

T H E A D V O C A T E

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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.

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JUDGE OR JURY?

Perhaps one of the most significant changes wrought by the Military Justice Act of 1968 permits an accused serviceman to elect to be tried and sentenced by a military judge alone. This amendment not only brought military justice into conformity with most civilian jurisdictions, but it operated to give the accused and his counsel a meaningful vote in selecting the mode of trial. How counsel helps his client to make this decision may well determine most of the remaining substantive and procedural questions at trial.

Between 1 August 1969 and 31 March 1970, there have been 1776 trials by general court-martial in the Army. Of these 997 have been by judge alone. While we do not know what criteria counsel used in these cases to decide whether to be tried by judge or jury, we can suggest some criteria which should be considered before trial by jury should be waived. [We analogize here the court-martial with members with a civilian jury trial. But see United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1964).]

Clearly a primary concern should be whether a guilty plea is contemplated, for in this case, the only real function the military judge performs is sentencing. Of all trials by judge alone between 1 August 1969 and 31 March 1970, 644 or 65% were guilty pleas. This suggests that military judges are fast gaining experience and presumably expertise in sentencing, and also that discerning counsel now should be able to detect sentencing patterns in local jurists. A few judge-alone sentences we have noted have been disproportionate especially in drug and discipline-related offenses. Some judges have exercised little discretion in screening potential aggravating matters which the prosecution has offered in evidence, and still others have passed sentences with little time for deliberation, implying that little weight is being given to evidence in extenuation and mitigation. All of these factors should be explored and considered by counsel before a decision is made to waive a jury for the sentencing portion of the trial.

If a not-guilty plea is contemplated, the situation becomes more complex, for the sentencing proclivities of the judge must a fortiori become of only secondary concern.

Some cases make the decision easy. Where the crime is a particularly aggravated one, and when the aggravating facts are sure to come to the jury's attention, trial by judge alone is clearly indicated. A judge is less likely to be affected by aggravating factors than is a jury simply because he has been exposed to similar cases in the past. On the other hand, where an accused's technical guilt is overshadowed by extenuating circumstances which do not rise to the level of an affirmative defense, but which cry out for mercy, trial by jury should be considered. Very often a jury's mercy is reflected in all of its deliberations, including those preceding findings.

If an exclusionary hearing is contemplated, especially one with a high likelihood of success, trial by jury would again be indicated, for it is the rare judge who can pass on the admissibility of a purported confession, the results of a lineup or the fruits of a search, and then put the inadmissible evidence totally out of his mind. A bell, as the Supreme Court has observed, cannot be unring.

Trial by judge alone would also seem to be indicated where the defense case rests on a complicated factual pattern which a legally trained judge would comprehend better than a lay jury. Also, since the rules of evidence tend to be relaxed somewhat in trials by judge alone, counsel whose case requires this relaxation should consider waiver of the court. Finally, if there are strong military or civilian community prejudices against your client, trial by judge alone is almost mandatory.

There are, however, some general drawbacks to trial by judge alone and it has been noted that a judge alone tends to emphasize legal issues over factual ones, while a jury's view of the facts tends to be made more realistic than a judge's. See generally 1 Busch, Law and Tactics in Jury Trials, § 46 (1959).

Although the government does not have a veto power over the accused's decision to waive trial by jury, as it does in the federal system, the government will in general desire trial by judge alone. Not only is a considerable saving in manpower realized, but the probability of reversal on appeal is reduced when the judge is not required to formulate lengthy instructions fraught with potential error. This could, of course, work in reverse for a defense counsel who desires to forego his chances at trial in hopes of a reversal on appeal.

Statistics from the federal system indicate that there is a distinct preference for trial by jury. In 1968, for example, there were 3139 criminal trials by jury in all federal districts, whereas there were only 1668 trials by judge alone [this comprehends, of course, only not-guilty cases.] Strangely, however, the conviction rate in trial by jury (77.6%) was significantly higher than in trials by judge alone (71%). Administrative Office of the US Courts, Federal Offenders in the United States District Courts - 1968, p. 6.

Military statistics may be beginning to show a similar trend after an initial fascination with judge-alone trials. From 1 August 1969 to 31 March 1970, only 353 of the 997 general courts-martial by judge alone were not-guilty pleas,

and only 75 of the 275 judge alone bad conduct discharge adjudging special courts-martial were not-guilty pleas. [This last statistic may be misleading since during this period there were only 9 bad conduct discharge adjudging special courts-martial tried to a jury of a total of 284 cases!]

