T H E A D V O C A T E

A Bi-Monthly Newsletter for Military Defense Counsel

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

Vol. 5 No. 2 May-June 1973

* *

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.

* *

CONTENTS

ARTICLE 134 AND MILITARY DEFENSE COUNSEL - WHAT CAN YOU DO?

As all counsel are surely aware, both the Third Circuit and The District of Columbia Circuit have published similar opinions declaring Article 134, Uniform Code of Military Justice, to be unconstitutionally vague. Levy v. Parker, 478 F. 2d 772 (3rd Cir. 1973); Avrech v. Secretary of the Navy, 477 F. 2d 1237 (D.C. Cir. 1973). These decisions have been appealed to the Supreme Court of the United States.

Less widely known is the fact that recently a District Court in Florida granted habeas corpus relief to a sailor charged, but not yet tried, for violation of Article 134, declaring that the sailor need not exhaust his military remedies in light of the Court of Military Appeals' order in United States v. Unrue ____ USCMA ____, ____ CMR ____ (No. 26,552 2 April 1973). McCahill v. Eason ____ F. Supp. ____ (U.S.D.C. N. Fla. 12 June 1973). McCahill is currently pending appeal before the United States Court of Appeals for the Fifth Circuit. The issues involved are also pending in various other circuits across the country. The question arising is what can you, a military lawyer, do to assist a client who is charged with committing any one of the myriad offenses prosecuted under Article 134?

Confronting reality, it is clear that it is currently impossible to secure meaningful relief in the military courts. United States v. Unrue, supra. Because of the pending appeals in Levy and Avrech, likewise, many federal district courts may now choose to await a decision from the Supreme Court before hastily granting habeas corpus or declaratory judgment relief or before enjoining court-martial proceedings. Unresolved retroactivity questions, however, demand that certain minimal steps be taken to preserve the issue. Additionally, it is quite possible that many federal courts including those in the District of Columbia, where the Secretaries of Defense and Army may be named as defendants, may still grant relief and force the government to appeal.

As all military defense counsel know, the position of The Judge Advocate General is that military defense counsel may not appear for a client in federal court without first securing permission under AR 27-40. This is not a blanket prohibition as some would try to treat it. It merely requires that the defense counsel seek permission from The Judge Advocate General. Thus, the first thing you can do to assist your client is seek permission from The Judge Advocate General to appear in federal court to file a habeas corpus petition or seek an injunction. See The Army Lawyer, March 1972, at page 27 for the procedure which must be followed. See also AR 27-40 and AR 600-50. If a significant number of these requests should be summarily denied, corresponding litigable questions might arise from such a pattern of denial. Significantly, The Judge Advocate General has detailed certain Army Lawyers to assist in preparation of the government's cases in federal courts and has also detailed certain Judge Advocate General lawyers on a part time basis from divisions other than Litigation Division for this purpose. It would be difficult for The Judge Advocate General to justify a blanket denial of defense requests on the assertion of "too busy" while permitting other lawyers to act similarly on behalf of the government.[1]

If you are unable to seek or obtain permission to appear in federal court, there is an important alternative: Advise your client of the possibility of federal court relief and of his right to submit his own petition to the court with or without the assistance of civilian counsel. Because most of your clients will be considered "indigent", they may qualify for civilian legal aid and may also be eligible for assistance from groups such as American Civil Liberties Union and National Prison Project.[2]

1/ Assuming that he has authority as an officer to sue the United States. See 10 U.S.C. 3037; 18 U.S.C. 203, 205.

2/ Lawyers Military Defense Committee, 410 First Street S.E., Washington, D.C. 20003; The National Prison Project, 1424 16th Street N.W., Suite 404, Washington, D.C. 20036. For the procedure for referring a client to local civilian counsel see Section B2a of the Attorney-Client Guidelines (Army Lawyer, June 1973, pp. 16-17).

Both of these organizations may provide gratis the necessary materials to enable the average soldier to intelligently complete the paperwork required to get into court.

