 (AFBR 1960) distinguishing and declining to follow United States v. Virgil, S8159 (ACMR 13 October 1972). But note: The Court dismissed that charge but after affirming the other findings it reassessed and affirmed the sentence.

29 April 1975

Massey, 50 CMR 346. Appellant had been convicted of Article 119 violation. The evidence showed that driving while intoxicated, the appellant failed to obey a traffic signal and crashed into another auto; a passenger in the second auto was killed. At trial, the prosecution elicited testimony from a medical corpsman that the appellant, who was white, made the following remark when informed that the passenger, a black, had died: "[t]hat's one less nigger I have to worry about." There was a motion for a mistrial by the defense which the military judge denied. The Court reversed citing the prejudicial nature of the racial slur and noting that even "bigots have as much right to a fair trial as anyone else." Findings and sentence set aside with a rehearing authorized. Note - Dissent by Judge Jones who disagrees that the judge abused his discretion in light of the ample evidence against the appellant.

30 April 1975

Howard, SPCM 10643. Among other offenses, appellant was charged with wrongful possession of marijuana. At the 39(a) session and later at trial, appellant objected to the laboratory report. He requested the presence of the chemist for cross-examination. The denial of the chemist was error. Rather than ordering a rehearing, the Court reassessed the sentence. Note - Appellant had a good record with a tour of duty in Vietnam during which he was wounded. This influenced the Court in their reassessment.

30 April 1975

Kimball, 50 CMR 337. Appellant pleaded guilty to a 72 day AWOL; he was charged with a four year AWOL. He was convicted of the former, but his DA 20 shown to the jury during the sentencing reflected 1700 days of bad time. There was timely objection by counsel. The offense was committed prior to the 1969 Manual and because the DA 20 was not admissible to show the unauthorized

absence, it was error to present that to the jury. There was also unlawful pretrial confinement in violation of Article 13. The Court held that the proper remedy for this is meaningful reassessment as opposed to the conclusion of the military judge that credit for the confinement is to be given toward the sentence contemplated. Again, because of prior good record and combat service, the discharge was disapproved.

30 April 1975

Sims, 50 CMR 341. There is jurisdiction over a forgery offense where (1) the stolen instruments were the property of military personnel and (2) the appellant showed his military identification to cash the instruments in an off-post liquor store. It is also noted that the latter aspect was not elicited by the prosecution but by the military judge. Note - A warning by the Court concerning verbatim transcripts; be wary of errors and omissions.

30 April 1975

Kelker, 50 CMR 410. The case involved sale of marijuana to a CID informer. The Court grants relief upon the failure of the military judge to instruct sua sponte on the informer's prejudicial testimony as to uncharged misconduct. The Court also spoke strongly on the military judge's instructions as to jury questioning; the instructions appeared to inhibit the jury's ability to ask questions. Findings and sentence set aside, rehearing authorized.

30 April 1975

Warren, 50 CMR 357. Appellant was tried by a court composed of officers and enlisted men pursuant to a request by the appellant's trial defense counsel that the case be referred to a court "composed entirely of lower ranking enlisted men." There was no written request by the appellant. The Court finds the proceedings void, citing United States v. White, 21 USCMA 583, 45 CMR 357 (1972).

30 April 1975

Clark, 50 CMR 350. The military judge examined the accused based on the latter's unsworn statement. This was error and the Court reassessed the sentence. The Court strongly reiterated the accused's right to make an unsworn statement and not breach his right to testimonial silence.

30 April 1975

Hilerio-Cardona, 50 CMR _____. The appellant was convicted of sale of marijuana upon the sole testimony of an informer who was guilty of possession. The Court holds that the military rule on what is an accomplice is broader than the civilian rule. Under the Federal rule, one must be subject to the identical criminal

liability as the accused to be an accomplice. The military rule states that this is not the exclusive definition of accomplice but added criminal liability for the same crime. In other words an accomplice in the military need not have been guilty of the identical crime but merely an associated crime with the major perpetrator. Charges and specifications dismissed.

