

T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

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

Vol. 2 No. 3

April 1970

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.

CLEMENCY AND PAROLE

Many prisoners confined at the United States Disciplinary Barracks are unaware of their rights under the Army clemency and parole system. Trial defense counsel should therefore take the time to explain to their clients how the clemency and parole system operates before they are sent into confinement.

Parole occupies a high priority in the concerns of a prisoner. Parole opportunities may be even more immediately important to a prisoner than is appellate review. To some, the chances of being released from confinement by parole are higher than is release by reversal of their conviction.

Parole. The authority for parole is found in 10 U.S.C. §952 (1964) which authorizes the secretaries of the armed services to establish a system of parole for

prisoners confined in military correctional facilities. By order of the Secretaries of the Army and Air Force, Army Reg. 190-26 AFR 125-23 (20 January 1970) was promulgated to implement such a system. The regulation defines parole as a form of conditional release from confinement granted by the secretary of the department concerned to those select individuals who have served a portion of their sentences in confinement and whose release under supervision is considered to be in the best interest of the prisoner, the military and society. A parolee remains in the legal custody and under the control of the Commandant of the Disciplinary Barracks until the expiration of the full term or aggregate terms of his sentence without credit for abatement (good time).

A prisoner with an unsuspended punitive discharge or dismissal and who is sentenced to three years or less confinement is eligible for parole after he has served one-third of his term of confinement, but at least six months. A prisoner with an unsuspended punitive discharge or dismissal, who is sentenced to more than three years confinement will become eligible for consideration after he has served at least one year in confinement at such time as the Clemency and Parole Board may recommend and the secretary approve, but such time shall not be more than one-third of the sentence approved or not more than 10 years when the sentence is in excess of a term of 30 years or life. Good time or abatement time will be excluded in computing eligibility for parole consideration. The commandant or the Clemency and Parole Board are empowered to waive these requirements in exceptional cases.

Each prisoner who desires parole must execute a parole officer's reference (DA Form 1702-R) and a parole plan (DA Form 1704-R) prior to becoming eligible for parole. Requests for parole will be considered by the disposition board at the Disciplinary Barracks and forwarded to the Provost Marshal General. The prisoner will appear before the disposition board for a personal interview when his request is considered. The prisoner will appear alone but others may submit, in writing, matters they wish the board to consider.

Release from confinement on parole takes two forms, release under supervision of the Federal Probation Service (regular parole) and release under the supervision of the commandant (commandant's parole). Since both types require affirmative action by the prisoner and the requirements for each differ markedly, counsel must study each case objectively and advise his client accordingly.

Prisoners will be released on regular parole only after their sentences have been ordered into execution which generally means upon completion of appellate review. This is the area which gives rise to many of the problems in the parole-appellate review area, since parole is frequently granted effective only upon completion of appellate review. No matter how anxious a prisoner is to test his conviction in the appellate courts, when confronted with the choice between immediate release from confinement and further appeal to the Court of Military Appeals, [a process which might take an additional six months], the prisoner will normally leap at the opportunity to be released. It would appear that many prisoners are thus "gently persuaded" to forego or terminate their rights to further appeal.

Approval of parole is further conditioned upon completion of an acceptable parole plan which generally requires satisfactory evidence of employment. The prisoner is also required to sign a written agreement outlining the conditions of parole.

The primary purpose of commandant's parole is to provide a means of parole for prisoners otherwise qualified but whose cases are undergoing appellate review.. This should solve the problem of improper persuasion to forego appellate remedies. However, a careful reading of paragraph 3-2, Army Reg. 190-26 (20 January 1970) reveals that different criteria are used in determining whether this type of parole will be granted. As we noted, a prisoner released under regular parole is subject to the supervision

of the Federal Parole Service whereas a prisoner released under commandant's parole is supervised only by the commandant, and this normally amounts to only nominal supervision. Also, the prisoner does not apply for commandant's parole by name and thus has no way of knowing in advance whether further appeal will delay his parole. While all action on regular parole, whether or not favorable, will be announced, only favorable action on commandant's parole is announced. Upon favorable parole action and submission of a satisfactory parole plan the prisoner will be required to execute a statement agreeing to the specific conditions of his parole and will then be released. If appellate review is completed prior to the expiration of the term of confinement, the commandant will transfer supervision of the parolee to the Federal Probation Service. This, in essence, changes commandant's parole into regular parole. A parolee is discharged from parole supervision at the expiration of the full term of his sentence.