The one final way in which you can protect your client is to raise the unconstitutionality of Article 134 during every phase of the military criminal proceeding. This action will preserve the issue for appeal should the Court of Military Appeals at a future date become confronted with a Supreme Court affirmance of the Levy and Avrech holdings.

In the meantime, however, it is clear that the Army will "continue to march" in cases involving Article 134 offenses. During this period, counsel should not neglect to insure that your client is fully aware of all military and civilian remedies in all court-martial proceedings.

DRUG OFFENSES COMMITTED OFF-POST: MILITARY AND FEDERAL COURT REMEDIES

The issue of whether or not courts-martial have jurisdiction over various types of drug offenses committed off-post has often been the subject of litigation both in military and federal courts. There has been a recent resurgence in federal court cases in this area, generally following the rule in Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) that off-post possession of marihuana is not "service-connected" within the rule of O'Callahan v. Parker, 395 US 258 (1969). The Court of Military Appeals has rejected the Moylan rationale, holding that in all cases even the off-post, off-duty possession and use of marihuana or drugs is service-connected. United States v. Beeker, 18 USCMA 563, 40 CMR 275 (1969).3/ Likewise, sale to an "ordinary

3/ The court recently held that failure to follow Beeker "would require us to ignore the plain obligation of our armed forces to maintain by proper disciplinary sanctions, the capacity of all service personnel to function as an effective force". Rainville v. Lee, Misc. Doc. No. 73-42, USCMA ____, ____ CMR ____ (September 13, 1973) M/S Op. page 2.

serviceman" off-post has been held to be within court-martial jurisdiction. United States v. Rose, 19 USCMA 3, 41 CMR 3 (1969). The Court has also held that off-post, off-duty sale to a civilian, even if a federal narcotics agent, is not "service-connected." United States v. Morley, 20 USCMA 179, 43 CMR 19 (1970). Whether jurisdiction applies in cases where the off-post buyer is an undercover CID agent or informant, has not yet been decided by the Court of Military Appeals. The Army Court of Military Review has held such sales to be service-connected. United States v. Getty, No. 429108, ___ CMR ___ (ACMR 31 July 1973); United States v. Johnston, 41 CMR 461 (ACMR 1969, pet. denied, 41 CMR 403. However, at least one panel of the Navy Court of Military Review has held to the contrary. United States v. Blancuzzi, NCM 722308, ___ CMR ___ (NCMR 1972).

Because of the uncertain state of military law with regard to off-post sales, and the preclusion of relief in military courts in off-post possession and use cases, defense counsel should be fully cognizant of the remedies possibly available to the clients in federal courts.

Clients charged with off-post drug offenses should be made aware in every case that they may seek civilian counsel, not only in connection with court-martial proceedings (Article 38, UCMJ), but also for exploiting the possibilities of instituting federal habeas corpus or injunctive relief on grounds that the offense is not "service-connected".

It is the law in at least two federal circuits that off-post possession, use and sale to a CID agent of marihuana is not "service-connected" if the facts measure up against the criteria set out in Relford v. Commandant, supra. Councilman v. Laird, 481 F.2d 613 (10th Cir., 1973) 4/; Cole v. Laird, 468 F.2d 829 (5th Cir. 1972). Several federal district courts have reached a similar conclusion with regard to marihuana and other drugs. United States v. Holder, Civil Action No. 534-73, __F. Supp. __ (D.D.C. June 21, 1973), notice of appeal filed August 21, 1973; Schroth v. Warner, 353 F. Supp. 1032 (D. Hawaii 1973) (concerned possession of methamphetamines); Redmond v. Warner, 355 F. Supp. 812 (D. Hawaii 1973) (concerned possession of heroin and cocaine); Lyle v. Kincaid, 352 F. Supp. 81 (N.D. Fla. 1972);

4/ Councilman has been appealed by the government to the United States Supreme Court.