Once the decision is made to accept trial by jury, counsel and the accused next face the decision whether or not to ask for enlisted men on the court. There seems to be a preconception in JAG circles that enlisted men are "tougher" on accused than are officers. Like many overly simplistic canards, this one appears to us to be only partly true. A study of the acquittal rates and mean sentences in courts-martial with enlisted members over the past few years will reveal that there is no significant difference from courts composed of officers only. The myth about "tough" enlisted men is widespread, however, and probably stems partly from the once universal practice of including only E-8's and E-9's among the roster of eligibles. See United States v. Crawford, supra. We detect a change in this practice--indeed the longest Presidio "mutiny" trial included an E-5 on the court and this was the only court of six to return with findings of guilty of lesser included offenses. United States v. Rowland et al, No. 421750 (ACMR 1970). Thus we suggest a reexamination of the feasibility of requesting enlisted persons be included in the membership of courts.

Several factors often militate strongly in favor of enlisted courts. First, the enlisted members will almost invariably be sitting on their first court-martial, and will be more amenable to what experienced officers might consider "routine" sentence arguments. Second, an enlisted member will probably be more receptive to testimony from the accused's enlisted superiors that he would be welcome back in the unit.

The type of offense will naturally be a foremost consideration. Enlisted men may be more sympathetic to offenses prompted by human foibles such as intoxication than they would be to discipline-type crimes.

Counsel must, in each case, assess all factors bearing on the type of court they will recommend to their clients. The decision should be an informed one, and counsel should not rely on clichés or general rules in making this all-important choice. Intensive examination of the alternatives and sound professional judgments are always required.

POST-TRIAL COMMUNICATION WITH COURT MEMBERS

As every trial attorney knows, one of the more useful means of appraising his performance at trial is by post-trial discussions with court members who sat on the case. Often these discussions provide valuable insight into lay reactions to the testimony of witnesses, arguments and legal tactics. Counsel should clearly understand that such communications normally present no ethical or other problems. There are, however, certain limitations which counsel must bear in mind. The first restriction is that imposed by the form of the oath taken by the court member. It enjoins him from disclosing "the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in due course of law." Thus, counsel should not seek to know how the particular members voted on these matters. Within the limits of the oath, however, much valuable information can be gained. Further considerations governing an attorney's conduct in this area are contained in the recently adopted Code of Professional Responsibility promulgated by the American Bar Association, the pertinent parts of which are set out below. One further rule is suggested by this excerpt. A counsel should not discuss a case with a court member who is unwilling to do so unless the matter is one which concerns illegality or invalidity of the verdict. Such conduct, obviously, is self defeating.

Ethical Consideration 7-29:

After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking

questions or making comment that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror he could not ascertain if the verdict might be subject to legal challenge in which event the invalidity of the verdict might go undetected. When an extra-judicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

SUGGESTIONS FOR DEFENSE REQUESTED INSTRUCTIONS

Defense counsel while engaging in legal research should be alert to possibilities for drafting instructions which are both approved and favorable to the defense position. It is important to note that the instructions contained in the Military Judges' Guide, DA Pamphlet 27-9, do not constitute an exhaustive list of possible instructions. As an illustration, we have set out below a passage which could be fashioned into a valuable instruction in appropriate cases. The following excerpt is taken from a Court of Military Appeals case dealing with the mens rea requisite to conviction for narcotics possession. It can be tailored, however, to many other criminal intent situations.

The word "wrongful," like the words "willful," "malicious," "fraudulent," etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act. The word "wrongful" implies the opposite of right, a perverted evil mind in the doer of the act. United States v. West, 15 USCMA 3, 7, 34 CMR 449, 453 (1964).

EN BANC DECISIONS IN THE COURT OF MILITARY REVIEW

Counsel may be puzzled about the spate of recent en banc decisions from the Courts of Military Review, and may wonder whether greater weight should be attached to these opinions than to regular 3-judge panel decisions.

Although a truncated en banc procedure existed in the Board of Review, (see, e.g., United States v. Jacobson, 39 CMR 516 (ABR 1968) (en banc), the procedure was recently formalized by the rules enacted pursuant to amended Article 66(a), Uniform Code of Military Justice. Rule 18, Courts of Military Review, Rules of Practice and Procedure (AR 27-13) provides for en banc hearings or rehearings in two cases--by the court on its own motion, and at the suggestion of a party. Three grounds for en banc hearings are listed: (1) when en banc consideration is necessary to maintain uniformity of decisions of the court, (2) when the proceeding involves a question of exceptional importance, and (3) when the sentence affects a general or flag officer, or extends to death. The first two grounds are similar to those found in Rule 35 of the Federal Rules of Appellate Procedure.