Clemency. While eligibility for clemency is theoretically governed by Army Reg. 633-10 (21 May 1968), it is in practice treated by the Army and Air Force Clemency and Parole Board as being within the sound discretion of the secretary concerned. This board considers each prisoner for possible clemency six months after he arrives at the Disciplinary Barracks or as soon as possible thereafter. There is then an annual review of the prisoner's file, including all parolees, with a view to possible clemency action. There are no other time limitations, based on length of sentence or otherwise, nor does clemency depend on the completion of appellate review or application by the individual.

The major areas in which clemency operates are in the case of a patently excessive sentence, to reward a prisoner whose progress warrants such action, and to change a discharge when warranted by the offense, the offender or a change in the offender in the correctional setting. Caughlin, Army and Air Force

Clemency and Parole Board - A Brief Summary, AFRP
125-2 Security Police Digest 16 (Summer 1968).

A few minutes time taken by trial defense counsel to explain these procedures will provide for well informed clients and should serve to rebuild the morale of a soldier recently convicted by court-martial.

ALL-WRITS POWER IN THE COURT OF
MILITARY REVIEW

A far from unanimous Army Court of Military Review ruled last month that it is a court "established by Act of Congress" for the purpose of the All Writs Act [28 U.S.C. §1651 (1964)] and thus could issue any writ necessary in aid of its jurisdiction. United States v. Draughon, No. 419184 (ACMR 20 Mar 1970) (petition for appropriate relief in the nature of writ of error coram nobis) (en banc). The court was asked to review the conviction of an Army lieutenant whose case had become final prior to the date of the Supreme Court's decision in O'Callahan v. Parker, 395 U.S. 258 (1969). The court declined to set aside the conviction, based on the prospective application of O'Callahan in the military, but felt it necessary to reach the all writs issue in order to decide the case.

Four judges joined in the opinion of the ten-judge court. They held that Congress, not The Judge Advocate General, established the Court of Military Review. Congress determined what cases must be referred to the court, and the qualifications of the judges, and Congress intended, by the Military Justice Act of 1968, to "create an independent court system."

Thus, the Army Court of Military Review has answered the question posed by the Supreme Court in Noyd v. Bond, 395 U.S. 683 (1969) and has provided "a decision of a [Court of Military Review] which asserts the power to grant emergency interlocutory relief."

Draughon, unfortunately, raises another difficult question and does not satisfactorily resolve it. Is the power of the Court of Military Review to grant extraordinary relief limited to those cases which have already been referred to it for review under either Article 66 or 69, Uniform Code of Military Justice? Three concurring judges of the court seem to think so. This limitation on the court's all-writs power would restrict it almost exclusively to situations such as Draughon. The Court of Military Appeals never recognized such a limitation on its own all-writs power, nor did the Supreme Court recognize such a limitation in Noyd, supra.

Until this question is resolved, must defense counsel who seeks extraordinary relief prior to or during trial now exhaust his remedies first before the Court of Military Review before approaching the Court of Military Appeals? The practical answer to this question must be yes, lest counsel waste valuable time and effort pursuing a remedy in the Court of Military Appeals which may be premature. However, the technical answer must be that we simply do not know, for the Court of Military Review has not yet decided finally whether it possesses the power to act in that situation. We suspect that when presented with the issue, the court will decide, however that it does have the power to grant such interlocutory relief, else the considerable effort which went into Draughon would be limited virtually to the facts of that case.

ALL-WRITS POWER IN THE MILITARY JUDGE

An Air Force case now pending in the Court of Military Appeals appears squarely to present the issue of the nature and extent of the extraordinary writ powers of the military judge.