Moylon v. Laird, supra. The best review of the law in this area and a comprehensive discussion of all pertinent military and civilian cases is found in the Schroth opinon. 5/

Perhaps the most significant aspect of the decisions in these cases is that exhaustion of military remedies normally will not be necessary before a court-martial may be enjoined. See Councilman, Cole, Holder, Schroth, and Redmond, all supra. 6/ Thus, clients should be made aware that a civilian attorney may seek relief in a federal court even before the court-martial is convened. Additionally, clients may appear pro se. Should they elect this course, however, it is advisable for them to contact an organization such as the American Civil Liberties Union or National Prison Project to secure appropriate forms. Alternatively, he may write to the clerk of the local federal district court for the appropriate information. While military defense counsel may seek permission from The Judge Advocate General to enter federal court on behalf of the client, this procedure could take too much time for reasons detailed elsewhere in the issue (See earlier discussion of Article 134, infra/supra). In any event, the client should be advised of the remedies possibly available to them in civilian courts.

In addition to advising clients about federal court remedies, counsel should raise the jurisdictional issue during the court-martial proceedings, when a trial may not be enjoined by a federal court. This will preserve the issue for appeal in both military and civilian courts. The proper method for raising the issue is to object to the jurisdiction of the court-martial and to move for dismissal of the charges. Careful research of the issue by reading and analyzing all of the cases cited above will properly frame the issue for decision by the military judge.

THE ADVOCATE will endeavor to keep counsel advised of the most recent developments in this area, but counsel should scrutinize the Criminal Law Reporter, federal advance sheets

---

5/ Counsel should note that, at least in Hawaii, although the substances involved were generally regarded as much more debilitating than marihuana, this factor was not sufficient to effectively bar relief. (See Schroth, supra and Redmond, supra).

6/ But for a contrary holding see Sedivy v. Richardson, __F.2d __ (3rd Cir., 26 September 1973).

and newspapers for reports of current decisions. If you are located in the Fifth Circuit (Texas, Louisiana, Mississippi, Alabama, Georgia and Florida) or Tenth Circuit (Oklahoma, New Mexico, Kansas, Colorado, Utah and Wyoming) your client may be in good position to obtain relief in federal court. If you are located elsewhere, clients should be advised that the Secretaries of Defense and Army may be sued in the United States District Court for the District of Columbia, where the favorable Holder decision was recently handed down.

THE ADVOCATE REVISITED

The following article appeared in a past issue of The Advocate. In view of the rapid turnover of military defense counsel in the field, many attorneys now defending courts-martial cases have undoubtedly never seen this material. The editors are confident that certain older articles, updated where appropriate, merit resurrection. We shall present others in forthcoming issues.

THE ARTICLE 38(c) BRIEF: A FORGOTTEN DEFENSE TOOL

Although both the Uniform Code and the Manual specifically authorize the trial defense counsel to file appellate briefs in behalf of their clients, we are constantly dismayed by the paucity of Article 38(c) briefs being attached to records of trial. This provision of the Code provides counsel with one of the most effective weapons in the defense arsenal, and no counsel should ever complete his representation without at least considering the possibility of an Article 38(c) brief.

Article 38(c), Uniform Code of Military Justice, provides in part that the defense counsel may, in every court-martial proceeding, "forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate." This provision applies to summary and special courts-martial as well as to general courts.

In United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955), the Court of Military Appeals took a broad view of Article 38(c) briefs. "The Code does not describe the nature of the matters which may be noted in defense counsel's post-trial brief. Neither does it directly indicate to whom the brief should be forwarded. However, it is clearly inferable that the brief may include factors relating to the sentence and that it is to be forwarded to the convening authority." Id. at 20 CMR 97. In that case, the Court noted that the Article 38(c) brief need not be written: "We think the fair intendment of the statute contemplates an oral presentation as well. With regard to the sentence, the oral presentation may take the form of a personal interview of the accused by the convening authority's legal officer." Id. Thus, Article 38(c) has become the only statutory authority for the post-trial interview. Since that interview was originally intended to replace a written brief on behalf of the accused, there is no authority for the inclusion in a staff judge advocate's review of any derogatory material garnered from the accused during the interview.