Although the rules provide for en banc hearings or rehearings at the suggestion of a party, similar to the federal rules [Fed. R. App. P. 35(b)] all en banc hearings in the Army to date have been ordered by the court on its own motion. One reason for the failure of the court to grant en banc rehearings at the suggestion of a party is that Rule 18 b contains a logical inconsistency which makes this type of en banc rehearing impossible. The rule provides that the suggestion for rehearing en banc "shall be filed with the Court within 5 days after appellate Government counsel files its reply to the assignment of errors." Suggestion for rehearing could not possibly be made within that time limit unless the first hearing is also had within that time--something current calendar backlogs render

improbable. See United States v. Crow, No. 419650 (ACMR 5 Aug 1969) (suggestion for rehearing en banc denied as inappropriate), rev'd on other grounds No. 22,480 (COMA 24 April 1970).

En banc procedures in the Court are relatively formalized. Each long-form decision of each panel is circulated to the other panels for three days. Within that time, any judge may taken an exception to the draft opinion. A meeting then is held at which a majority vote of those present may cause the case to be heard en banc. No case in the Army has yet been orally argued en banc before the Court of Military Review since the Court has not ordered such oral presentations.

Some en banc decisions in the Army have been used to bring into conformity various divergent views of the panels. Others, such as the decision announcing all writs power, have been used in cases of major importance. Confusion has arisen in some en banc cases, however, which have been characterized by a spate of opinions offering varying combinations of concurrences and dissents. For example, in United States v. Butler, No. 420266 (ACMR 1 Dec 1969) (en banc) the lead opinion concurred in by nine judges, held that the question of exceptional importance was a jurisdictional one, and thus affirmed military jurisdiction over the transfer of hashish. Four judges dissented, finding no jurisdiction, but their opinion became the majority opinion on the dispositive issue of entrapment. One of the four dissenting judges also concurred separately, declining to express an opinion on the entrapment issue. Two of the judges joining in the majority opinion on jurisdiction apparently found entrapment not in issue. It is difficult to tell where one judge stood. In short, the Butler opinion will have little precedential value since en banc procedures there resulted in confusion.

By their nature, en banc decisions should be accorded greater weight than panel decisions by counsel seeking controlling precedents. Counsel should note however, that because of an increase in concurring and dissenting opinions in these cases, the holdings may in fact be quite narrow.

THE CONSTITUTIONALITY OF ARTICLE 125

In the wake of current attacks on the vagueness of the general article, the possible overbreadth of Article 125, Uniform Code of Military Justice should not be overlooked. This article proscribes, unnatural carnal copulation. Recent federal decisions have raised a serious question as to the constitutionality of similar statutes which purport to regulate private, consensual acts and which apply to married as well as unmarried persons.

The starting point for an examination of Article 125 must be Griswold v. Connecticut, 381 U.S. 479 (1968). "The import of the Griswold decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty." Lotner v. Henry, 394 F.2d 873 (7th Cir. 1968).

In Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), a three-judge panel struck down Article 524 of the Texas Penal Code, which proscribed sodomy, as unconstitutionally broad and hence void. Article 524 of the Texas Penal Code reads in part:

Whoever has carnal copulation . . .
in an opening of the body, except
sexual parts, with another human
being, or whoever shall use his
mouth on the sexual parts of
another human being for the purpose
of carnal copulation . . . shall
be guilty of sodomy. . . .

In striking down this section of the Texas code, the Court took pains to point out that the state has the power to regulate sexual relations by passing laws prohibiting what it considers immoral acts. However, that regulation "may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms." See NAACP v. Alabama, 377 U.S. 288 (1964). Since the sections of the Texas code applied to everybody, whether or not married, or whether or not consenting adults, the statute was overbroad and void on its face.

Clearly, Article 125 applies to married as well as single couples. Its introductory phrase is "any person" which can only mean what it says. Buchanan, supra, makes it clear that statutes like this one cannot be saved by a showing that only unmarried persons are prosecuted. The law still applies to all and the fear of prosecution is real.

It should be emphasized that there are no military cases holding Article 125 unconstitutional. However in view of the latest federal cases, this may be a fertile field for defense counsel to explore.

MAY THE JUDGE LOOK AT THE PRETRIAL AGREEMENT?