In Gagnon v. United States, Misc. Docket No. COMR Misc. 70-2 (COMA petition for writ of mandamus filed 2 April 1970), the military judge ruled at an

Article 39(a) session that he did not have the power to order the accused released from pretrial confinement, but that he strongly urged the convening authority to do so. The convening authority declined to release the accused, and an appeal was taken to the Air Force Court of Military Review. In an en banc decision, one judge dissenting, the court decided that neither the military judge nor the court had extraordinary remedy power.

The same day, a petition for writ of mandamus was filed in the Court of Military Appeals, asking that court to direct the Air Force Court of Military Review to grant a writ of mandamus of its own, holding that the military judge has the power to grant a writ of habeas corpus.

Thus for the first time, the issue of the extraordinary remedy power of the military judge is squarely presented to the Court of Military Appeals. Although the court has not yet been heard directly on the issue, it has, on one previous occasion relied on heavily by Gagnon's counsel, indicated at least tangentially that the military judge may have such power. In In re Strichland, Misc. Docket No. 69-48 (COMA order dated 24 September 1969), the court in a brief order denying a petition for writ of habeas corpus, noted that "petitioner has failed to seek appropriate relief from the Convening Authority or the Military Judge (See Article 39(a), Uniform Code of Military Justice)". The meaning of that phrase should be explored in Gagnon.

Needless to say, should the Court decide that the military judge does have extraordinary remedy power, it would take great strides toward the isolation of military justice from command pressures, and would add to the stature of the field judiciary. In addition, a part of the all-writs burden now laid squarely on the shoulders of the Court of Military Appeals should be relieved.

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 * Use of Personnel Records in Aggra- *
 * vation Prior to Sentencing: The *
 * Court of Military Appeals has *
 * recently agreed to decide whether *
 * it is permissible to use as a *
 * matter in aggravation for sentencing *
 * evidence of previous nonjudicial *
 * punishment, United States v. Johnson, *
 * No. 22,648 (NCM 69-3518) (COMA *
 * petition granted 28 January 1970; *
 * argued 24 April 1970); and prej- *
 * udicial portions of DA Form 20, *
 * United States v. Montgomery; *
 * No. 22,747 (COMA petition granted *
 * 5 March 1970). Counsel should *
 * object to the admission of such *
 * evidence when it is offered in order *
 * to insure that this issue is properly *
 * preserved for appeal pending the *
 * decisions of the court in these cases. *
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EXCESS LEAVE WITHOUT PAY

THE ADVOCATE has been informed that a new Department of the Army policy favoring excess leave without pay upon the completion of confinement has been formulated. Army Reg. 630-5 is to be amended to implement this policy.

The new policy provides that a convicted soldier with an unexecuted punitive discharge who has completed his adjudged term of confinement, and whose appellate review is still pending, may apply for excess leave without pay for the duration of appellate review regardless of whether the soldier has reached his ETS. If the punitive discharge is approved on appeal, the soldier will be required to report to a conveniently located military facility for a final physical examination and outprocessing.

Each case will be decided on an individual basis, but DA policy favors such leave. The new policy should preclude recurring pay problems concerning soldiers restored to duty pending appeal, but who have passed their ETS, and should benefit commanding officers who otherwise would be burdened with a flagged, temporary member of the command.

Applications should be in writing, signed by the soldier involved, and should state the soldier's current address and military status, the status of his appeal, his ETS, previous convictions, if any, and his anticipated leave address. The application also should note that the soldier understands that if his punitive discharge is ultimately approved, he will be required to report to a military facility for a final physical and outprocessing; the soldier should, in the application, specifically promise to do so.

Applications for excess leave without pay should be forwarded through command channels to The Adjutant General, HQ, DA, ATTN: AGPF-IE, Washington, D.C. 20310. An information copy may be sent to Deputy Chief of Staff for Personnel, HQ, DA, ATTN: DSCPER-PSD, Room 2D 739, Pentagon, Washington, D.C. 20310.