The Court of Military Appeals has always been concerned with the failure of counsel to make use of Article 38(c). In United States v. Fagnan, 12 USCMA 192,30 CMR 192 (1961), Judge Ferguson called the attention of counsel to "the responsibility of the trial defense personnel for including in the record all possible information which may have a bearing on the sentence to be adjudged and approved. Moreover, we refer once more to the infrequently invoked provisions of [Article 38(c)]which permit the defense counsel to prepare a brief to be forwarded 'for attachment to the record.'" In that case, the court

ruled that the board of review was limited to consideration of the "entire record", but it added that an Article 38(c) brief was part of the "entire record." The clear import of this decision is that matters may be included in such a brief which were not otherwise included in the record proper. Thus, the Article 38(c) brief becomes a very important vehicle for counsel who has either forgotten to include some important evidence in extenuation and mitigation for his client, or who feels that some additional evidence should be considered by appellate authorities. It should be noted, however, that the Court of Military Reivew will not consider new material in such a brief unless it was first presented to the convening authority. United States v. Lancaster, 31 CMR 330 (ABR 1961); compare United States v. Strahan, 14 USCMA 41, 33 CMR 253 (1963).

The Article 38(c) brief may be used by counsel to rebut or correct omissions in the post-trial review. United States v. Cash, 12 USCMA 708, 31 CMR 294 (1962). It has also been used on occasion to fill gaps in the record of trial created by unrecorded conversations. United States v. Strahan, supra. The absence of an Article 38(c) brief has been used by the courts to diminish the credibility of an accused who makes allegations of irregularities for the first time on appeal. United States v. Tawney, 33 CMR 459 (ABR 1963).

An Article 38(c) brief should, as we have already noted, first be filed with the convening authority. In this event, matters otherwise aliunde the record may be presented. If the brief is filed directly with the appellate tribunals, there is a great risk that it may be disregarded, for the law seems clear that except in exceptional circumstances, appellate tribunals are limited to the record as presented to the convening authority.

On occasion, appellate defense counsel will adopt an Article 38(c) brief as their own pleading, and will merely amplify it during oral argument. United States v. Harris, 34 CMR 522 (ABR 1963). Moreover, there have been cases when a late-filed Article 38(c) brief has caused the Court of Military Review to reconsider an earlier decision. In United States v. Wright, 40 CMR 895 (ACMR 1969), the trial defense counsel took occassion to write to the appellate

defense counsel concerning the trial, and entitled his letter "Article 36(c) [sic] brief." Appellate counsel filed the letter with the Court, which by that time had already decided the case. The Court reopened the case and ordered that the letter be considered as an Article 38(c) brief. Counsel for both sides were then permitted to file further pleadings. The Court refused to grant the government's motion to strike the brief, noting that it merely restated, in clearer form, arguments which had already been made at trial. The government, said the court, was placed at no disadvantage since it filed pleadings opposing the brief on the merits.

It should be obvious that Article 38(c) provides an excellent means for counsel to make one last plea for his client. It gives counsel an opportunity to submit last minute evidence in extenuation and to make a final argument on the appropriateness of the sentence. This can be more important than a similar plea made by appellate counsel, because the trial defense counsel had a personal as opposed to a paper relationship with his client. A defense counsel who neglects to examine the possibility of an Article 38(c) brief for his client does his client a distinct disservice at a time when his client has a great need for his continued assistance.

CHARACTER EVIDENCE

Records of trial recently received at the appellate level demonstrate that in some closely contested cases, trial defense counsel are overlooking favorable character evidence before findings. It is important to let the court know that the appellant is a good soldier with an excellent record before they leave to deliberate on findings. Frequently, counsel permit favorable character witnesses such as commanding officers and first sergeants to literally wait out in the hallway until after conviction before bringing their testimony forward in extenuation and mitigation. In the military, evidence of good character is admissable before findings, regardless of the nature of the offense, and such evidence

should often be proffered on the merits.[1/] Paragraph 138f, Military Courts-Martial, United States, 1969 (Rev. ed), stresses the importance of character evidence as follows:

> To show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person and law abiding citizen . . . .