Pending before the Court of Military Appeals is the issue whether in a guilty plea case it is error for the military judge sitting alone to see the quantum portion of the pretrial agreement. United States v. Villa, No. 22,713 (Argued 24 March 1970); United States v. Razor, No. 22,891 (COMA petition granted 11 May 1970). Most military judges refrain from looking at that part of the pretrial agreement containing the quantum agreed to by the accused and the convening authority. A few judges, however, have informed themselves of this part of the agreement. The defense position before the Court is that a military judge can determine the providence of the plea without knowing what maximum sentence limits the convening authority. The judge can inspect the quantum in the pretrial agreement after he renders the sentence. This is the advice given to military judges in Military Judge Memorandum Number 49, enclosing a revision of Chapter 3, Guilty Plea Cases, of DA Pam. 27-9, Military Judges' Guide.

The defense argument in Villa contends that the military judge, as a sentencing body, should not feel it necessary that he conform his sentence to the wishes of the convening authority. The military judge should act in an independent manner, free from any outside influence, advice or suggestion.

In a guilty plea case, where there is a pretrial agreement, defense counsel should attempt to achieve a sentence from the judge less than that agreed to with the convening authority. His endeavors may be hampered if the military judge knows what sentence was agreed to in the pretrial agreement. The judge may be tempted to give a heavier sentence, relying on the required reduction action of the convening authority, in order to register his disapproval of the accused's acts and display his feeling that the offense is serious.

If the military judge insists on looking at the pretrial sentence, defense counsel should object. Even if Villa holds that the judge does not err per se when looking at the quantum portion, defense counsel should as a matter of policy and tactics request that the quantum part be viewed only after sentence is rendered.

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* THE ADVOCATE understands that
* many trial-level military judges
* are rendering written opinions on
* interlocutory questions of law
* which arise during their trials.
* Since these opinions are, to our
* knowledge, not otherwise published,
* THE ADVOCATE will, as a service
* to its readers, publish brief
* synopses of significant trial-
* level opinions, if copies of
* these opinions are furnished.
* Thus, we urge military judges
* to send us copies of their writ-
* ten opinions as soon as they are
* rendered so that digests of them
* may be widely disseminated.
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THE MISCELLANEOUS DOCKET

We have in the past noted the emerging importance of extraordinary remedies in military jurisprudence. Most of the activity in the area has thus far taken place in the United States Court of Military Appeals. The very nature of extraordinary relief normally demands a more expeditious procedure than would be possible were the case to be considered in due course. Thus, to accord extraordinary petitions and motions due attention the Court of Military Appeals maintains a separate register of these cases known as the miscellaneous docket.^{1/}

The miscellaneous docket is, indeed, a separate book maintained in the dockets room in the Court of Military Appeals. The docket presently contains forty cases, each representing a request for extraordinary relief. The Court frequently writes opinions accompanying their decisions in these cases, and they are reported in the same manner as opinions written in cases arising through normal appellate channels. Usually these opinions are not available to counsel in the field until they are published in a bound volume. Similarly, miscellaneous docket cases disposed of without opinions normally are not relayed to the field and thus go unnoticed by counsel.

Miscellaneous docket decisions often make new substantive law and frequently set forth guidelines for subsequent requests for appropriate relief. THE ADVOCATE will briefly note any miscellaneous docket decisions during the month which in our opinion would be helpful to counsel.^{2/} We begin by offering a capsule review of all significant miscellaneous docket decisions of 1970 in this issue.

^{1/}The miscellaneous docket is utilized for all cases coming to the Court outside the normal appellate route.

^{2/}Since United States v. Draughon, No. 419184 (ACMR 20 Mar 1970), established the all writs power of the Army Court of Military Review, that court too has established a miscellaneous docket. We will consider cases appearing there as well.

Counsel at special courts-martial seem effectively precluded from obtaining post-trial extraordinary relief from military appellate courts unless a bad conduct discharge was adjudged. Because the all writs power is to be employed only "in aid of" the court's jurisdiction and a special court sentence not adjudging a punitive discharge is not reviewable by a military court under Article 67(b), the Court has decided it has no jurisdiction to grant appropriate relief in those cases. Hyatt v. United States, COMA Misc. Docket No. 70-25 (decided 27 Mar 1970). The same result has obtained on applications for extraordinary relief from a summary court-martial, Thomas v. United States, COMA Misc. Docket No. 70-26 (decided 27 Mar 1970), and from nonjudicial punishment. Whalen v. Stokes, COMA Misc. Docket No. 70-36 (decided 21 April 1970). In short, the Court seems determined not to permit applications for appropriate relief to circumvent the limitations placed upon appellate review by Article 67(b). See also Barrera v. Laird, COMA Misc. Docket No. 70-28 (decided 7 April 1970). Moreover, the mere labelling of a petition as a class action has been held not to alter the rule prohibiting circumvention of Article 67(b). In re Watson and Others Similarly Situated, COMA Misc. Docket No. 70-37 (decided 28 April 1970).