*Reconsideration 3 July 1975 - Withdraws the dicta about accomplices, but still finds the testimony of the informer incredible and dismisses the Charges and specifications.

23 May 1975

Royal, SPCM 10722. Defense counsel objected to DD 493 extract of previous convictions on the grounds that it failed to show completion of supervisory review. Also, accused was originally charged with a violation of Article 92 for failing to obey a brigade commander's order requiring that all West Point Cadets assigned to the platoon leaders be treated with the same courtesy and respect as officers. This was amended to allege disrespect toward a West Point Cadet in violation of 134. The amendment was made in face of a defense objection that the amendment changed the offense. This ought to have been granted by the trial judge, but the Court of Military Review dismissed the Charge on other grounds and did not reach the issue as to whether or not the order was legal.

29 May 1975

Juarez, SPCM 10929. Court discusses numerous errors under three broad headings (1) Pretrial agreement - This provided for the automatic cancellation of the agreement if the plea was rejected. There was no inquiry by the judge as to whether the appellant understood that the convening authority was not bound when the plea was rejected. This issue was mooted by the fact that the sentence imposed was less than the maximum imposable sentence. There was another clause to the pretrial agreement which indicated that the convening authority would approve no discharge in excess of a bad conduct discharge. Since the Court was a BCD special, this term is unclear even to the military judge. Held: Error to leave such a provision unexplained. (2) The Providency Inquiry - The appellant equivocated on the plea to the housebreaking charge which was rejected. He also equivocated on the larceny charge; the Court was not convinced that the appellant understood the difference between larceny and accessory after the fact. The military judge ought to have inquired more fully into this particularly in light of appellant's low GT. (3) Pretrial Recommendations - The pretrial advice and the post-trial review omitted favorable recommendations. Court found that this was error. The Court in light of the above, set aside the findings and sentence and authorized a rehearing.

30 May 1975

Monahan, CM 431175. Appellant was convicted of wrongful use of false documents and solicitation to wrongfully sign false documents in violation of Article 134. While proving that the documents were false, the Government failed to show how the documents were used. Documents relating to use were requested by the defense counsel but were not produced. Another error was the failure to mention in the SJA review, the appellant's favorable matter in the DA 20. But the DA 20 also contained a record of a previous conviction. Even so, the Court assumed prejudice. The above errors were the basis of a sentence reassessment.

30 May 1975

Payton, CM 432733. Pursuant to a pretrial agreement, appellant pled guilty to conspiracy to commit arson and the Government agreed not to present evidence on the substantive crime. A stipulation showed the appellant withdrew from the conspiracy prior to commission of the offense. The government introduced the evidence of the arson in presentencing matters. Held: Appellant's withdrawal from the conspiracy before commission of the substantive offense bars evidence of the commission of the offense, even in aggravation. It was error for the Government to use the evidence and the Court tested for prejudice. The Court found the effect of the error to be minimal, reassessed the sentence and reduced the forfeitures.

5 June 1975

Montgomery, CM 432857 (to be published CMR). Dunlap presumption applied to an Army case for the first time. Government tried to argue (1) Dunlap didn't apply because of deductible days (2) personnel turbulence, heavy workload and the weather combined to create extraordinary circumstances. Held: Days are only deductible where there are defense requested delays, not delays beyond the control of the Government. Further, the reasons cited to the Court are not extraordinary circumstances. The absence of the convening authority on the 90th day will not serve to explain the delays nor will it be deductible. Findings and sentence set aside and charges dismissed. Reconsidered and reached the same result.

5 June 1975

Houston, CM 432073. Trial defense counsel argued for a discharge. Normally, this is impermissible. When it occurs, the judge should sua sponte inquire of the accused what his desires are. In this case, nothing on the record suggests that appellant wanted to stay in the Army; the post-trial affidavit was judged to be incredible and refuted by the affidavit of the trial defense counsel. The argument, however, might have been overbroad

in that it covered both dishonorable and bad conduct discharges. Although there was little risk of prejudice, the court reassessed and made the dishonorable discharge a bad conduct discharge.