Recently, in United States v. Wright, 20 USCMA 12, 42 CMR 204 (1970), the Court of Military Appeals placed strong emphasis upon the importance of favorable character evidence by stating:

> Evidence of good character may raise a reasonable doubt as to the accused's guilt of the offense charged for the reason that one who has consistently followed an honest and upright course of conduct is not likely to commit an act contrary to his character. Id., 42 CMR at 205.

See also Edgington v. United States, 164 U.S. 361 (1896); United States v. McPhail, 10 USCMA 49, 27 CMR 123 (1958); United States v. Sweeney, 14 USCMA 599, 34 CMR 379 (1964); United States v. Rausch, 43 CMR 912 (AFCMR 1970).

Furthermore, in United States v. Browning, 1 USCMA 599, 5 CMR 27 (1952) the United States Court of Military Appeals observed with approval:

> . . .Wigmore goes so far as to say that evidence of good soldierly character is even stronger than the customary evidence of good general character. Wigmore, Evidence 3d ed., §59.

Once the good character of the accused is placed in issue, the military judge must, on request, instruct the court as to the weight which should be accorded to good character evidence.

1/ Care should be exercised that compelling evidence in the extenuation and mitigation portion of the proceedings is resubmitted in some manner in the event of conviction. The effect of favorable character evidence could be lost if the client is not fully defended both before and after findings.

The instruction found at paragraph 9-20, DA Pam 27-9, The Military Judges' Guide may be utilized, but counsel should consider, and may request particular tailored instructions in this area.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

Sentencing Procedure — United States v. Clark
CM 428536 12 February 1973

Accused plead guilty to two assaults, then elected to be sentenced by court members rather than military judge. After presentation of evidence the court members went into deliberation at about noon; approximately one hour later the military judge opened the court, without the members present, and entertained a "motion for sentencing by military judge alone". The accused then presented a written request for trial by judge alone and the judge thereupon sentenced the accused, telling trial counsel to dismiss the court members from the deliberations. By stipulation before the Court of Military Review, it was agreed that during the members deliberations, the judge had remarked to the defense that he bet they wished they had requested sentencing by judge alone. This is what induced the "motion" and the unprecedented procedure.

The COMR, en banc, held that there is no authority in military law for the procedure used here, finding it violative of Articles 16 and 29 of the Code. The Court noted that all requirements of Article 16 are jurisdictionally significant including the requirement that the written request be presented prior to assembly of the court, which was not done here. The Court set aside the sentence, but did not order a rehearing, thus giving the accused "no sentence".

Expert Witnesses — United States v. Kitchen
SPCM 8376 23 February 1973

Appellant had been convicted of aggravated assault by kicking the victim on the head with a "shod" foot (no harm to victim other than a bruise on his ear). The victim was unable

to tell what footwear the appellant was wearing at the time of the kick. Consequently, the crucial question was whether the kick itself was a means likely to produce death or grievous bodily harm. The victim, also the only witness, professed to be a former part-time student of Tai Kwan Do (kick-fighting), and stated he had seen similar kicks used in that art of self-defense, albeit rarely, because "it could be awful dangerous to the person receiving the kick." The military judge allowed the witness, in effect, to evaluate an ultimate fact in issue (dangerousness) via his supposed expertise, contrary to appellant's position. The military judge compounded the damage by instructing court members that the victim was an expert on Tai Kwan Do, notwithstanding the fact that the trial counsel stated that such an instruction was unnecessary.

The COMR found that the victim was not an expert, that the instruction was improper and prejudicial, and only affirmed a simple assault and battery.

Instructions - Accident — United States v. Moyler
CM 427398 6 March 1973

Negligence by violation of unit SOP in carrying a loaded weapon in base camp area (in combat zone) held to preclude possibility of receiving accident instructions. Court concluded that testimony concerning widespread ignoring of the SOP was not relevant. To raise the defense of accident the defense must demonstrate "a lawful act conducted in a lawful manner."

Military Judge - Challenge for Cause — United States v. Cardwell
CM 428565 6 March 1973

At the commencement of the Article 39(a) session, the trial defense counsel challenged the military judge for cause on the basis of his prior involvement in the case, to wit: having previously acted in the capacity of a magistrate issuing a search warrant which gave rise to the charged offense. In response to the challenge, the military judge declared that if the same circumstances were presented, as had been presented to him at the time of issuance of the warrant, he would again find probable cause for issuance.