DEFERMENT APPLICATIONS

Despite our advice that applications for deferment of confinement pending appellate review be filed first at the local level (THE ADVOCATE, November 1969), we note that few counsel are pursuing this avenue for their clients. Consequently it often happens that the first application for deferment is filed after the accused is already at the Disciplinary Barracks, where few of these applications in the past have been granted. Thus we again urge that applications for deferment be made first at the local level, especially where there has been no pretrial restraint. Appeals of denials to The Judge Advocate General will continue to be processed by the

appellate defense counsel. To date, one denial has been reversed on appeal. United States v. Grossman, No. 420647 (ACMR _____).

KEEPING THE FACT OF PRETRIAL CONFINEMENT
FROM THE COURT MEMBERS

* The following excerpt from the ABA Project on Minimum Standards for Criminal Justice is offered for the consideration of defense counsel: *

"TRIAL.

The fact that a defendant has been detained pending trial should not be allowed to prejudice him at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

COMMENTARY.

The common practice of having every defendant who is in custody accompanied in the courtroom by uniformed police or corrections officer is more often than not unnecessary. Courts have wide power to preserve courtroom decorum and to use restraints on defendants where required. In the vast majority of cases the defendant in custody poses no threat of harm, and the threat of escape is usually nonexistent.

The jailed defendant frequently shows by his dress and physical condition that he is in custody. To the greatest extent possible, these factors distinguishing him from the defendant at liberty ought to be eliminated.

One way to avoid discriminatory treatment would be to require all defendants to enter and leave the courtroom through a door not available to the jury or the public." §5.11, Standards Relating to Pretrial Release, Approved Draft, 1968.

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* Retroactivity of O'Callahan: *
* Although the Court of Military *
* Appeals has recently decided that *
* the decision of the Supreme Court *
* in O'Callahan v. Parker, 395 U.S. *
* 258 (1969) applies only to court- *
* martial cases which were not final *
* as of the date of that opinion *
* (June 2, 1969), Mercer v. Dillon, *
* Misc. Docket No. 69-57 (COMA 6 *
* March 1970), counsel should not *
* assume that the issue of juris- *
* dictional retroactivity has been *
* forever settled. The issue of *
* retroactivity is indeed now *
* pending before the Supreme Court. *
* Relford v. Commandant, US Disci- *
* plinary Barracks, Misc. Docket *
* No. 665, renumbered No. 1250 *
* appellate, cert. granted, 27 Feb. *
* 1970, 38 U.S.L.W. 3338. *
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APPELLATE CONSIDERATION OF TJAG ACTION UNDER ARTICLE
69 SETTING ASIDE PREVIOUS CONVICTIONS

The Court of Military Review has, on several occasions, reassessed sentences and reduced them on appeal after taking judicial notice of favorable

action by The Judge Advocate General on previous inferior court-martial convictions which had been introduced at trial against the appellant. United States v. Thompson, No. 419435 (ABR 16 May 1969) United States v. Bullard, No. 419120 (ABR 20 Mar 1969).

It sometimes happens, however, that the action of The Judge Advocate General occurs after the Court of Military Review has acted on a case and thus the appellant loses the benefit of having the court consider the favorable TJAG action on review. To help insure that Article 69, Uniform Code of Military Justice relief, if any, occurs before the Court of Military Review acts on an appeal, trial defense counsel should, before trial, examine his client's previous convictions. If any of them is arguably subject to relief under Article 69, an application for relief should be submitted to The Judge Advocate General. DA Form 3499 is appropriate. To further expedite this matter, the original record could be sent along with the application, if the case was tried in the same jurisdiction and the record is available. Conceivably, the previous conviction could be set aside before the pending case is even tried, thus precluding the use of the previous conviction in evidence.

If at the time of trial an application for relief under Article 69 is pending, that fact should be noted on the record, or appellate counsel should otherwise be notified. If action on the review by The Judge Advocate General is favorable, appellate authorities can thus be apprised of that fact.

QUALIFYING AN EXPERT WITNESS

Below are sample questions which might be used in qualifying an expert witness. The example we

use involves the qualification of a psychiatrist, but the examination of any expert will involve the same basic approach.