8 June 1975

Perkins, CM 430227. Speedy trial case where the Court held that: defense counsel's leave request was not a defense requested delay, a pretrial conference was not a defense delay, but an offer to plead guilty by the accused was a delay. The Government offered no more than a mere chronology and not an explanation for the delay and, therefore, did not rebut the Burton presumption. Findings and sentence set aside and charges dismissed.

8 June 1975

McElvane, CM 430552. Speedy trial issue. Mistaken view on the part of trial counsel that an application for an administrative discharge obviated the need for an Article 32 investigation. Acting on that view, he delayed the commencement of the Article 32 for some 123 days after pretrial confinement. Held: Inordinate delay requires a dismissal on pre-Burton grounds. Dissent: No oppressive design.

12 June 1975

Martori, CM 430834. Appellant was convicted of larceny and housebreaking. The only evidence against him was the testimony of a lieutenant in charge of the Finance Section which was based upon what his cashier had told him and not from his own observation. This hearsay will not support a conviction even though there was no objection. The Court set aside the findings as to the larceny charge, ordered it dismissed, and reassessed the sentence.

Grundy, CM 431710. Appellant was convicted of wrongfully distributing a counterfeit substance purported to be heroin under clause 3 of Article 134. The statute allegedly violated was 21 USC 841 which provided in relevant part for criminal sanctions for one who sells a counterfeit controlled substance. The proof showed that appellant sold a CID informer flour by misrepresenting that it was heroin. Held: This is not proscribed by 21 USC 841 as a counterfeit is therein defined as falsely labelled. Result was the dismissal of that charge.

29 May 1975

Jones, CM 431157. The Court holds that willful destruction of non-military property under Article 109 requires an intentional act and not just a degree of negligence. The Court also holds that the offense of leaving the scene of an accident requires

pleading the essential element of failing to make one's identity known. Having failed to do this, the trial counsel attempted to amend at trial, over objection, to allege properly the offense. This constituted being brought to trial upon unsworn charges. The Court ordered the two charges dismissed, reassessed the sentence, and affirmed.

McLellen, CM 430712. Appellant requested counsel several times during an interrogation and none was provided. Therefore, the confession received as a result of the interrogation was inadmissible and reversal is required. The Court also found a pre-Dunlap post-trial delay error. Although neither error requires dismissal, the Court ordered dismissal in the interests of justice.

Goodrich, CM 431385. This case involved the subsequent AWOLs of a National Guardsman who had been punitively called-up. The Court held no jurisdiction where the Army had failed to follow its own regulation with regard to proper proceedings in the call-up, citing Kilbreth, 22 USCMA 390, 47 CMR 327 (1973) and Smith v. Resor, 406 F. 2d 141 (2nd Cir. 1969). Constructive enlistment will not apply where appellant did not know of the jurisdictional defects.

Green, CM 432463. Government contended that the contraband obtained as a result of an illegal search were admissible on the grounds that the search was in fact conducted by the German authorities. The Court finds that while the Army neither initiated the search, nor was the search based upon Army furnished information, the search itself was a joint venture. The Court reversed the judge's findings that the search was a German search and, applying Fourth Amendment standards, found that the search was illegal and the fruits thereof inadmissible. Reversed and dismissed.

31 July 1975

Bertolino, CM 430363. The military judge had held the first of two statements to be inadmissible because the investigator persisted in his questioning after appellant had stated that he did not want to make a statement. The Government had the burden to show the second statement was not the product of the first; the Court held that it did not do so. Some of the factors considered by the Court were: (a) Admissions in the first statement were not inconsequential (b) the second statement was given shortly after the first (c) the first statement was used in the second interrogation (d) appellant was not advised that the first statement would not be used against him. Findings and sentence set aside, rehearing authorized.