The search was contested and the military judge actually took the witness stand under oath and testified concerning facts and testimony which had been related to him by an unnamed informant when the warrant was issued. Subsequently, the trial counsel offered into evidence the actual search warrant which included a recitation of the pre-issuance facts presented by the confidential informant to the judge and signed by the same judge.

The Court held that paragraph 63, MCM, precluded the military judge from further participation as he had become a witness for the prosecution. The opinion did not imply that simply because the judge had previously issued the warrant, he was required to recuse himself, but rather found greatest significance in his testimony and subsequent introduction of the warrant.

Search and Seizure — United States v. Tillman
CM 428980 23 March 1973

Appellant was apprehended by the military on the basis of a civilian warrant for allegedly failing to comply with a traffic warrant that involved a fine of $35.00. Appellant upon learning of the warrant apparently tried to flee the post. He was later returned to the orderly room, where the authorities decided to restrain him in a detention cell. In a search conducted prior to incarceration, heroin and a bottle cap apparently used as a "drug cooker" were found.

Although it appeared that appellant, in fact, had already paid the traffic fine comprising the basis of the arrest warrant (which necessarily would have voided the warrant) the COMR held that the validity of the warrant was not an issue. COMR concluded the police actions in apprehending the appellant were reasonable and in accord with Army policy (Paragraph 6b AR 600-40). Combined with the apprehension was a "past history of violence" of appellant, known to the military police, that authorized detention as reasonable course of action. Discovery of the confiscated items then resulted from a good faith inventory in preparation for holding appellant in the detention cell.

Confession - Instruction to Court on Voluntariness

United States v. Palms
CM 426421 9 April 1973

COMR set aside a conviction of indecent assault and unlawful entry into a WAC barracks holding that the military judge's instruction was erroneous. The judge instructed the court members that they could and should consider certain statements that the appellant allegedly made to CID agents while he was in custody regardless of their determination of the voluntariness of those statements, if those statements could be characterized as "exculpatory" in nature. The military judge instructed the court members that the appellant's alleged statements to the CID agents that "No, I didn't intend to commit rape. No, I just wanted to see what the inside of the WAC barracks looked like" were exculpatory. While the above statements were perhaps "exculpatory" as to the question of specific intent as to the charged offenses of assault with intent to commit rape and burglary, the same statements were clearly inculpatory as to the lesser included offenses of which appellant was convicted because the pretrial statements provided the only evidence that placed the appellant at the situs of the crime and identified him as the actual perpetrator.

The Court noting that the defense had presented a great deal of evidence at trial tending to show that the appellant did not enter the WAC barracks and commit an assault therein in addition to attacking the voluntary nature of the statements, refused to apply waiver where counsel had failed to object to the instruction.

Non-Punitive Regulation

United States v. DeFrain
CM 429178 11 April 1973

Following the decision in United States v. Murray, 41 CMR 676 (ACMR 1970), the COMR set aside a conviction for operating a vehicle without permit in violation of AR 600-55 dated 25 January 1968, para. 2a, section 1, holding this regulation to be non-punitive.

Right to Continuance — United States v. Tope CM 428989
23 April 1973 47 CMR 294

During extenuation and mitigation appellant testified that he had never taken any property wrongfully, other than the three credit cards to which he had entered a plea of guilty. In rebuttal the government, through testimony of appellant's former roommate, introduced a letter allegedly written by appellant wherein he admitted stealing stereo equipment. Claiming surprise at the existence of this letter, defense requested a continuance for purpose of causing the letter to be submitted to handwriting experts at Fort Gordon for analysis. After hearing argument, the judge denied the request, feeling the issue was collateral to the main issues in the case. He agreed, however, to "retain jurisdiction of the case" so that the results of the analysis could be submitted to him. At a post-trial 39(a) session conducted later, the trial counsel revealed that handwriting experts had concluded that appellant was probably not the author of the letter. A dispute then arose as to whether a mistrial as to the sentencing portion of trial or a rehearing on sentence was the proper remedy. The staff judge advocate advised the convening authority that sentence reassessment could cure any prejudice.