A petition for appropriate relief is one means of precluding prosecution and further incarceration. In Zamora v. Woodson, COMA Misc. Docket No. 70-22 (decided 4 May 1970), motion was made to a military judge for a "Writ of Habeas Corpus and for Relief in the Nature of a Writ of Mandamus" seeking dismissal of the charge against a civilian. United States v. Averette, 19 USCMA 363, 41 CMR 363 (1970). On appeal from the military judge's denial of the motion, the Court of Military Appeals granted the requested relief by ordering the charge dismissed.^{3/}

^{3/}The Court specifically declined to pass on the power of the military judge to grant extraordinary relief. This issue is presently pending before the Court in the Air Force case of Gagnon v. United States, COMA Misc. Docket No. 70-31 (argued 24 April 1970). Zamora is also significant because the appeal did not go through the Court of Military Review and the Court of Military Appeals imposed no such requirement.

Appropriate relief may be an effective means of precluding inordinate post-trial delays attributable to officials responsible for the efficient administration of justice. Thus, where the convening authority had taken no action during approximately ten months after the sentence imposed at trial, the Court of Military Appeals, upon application for appropriate relief, ordered him to complete his review and action on the record of trial and to file the same with the Court. Montavan v. United States, COMA Misc. Docket No. 70-3 (Order Issued 26 February 1970).

Pretrial confinement is traditionally a matter for the sound discretion of the commanding officer. The miscellaneous docket this year reveals several attempts, via extraordinary relief application, to obtain release from pretrial confinement, all of which have been rejected by the Court. Horner v. Resor, COMA Misc. Docket No. 70-11 (decided 11 March 1970) (Misc. Docket Cases 70-12 and 70-13 are related to and rely upon the decision in Horner); Smith v. Coburn, COMA Misc. Docket No. 70-18 (decided 11 March 1970). Though the attacks upon pretrial confinement have been unsuccessful, the fact that the Court has discussed the merits of the decision confining the respective petitioners suggests that such decisions are indeed reviewable by the Court for abuse of discretion. See, e.g., Ball v. Thomas, COMA Misc. Docket No. 70-14 (decided 5 March 1970). A "petition for a writ of habeas corpus, or other appropriate relief" seems the proper vehicle for such review.

The extraordinary relief remedy has proven its value in attacking the status of a prisoner in confinement. Thus, where The Judge Advocate General (Navy) ordered a new trial on the basis of newly discovered evidence and instructed that the accused was to remain incarcerated as a sentenced prisoner while a decision concerning the practicability of a new trial was pending, the Court granted an application for

appropriate relief to the extent necessary to remove from petitioner the status of a sentenced prisoner. Johnson v. United States, COMA Misc. Docket No. 70-32 (decided 8 May 1970).

A recent miscellaneous docket case suggests that a post-trial attack on confinement pending appeal may be feasible but that such extraordinary relief will not be granted unless a petitioner has first exhausted available administrative remedies. The Court has stated: "[I]t appearing that petitioner has failed to apply for deferment of the confinement portion of his sentence as provided for by Article 57(d), Uniform Code of Military Justice, . . . the petition for habeas corpus (or other appropriate relief) is denied." Miller v. United States, COMA Misc. Docket No. 70-39 (decided 14 May 1970). Defense counsel should consider filing application for deferment immediately after a sentence to confinement has been adjudged. (See THE ADVOCATE, November 1969 and April 1970).