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF: DAJA-ZX

12 February 1975

SUBJECT: Travel of Witnesses

TO: ALL STAFF JUDGE ADVOCATES

The critical shortage of funds has affected all Army operations. Courts-martial are no exception. In particular the money available for the travel of judges and the travel of witnesses has been sharply curtailed. This means that there must be renewed emphasis on reducing, to the extent compatible with the needs of discipline, both the number of cases tried and the number of offenses charged.

In addition you should remind your chief trial counsel of his duty to oppose vigorously the subpoena and travel of witnesses who are not manifestly necessary and material to a fair disposition of the case. The request for "live" witnesses on extenuation and mitigation should particularly be opposed unless the trial counsel is satisfied that the accused can bear his burden of proving that personal appearance (as opposed to, say, a stipulation) is somehow vital to his case. In this connection, attention is invited to United States v. Manos, 17 USCMA 10, 37 CMR 274 (1967) wherein the United States Court of Military Appeals seemed to indicate that "live" testimony on extenuation and mitigation was not normally necessary if there was adequate "substitute" testimony.

In no manner should this letter be construed as implying that trial counsel should oppose travel of witnesses solely because there is a shortage of money. Justice, of course, cannot be measured in purely monetary terms. However, because of the shortage of money it is necessary that travel funds be expended only for those witnesses who are clearly necessary and material to a full and fair hearing. In the past, trial counsel, perhaps in an abundance of caution, often resolved all doubts in favor of the accused and did not always oppose requests for witnesses even if it was unlikely that necessity and materiality could be established.

Please give this matter your full personal attention so that insofar as is possible public monies are expended in a way that is consistent both with the rights of the accused and the rights of the public.

LAWRENCE H. WILLIAMS
Brigadier General, USA
Assistant Judge Advocate General
for Military Law

Appendix

Editors Note

The following represents a continuation of the "Quick Reference Outline" initiated in Volume 6, Number 2 and continued in Volume 7, Number 1, THE ADVOCATE:

I. Limits on Sentences Which May Be Adjudged

A. Relevant Law

1. Uniform Code of Military Justice (10 U.S.C. §801-940)

Article 13. Punishment Prohibited Before Trial:

Article 18. Jurisdiction of general courts-martial in general:

Article 19. Jurisdiction of special courts-martial:

Article 20. Jurisdiction of summary courts-martial:

Article 47. Refusal to appear or testify:

Article 48. Contempts:

Article 55. Cruel and unusual punishments prohibited:

Article 56. Maximum limits of punishment:

Article 58a. Sentences: reduction in enlisted grade upon approval:

2. Manual for Courts-Martial, United States, 1969 (Revised edition), Paragraphs 15, 16, 76a, 81, 88, 89, 109d, 110a(3), 125, 126, 127

B. Summary of Limits Based on Offenses. To determine the maximum punishment for a particular offense, examine in this order:

1. The Code article proscribing the offense (an offense may contain mandatory sentence, e.g. death or life imprisonment for premeditated murder).

2. The Table of Maximum Punishments, Paragraph 127c, Manual for Courts-Martial, United States, 1969 (Revised edition).

3. If there is no maximum punishment listed but there is a listed maximum for a "closely related offense" or an offense which includes the offense in question as a lesser and included offense, this listed maximum punishment applies. If there is no such offense, the offense in question is punishable as punishable in the United States Code or the District of Columbia Code (whichever is lesser), or by custom of the service.

C. Additional Limits.

1. Maximum punishments for aiders and abettors, accessories after the fact, and persons guilty of attempts and conspiracies are determined by Footnotes 1 through 4 respectively, to the Table of Maximum Punishments.

2. Footnote 5 to the Table of Maximum Punishments provides that a violation of an order or regulation which, absent that order or regulation, would be also a separate offense listed in the Table, has as its maximum punishment the separately listed maximum if that maximum is less than the maximum for violating the order or regulation.