Before the COMR, appellate counsel successfully argued that the original denial of the defense request for a continuance, to permit examination of the contested letter, was an abuse of discretion entitling the accused to a re-hearing. Because the staff judge advocate had failed to apprise the convening authority that a rehearing was, in fact, the proper remedy, further error was found. In view of all the circumstances, the COMR approved no sentence.

Entrapment — United States v. Skrzek
CM 427804, 27 April 1973

Appellant was charged with the sale of heroin on 3, 6, 8, and 10 November 1971. At trial the military judge acquitted appellant of the first sale on the grounds of entrapment and/or agent for the buyer but convicted appellant of the remaining specifications. The Court concluded that where one illegal inducement was shown, a continuing course of conduct related thereto, is presumed to be tainted by the influence of that illegal inducement until the government proves

to the contrary. Here they did not and could not, since: "It would be contrary to public policy to permit narcotics agents to use any trickery to induce a sale, then make subsequent buys, and, by not charging the first sale, insulate subsequent transactions from the effect of their misconduct." The Charge and all specifications were dismissed.

Witnesses

United States v. Daley
CM 428330 10 May 1973

In an extremely well-written and noteworthy opinion, the COMR reversed and dismissed appellant's conviction because the military judge abused his discretion when he refused to order the appearance of certain witnesses requested by the defense counsel in support of his motion to dismiss charges on the basis of unlawful command control even though the request conformed with the requirements of para. 115a, MCM and the testimony of the witnesses was material and necessary to support the defense counsel's motion.

Instructions on Uncharged Misconduct; Accomplice Testimony

Unites States v. Gilliam
CM 427808, 18 June 1973
Pet.Granted by USCMA
9 Oct 1973

Testimony for defense at murder trial revealed accused was peaceable, as far as the character witness knew. Trial counsel properly attempted impeachment by asking if witness knew of previous conviction of accused for violent crimes. Judge improperly instructed court members that they could consider the "evidence" of uncharged misconduct only insofar as it bore on premeditated design to kill or intent to inflict great bodily harm. COMR held instruction erroneous, but only affected premeditated murder charge in view of overwhelming evidence of intent to inflict great bodily harm. Court affirmed unpremeditated murder.

In the same case, a principal witness was an accomplice who had a pre-trial agreement in which he had agreed to testify against the accused. The agreement stipulated that he "would establish conspiracy and premeditation" and would identify murder weapons. In addition, no instruction was given on accomplice testimony. COMR held that agreements to

testify in conformance with matter set out in these terms was contrary to public policy and noting cumulative error in instructions, the Court set aside the conspiracy charge.

Withdrawal
(Para. 56, MCM)

United States v. Stagg
SPCM 8477 25 June 1973

In course of initial Article 39a session, two charges and three specifications were set aside for failure to state an offense. Trial counsel, arguing that "it would be unfair to let these offenses go uncharged" obtained a recess, conferred with SJA, then requested withdrawal of case. The charges were redrafted and again referred to trial.

The Court concluded that the withdrawal was without good cause and procedurally infirm because not directed by the convening authority. Surprisingly, however, rather than finding the proceedings invalid, the Court treated the error as harmless, and reassessed the sentence.

In the same case, two charges of lifting up a weapon against superior commissioned officers were set aside where the evidence failed to establish the existence of a simple assault. (See Para. 169, MCM, and United States v. Waller, 43 CMR 247).

Jurisdiction/
Bad Checks

United States v. Bowers
CM 429280, 9 July 1973

Appellant, on leave from Germany, cashed 12 bad checks in Pennsylvania, drawn on a military banking facility in Germany. The military judge stated at trial that he did not think that the government could prove that appellant's military status facilitated the passing of these checks. However, he ruled that solely because the trial was being held in Germany, the principles of O'Callahan did not apply. Held - that the judge improperly determined jurisdiction by looking to the situs of the trial and not the situs of the crime.