The recent case of Hutson v. United States, COMA Misc. Docket No. 70-40 (decided 22 May 1970), contains several points of interest for defense counsel. There, counsel was seeking mandamus, directing the convening authority to provide the defense with at least two qualified criminal investigators or, with the necessary funds to hire private investigators. Application for such relief had previously been denied by the convening authority and a military judge had refused to consider the request. The Army Court of Military Review also denied the application, holding that there had been no showing that normal trial and appellate remedies were inadequate to obtain the desired ends. Hutson v. United States, ACMR Misc. Docket No. 1970/1 (ACMR 22 Apr 1970).^{4/} The Court of Military Appeals, while sympathizing with petitioner's plight, found itself to be without power to grant

^{4/}It is interesting to note that the Court failed to mention the application to the Court of Military Review.

the requested relief. Noting that such relief has been provided for indigents in federal courts (18 USC § 3006A (1964)), the Court invited Congress to grant the same benefits to military defendants. Language in the Court's opinion seems to support defense counsel's right to interview witnesses "prior to the [Article 32] investigation and to make such preliminary investigations in connection with their appearance and the defense's own case as will enable him properly to represent his client." Geographical considerations are apparently irrelevant. We advise counsel to take full advantage of pretrial investigatory procedures. The Court concluded by suggesting, not too tacitly, that it would look favorably upon the government's voluntary compliance with petitioner's request for "such expert assistants as it may desire in order to assure a fair opportunity to prepare for any trial which may ultimately be ordered." Perhaps the Court will regard absence of such compliance as tantamount to a deprivation of the "fair opportunity to prepare for" trial.

Counsel seeking extraordinary remedies should set forth clearly in their applications the specific grounds for relief. In re Application of Moorefield, COMA Misc. Docket No. 70-8 (decided 18 February 1970). The Court has stated that it has jurisdiction to consider such petitions only if it is clear that charges under the Uniform Code of Military Justice have been preferred or are pending. Manning v. Healy, COMA Misc. Docket No. 70-35 (decided 21 April 1970). This information should appear clearly on the face of the application. An inartfully drawn pleading may result in an adverse decision resulting in unwanted and perhaps injurious delays.

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* Pay Entitlement of Persons on *

* Duty after ETS *

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* Occasionally, problems will *

* arise concerning the pay entitle- *

* ment of persons who are released *

* from confinement to perform *

* military duty beyond expiration *

* of their enlistment or term of *

* service while awaiting appellate *

* review of sentences which *

* include a punitive discharge. *

* Counsel should be aware that the *

* opinions of the Comptroller *

* General clearly establish the *

* service member's right to pay *

* in this situation. 37 Comp. *

* Gen. 228 (1957). This is true *

* even though the sentence *

* includes provision for total *

* forfeitures. 37 Comp. Gen 591 *

* (1958); Department of Defense *

* Military Pay and Allowances *

* Manual, Paragraph 70508d. *

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RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

ARREST--PROBABLE CAUSE--Police officers heard the following announcement over a police radio: "Wanted for investigation--four Negro males seen fleeing 2301 Monticello Road in 1958 Chevrolet, blue, Maryland license GY-7208." The Maryland Court of Special Appeals stated that ordinarily such a call would give an officer probable cause to stop and arrest the suspects without a warrant. However, in the instant case, the arresting officer did not have probable cause to believe that a

felony had been committed at the time the riders of the car were arrested as the police broadcast did not indicate the reason for investigation. The standard rule, according to the Court, is that a police officer may arrest without a warrant where there is probable cause to believe that a felony has been committed and that the person arrested committed it. Further, the arresting officer by observing four men in an automobile on a public street in the middle of the afternoon did not have probable cause to effect the arrest. Therefore, certain items seized after a search of the car were inadmissible as incident to an illegal arrest. Sands v. State, ___ A.2d ___ (Md. Ct. Spec. App. 4 March 1970); 7 Crim. L. Rep. 2033.

ARREST--PROBABLE CAUSE--The Pennsylvania Supreme Court held that police did not have probable cause to arrest an individual who appeared at a "pot party" that had been taken over by the police. The individual was searched and marihuana was found in one of his pockets. The only rationale for the arrest was guilt by association which, according to Sibron v. New York, 392 U.S. 40 (1968), cannot furnish probable cause to arrest. The arresting officers had no information about the defendant before he entered the apartment involved, and there was nothing about his demeanor or conduct to suggest that he was "on drugs" or that he had drugs in his possession. In addition, the search cannot be upheld as a permissible self-protective search for weapons as there was nothing about the defendant's demeanor or conduct to warrant a reasonably prudent man to apprehend danger. As the arrest of the defendant was not based upon probable cause, the incidental search of his clothes was likewise unlawful and the seized evidence was inadmissible in court. Reece v. Commonwealth, ___ A.2d ___ (Pa. Sup. Ct. 20 March 1970); 7 Crim. L. Rep. 2076

FAIR TRIAL--RIGHT OF CONFRONTATION--The U.S. District Court for the Eastern District of New York held that a Spanish-speaking murder defendant who was not afforded either a Spanish-speaking attorney or an interpreter to give him an on-the-spot interpretation of court proceedings and testimony was denied his right of confrontation and his due process right to a fair trial. An interpreter did, at two brief recesses in a three-day trial, inform the defendant roughly what was happening and what the prosecution testimony had been. In addition, some damaging testimony had been presented in Spanish. The Court, however, held that neither of these facts could overcome the harmful effect of the deprivation of the defendant's constitutional rights. Negron v. New York, ___ F. Supp. ___ (E.D.N.Y. 26 March 1970); 7 Crim. L. Rep. 2130.