NOTE: For Footnote 5 to apply and for the maximum punishment to be other than that for violation of an order or regulation, the maximum punishment for the other listed specific offense must be listed in the Table. Footnote 5 does not apply to offenses charged under Clause Three of Article 134 where the maximum punishment is taken from either the Federal or District of Columbia Codes. United States v. Ross, 47 CMR 55 (1973).

II. Reviewability Generally

A. Once a finding of guilty has been made and a sentence has been adjudged, the first review of the sentence is by

the convening authority. The convening authority may not increase the severity of the sentence but otherwise he has complete power over it. He may approve all or part of the sentence. He may suspend all or part of the sentence. He may defer service of confinement until the sentence is ordered executed. He may commute (change the nature of) any part of the sentence as long as he does not increase its severity, Articles 57(d), 64, Uniform Code of Military Justice; Paragraph 88, Manual for Courts-Martial, United States, 1969 (Revised edition)).

B. The severity of the sentence approved by the convening authority determines the further review of findings and sentence. To be reviewed by the Court of Military Review and to be eligible for review by the Court of Military Appeals the approved sentence must include death, dismissal, dishonorable or bad conduct discharge, or confinement for a year or more. Article 66, Code, supra. The Court of Military Review generally has all the powers over the sentence held by the convening authority but it may not suspend or defer sentences. It may reduce or modify a sentence to correct an error at trial or on the basis of appropriateness. Paragraph 100, Manual, supra. The Court of Military Appeals has no direct power over sentence but may order a re-assessment of a sentence or a rehearing on sentence if it determines that this is necessary based on an error of law. Paragraph 101, Manual, supra. The special powers of suspension, deferment, and commutation are dealt with in the following sections.

III. Suspension

A. Relevant Law

1. Article 71. Execution of sentence; suspension of sentence:

Article 72. Vacation of suspension.

Article 74. Remission and suspension.

2. Paragraphs: 88e, 97a, 97b, 105, 126i, Manual, supra.

B. Article 74(a), Code, supra, is implemented by AR 190-36 which gives The Judge Advocate General and the United States Disciplinary Barracks commander authority to remit or suspend all or part of a sentence prior to completion of appellate review.

C. A sentence cannot be suspended by the military judge at a court-martial or by an appellate judge. Articles 71, 72, 74, Code, supra, United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973).

D. The purpose of suspension is to grant the accused a probationary period within which he may by refraining from further misconduct earn the remission of his sentence.

E. All suspensions contain a provision (whether explicit or not) that the suspended sentence (or suspended portion of the sentence) will be remitted upon completion of the period of suspension unless the suspension is vacated for further misconduct under the provisions of Article 72, Code, supra, before completion of the period of the suspension of the sentence.

F. A sentence may also be suspended pending an anticipated future event. Paragraph 88e, Manual, supra.

G. A suspension of a sentence may be based on conditions other than future obedience to the Code. The Court of Military Appeals in Lallande, supra, said the convening authority had the "power to impose at least the same conditions allowable to a judge in a federal civil criminal court." The Court of Military Appeals approved provisions that a probationer must "conduct himself in all respects as a law-abiding citizen;" and must submit his person and effects to search by his commander at any time.

H. A suspension may not be for an unreasonably long period nor can it exceed the individual's present term of military service. Appellate authorities may reduce an unreasonably long period of suspension. Paragraph 88e, Manual, supra. United States v. Estill, 9 USCMA 238, 26 CMR 238 (1958); United States v. Holloway, 38 CMR 511 (ABR 1967).

I. Vacation of a suspended sentence under Article 72(c), Code, supra, where the sentence is imposed by summary court-martial or special court-martial and does not include a bad conduct discharge, may be taken without a hearing by the officer superior to the accused who is authorized to convene the type of court that imposed the sentence. Paragraph 97b, Manual, supra.

J. An act of misconduct to justify vacation of suspension, and the order vacating the suspension, must occur within the period of suspension. Paragraph 97b, Manual, supra.

K. Sentences to suspension from rank, command, or duty are not authorized. Paragraph 126i, Manual, supra.

IV. Deferment

A. Relevant Law

1. Article 57(d), Effective date of sentences:

2. Relevant Paragraphs, Manual, are 48k(4), 79d(4), 88f, 88g.

B. Deferment deals with confinement and forfeitures. Deferment of confinement is parallel to the civilian practice of bail pending appeal and is not clemency. United States v. Collier, 19 USCMA 511, 42 CMR 113 (1970).

C. Authority to grant deferment is in the sole discretion of the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over him. Authority to rescind deferment is in the sole discretion of the officer granting it or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over him. Paragraph 88f, g, Manual, supra.

D. Denial of deferment may be based on (1) danger of accused to the community (2) likelihood of flight to avoid service of sentence. Paragraph 88f, Manual, supra. These reasons are illustrative even as to

reasons for initial denial of deferment and do not limit grounds for rescission of deferment. United States v. Daniels, 19 USCMA 518, 42 CMR 120 (1970).

E. An abuse of discretion was found in rescission of deferment and an accused was ordered released by the Court of Military Appeals when the rescission was based on no new misconduct. United States v. Collier, 19 USCMA 511, 42 CMR 113 (1970).

F. During any period that service of confinement is deferred, the application of forfeitures must be deferred also. Additionally, a convening authority may in his discretion defer the application of forfeitures after the date of his action until some future time (such as the completion of appellate review and the ordering of the sentence into execution). Paragraph 88d, Manual, supra.

V. Commutation

A. Relevant Law, Paragraphs 88, 94, 100, 105a, 126d, Manual, supra.

B. The convening authority and the Court of Military Review may both commute (change the nature of) sentences as long as the severity of the sentence is not increased. Paragraphs 88, 100, Manual, supra.

C. In determining what sort of commutation is permissible, the commuted sentence as a whole must be less than the adjudged sentence. The adjudged parts of the sentence are not separate limits and, following the Table of Equivalent Punishments (Paragraph 127c, Manual, supra), one part of the sentence could be decreased and another increased as long as the increase did not increase the total sentence (e.g. confinement at hard labor for three months and forfeitures of \$50.00 per month for three months could be commuted to confinement at hard labor for one month and forfeitures of \$70.00 per month for three months). United States v. Brice, 17 USCMA 336, 38 CMR 134 (1971).

D. The Table of Equivalent Punishments does not directly state equivalents between punitive discharges and confinement. Paragraph 127e, Manual, supra, does provide that if an offense is punishable by confinement for one year a dishonorable discharge is also authorized and if an offense is punishable by confinement for six months a bad conduct discharge is also authorized. It has been held, however, (United States v. Johnson, 12 USCMA 640, 31 CMR 226 (1962)) that if no punitive discharge is adjudged, confinement for one year and total forfeitures may not be commuted to a bad conduct discharge even with the consent of the accused. A bad conduct discharge has been commuted to confinement for six months and the Court of Military Appeals has held this permissible. United States v. Brown, 13 USCMA 333, 32 CMR 333 (1962). There is language in United States v. Darusin, 20 USCMA 354, 43 CMR 194 (1971), that implies that United States v. Johnson, supra, can be read in reverse and that a commutation of a bad conduct discharge to confinement for as much as one year would be permissible. The Air Force Board of Review held to this effect in United States v. Owens, 36 CMR 909 (AFBR 1966). However, a bad conduct discharge cannot be commuted to confinement if the total of that confinement plus adjudged confinement is greater than the six months jurisdictional limit of confinement which may be adjudged at the special court-martial that sentenced the accused. Jones v. Ignatius, 18 USCMA 7, 39 CMR 7 (1968). If a punitive discharge is commuted to confinement, the confinement runs from the day the original sentence was adjudged.