REGULATION--DANGEROUS DRUGS--A defendant was charged with selling LSD under a state law which prohibits transactions in "Any drug which contains any quantity of a substance designated by regulations promulgated under the federal act as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect." The Supreme Court of South Dakota noted that the statute does not classify LSD as a hallucinogenic drug and reference must be made to the Federal Food, Drug, and Cosmetic Act to determine if a crime has been committed. Under the federal act, authority to promulgate regulations is vested in the Secretary of Health, Education, and Welfare. The Court indicated that the list of hallucinogenic drugs was constantly changing, and, at any given time, it would be necessary to consult the regulations of the Secretary to determine whether or not a certain drug came within the prohibition of the statute. The Court held that state statutes adopting laws or regulations of other states, the federal government, or its commissions or agencies which are

effective at the time of adoption are valid, but that the attempted adoption of any and all regulations and changes promulgated in the future was unconstitutional as an unlawful delegation of legislative power. State v. Johnson, 173 N.W.2d 894 (S.D. Sup. Ct. 1970). [Notes: The Army equivalent of the South Dakota statute, paragraph 18.1, Army Reg. 600-50, has been held to be punishable under Article 92, Uniform Code of Military Justice. United States v. Elwood, No. 419489, ___ CMR ___ (ABR 1969), rev'd on other grounds, No. 22,447, ___ USCMA ___, ___ CMR ___ (decided 17 April 1970). It should be noted that paragraph 18.1, supra, specifically mentions certain drugs such as barbituric acids, amphetamines, and then contains language similar to the South Dakota statute: "any other substance which the Secretary of Health, Education, and Welfare, or the Attorney General of the United States, or their designees, have found to have, and by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect." Para. 18.1a(3). Change 4. Army Reg. 600-50, 18 August 1969.]

SEARCH AND SEIZURE--BLOOD SAMPLES--Police obtained a blood sample from a rape suspect by a misrepresentation that blood was needed for an intoxication test. The blood actually was wanted for comparison with the type of blood found on the victim's mattress. The Fifth Circuit Court of Appeals held that Schmerber v. United States, 384 U.S. 757 (1966), did not apply to this situation and that the 4th Amendment rights of the suspect were violated. The Court noted that Schmerber approved the taking of blood for an intoxication test without a warrant or consent because of the danger that the evidence--the content of alcohol in the blood--would shortly be destroyed. In the instant case, as the real purpose of securing the blood was to determine blood type and the latter remains constant, ample time existed for securing a warrant. Graves v. Beto, ___ F.2d ___ (5th Cir. 3 April 1970); 7 Crim. L. Rep. 2104.

SENTENCING--JUVENILE CONVICTION--During the cross-examination of an appellant testifying after findings, the trial counsel elicited the fact that the appellant had a juvenile conviction for burglary. The military judge, sitting alone, stated that he would consider the evidence of the juvenile proceeding in determining an appropriate sentence. The Court of Military Review held that, under the circumstances of the instant case, the sentencing agency could not consider such juvenile proceedings. Paragraph 76a(2), Manual for Courts-Martial, United States, 1969 (Revised edition), states that: "A court may consider evidence of other offenses or acts of misconduct which were properly introduced on the case." Paragraph 153b(2)(b), supra, provides that evidence as to a juvenile proceeding, adjudication, or conviction, is not admissible to impeach the credibility of the accused as a witness unless the accused testified on direct examination that he had never, or had not within a certain period of time, committed an offense of any kind or of a certain kind. The Court noted that, in the instant case, the appellant "said nothing in his testimony on direct examination which could be deemed properly to have opened the door to his admission on cross-examination of a juvenile 'conviction' or proceeding." Thus, the evidence of the juvenile proceeding was not properly introduced in the case within the meaning of Paragraph 76a(2), supra, and should not have been utilized by the military judge as a basis for determining sentence. United States v. Collins, No. S5544 (ACMR 18 May 1970).

SENTENCING--RECORDS OF NONJUDICIAL PUNISHMENT; DA FORM 20--The Court of Military Review held that in a trial held after 1 August 1969 for an offense committed prior to that date (18 May 1969), an Article 15 in December 1968 was not admissible on sentence despite the provisions of Paragraph 75d, Manual for Courts-Martial, United States, 1969 (Revised edition) and paragraph 2-20, Army Reg. 27-10.

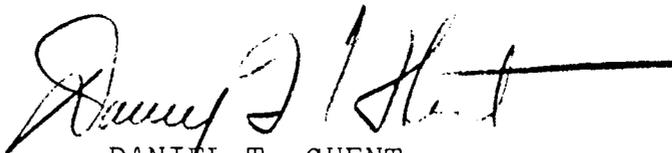
The Court relied on United States v. Griffin, 19 USCMA 348, 41 CMR 348 (1970), and Executive Order 11476, 19 June 1969, which promulgated the 1 August 1969 Manual, and which provided that "the maximum punishment for an offense committed prior to August 1, 1969, shall not exceed the applicable limit in effect at the time of the commission of such offense." The Court noted that, on the date the appellant committed the offense in question (18 May 1969), the pertinent provisions of the 1 January 1969 Manual did not authorize the sentencing agency in a court-martial to consider an Article 15 punishment, and that an Article 15 clearly tends to increase the punishment imposed. United States v. Moore, No. 422384, ___ CMR ___ (ACMR 21 Apr 1970). [Notes: This same line of reasoning has been applied to items in an accused's DA Form 20 which reflect adversely on his past conduct and performance of duties (e.g., reductions in grade in accordance with unit orders, time lost by reason of "AWOL") when a trial is held after 1 August 1969 for an offense committed prior to that date. United States v. Brewer, No. S5608 (ACMR 18 May 1970). In an AWOL offense where the appellant departed his unit prior to 1 August 1969 and returned to military control subsequent to that date, the Court of Military Review, citing United States v. Krutsinger, 15 USCMA 235, 35 CMR 207 (1965), held that the offense was complete the moment the appellant departed his unit without authority. Thus, the introduction of an Article 15 on sentence was prejudicially erroneous. United States v. Fedderly, No. 422810 (ACMR 28 April 1970).]

SENTENCING--RECORDS OF NONJUDICIAL PUNISHMENT--The Court of Military Review, applying the rule of United States v. Moore, No. 422384, ___ CMR ___ (ACMR 21 Apr 1970) (see above), offered several comments regarding the admissibility of Article 15's prior to sentencing. The Court stated that any waiver of objections by defense counsel applies only to those nonjudicial punishment records which have been

retained properly in an accused's Military Personnel Records Jacket (DA Form 201). The Court cited paragraph 3-15d, Army Reg. 27-10, which provides for the destruction of nonjudicial punishment records upon the expiration of two years from the imposition of the punishment, or upon the transfer of the individual from the organization provided that one year has elapsed since the punishment was imposed and all of the punishment imposed has been executed. The Court further stated that in computing the one or two year periods, any time that an appellant was "AWOL" would not be excluded from the calculations. Paragraph 3-15d, supra, qualifies the general rule with only one exception and, ordinarily, in the interpretation of statutes or regulations, the mention of one thing implies the exclusion of others. "Had the Secretary of the Army desired to incorporate the principle of excluding periods of unauthorized absence, paragraph 3-15d would have so stated." United States v. Reese, No. 422189 (ACMR 18 May 1970).

WILLFUL DISOBEDIENCE--FUTURE ORDERS--The appellant was given an order "to go on patrol" at a future time. At the time of receiving the order, the appellant stated his intention not to go on the patrol. The Court of Military Review noted that the evidence was unclear but appeared to indicate that at the time the patrol was briefed, the appellant was in the custody of an armed guard away from the departure point of the patrol. The guard was instructed to isolate the appellant from others and to prevent him from talking to anyone. The Court held, in accordance with Paragraph 169b, Manual for Courts-Martial, United States, 1969 (Revised edition), that if an order is to be executed in the future, a statement by an individual that he intends to disobey it is not an

offense under Article 90, Uniform Code of Military Justice. The Court further held that the government did not prove beyond a reasonable doubt that the appellant was not prevented by the action of the government from complying with the order. United States v. Shivers, No. 420985, ___ CMR ___ (ACMR 4 May 1970).

A handwritten signature in cursive script, appearing to read "Daniel T. Ghent", followed by a horizontal line extending to the right.

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