There are a few points to keep in mind:

1. The jurors should be impressed with the qualifications of your witness so that his testimony is most persuasive if not conclusive. If he is the authority on a given subject or one of the experts in a particular field, the qualification portion of the examination can tactfully bring out this point. Avoid having the expert seem egotistical or pompous, but make it clear that he is a leading authority.
2. Choose experts who, in fact, are authorities on the particular area of the subject you are considering. Seek out the best witness available, considering his location and fee.
3. Make sure the expert can support your case with textbook examples or references to other leading authorities. You want a convincing witness. Many psychiatrists testify in generalities, but do not reach concrete or helpful conclusions as far as counsel's client is concerned. Their testimony becomes an interesting lecture, but not a persuasive asset for the defense.
4. Choose an expert who makes a good witness, one who displays modesty but conveys knowledge and self-confidence, one who does not offend the jury but wins them over. Some experts are experienced, able courtroom witnesses. They have testified for government and defense and portray truthfulness. Such experts do not go over as "hired hands." Check into the background of the expert before he is asked to testify.
5. Note Paragraph 116, Manual for Courts-Martial, United States, 1969 (Revised edition), for "Employment of Experts."

6. Finally, carefully discuss your case with the expert, let him know your needs, your problem areas, your vulnerable spots. Ask his advice. Let him know what trial counsel or the military judge might ask. Furthermore, work with him prior to trial so that you will not ask questions which will force him to give damaging answers. He is your witness.

SAMPLE QUESTIONS

1. State your name.
2. Where do you reside?
3. What is your profession?
4. How long have you been actively engaged as a psychiatrist, doctor?
5. What is your present position in the field of psychiatry?
6. How long have you been in that position?
7. How many individuals operate under your supervision (if applicable)?
8. Does this include psychologists, social workers and nursing staff?
9. Would you give the military judge and the court members some information concerning your educational background in the field of psychiatry?
10. How many years of study are required before you can independently practice as a psychiatrist?
11. And when did you complete that part of the process, doctor?

12. Since that time, can you tell the court whether you have associated with any professional or honorary societies in the field of psychiatry, doctor?

13. What are some of them?

14. What is (name of specific organization) society, doctor?

15. And what requirements must be met before a doctor becomes a (diplomat, member of a specific honorary society, etc.)?

16. Have you had occasion in your professional career to write or lecture, doctor?

17. Where have you delivered lectures?

18. Can you tell us what books or papers you've developed?

19. Are you currently working on any research project?

20. What is that?

21. Now, doctor, what is the nature of your work at (institution)?

22. In the course of that work, and in your professional career, have you had occasion to examine patients for the presence, or absence, of mental illness?

23. About how many such examinations have you made?

24. Have you had occasion to testify, doctor, in court, with reference to the presence, or absence, of mental illness in some of your patients?

25. Approximately how many times have you had occasion to testify?

26. Have you testified in this courtroom, doctor?
27. On those occasions, have you testified as a witness both for the defense and the government?
28. And on those occasions, did you testify as an expert in the field of psychiatry?
29. Have there been occasions, doctor, when you have been independently appointed by the court to render an opinion on a psychiatry problem?
30. And on those occasions, did you make such reports to the court for use in civil and criminal cases?

I submit, Your Honor, that Doctor _____ is eminently qualified to testify as an expert in this case.

See generally Maryland, District of Columbia, Virginia, Criminal Practice Institute, Trial Manual (1964).

DUE PROCESS DURING POST-TRIAL REVIEW PROCEEDINGS

The convening authority's review and action upon a record of trial is an important stage of the court-martial process and one which vitally affects the defense counsel's client. Furthermore, his review is, in theory, a judicial function. See United States v. White, 10 USCMA 63, 27 CMR 137 (1958). While in practice, the action is taken primarily upon the written review of the staff judge advocate, the code does give explicit recognition to the adversary potentiality of the proceeding. Article 38(c), Uniform Code of Military Justice. It appears, however, that the potentiality is seldom fully explored.

The staff judge advocate has been called "an officer of a court whose function must carry with

it a high degree of impartiality and fairness" United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958). The Court of Military Appeals, however, has also compared his position with that of a district attorney. United States v. Hayes, 7 USCMA 477, 22 CMR 267 (1957); United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954). Indeed, as Judge Ferguson has remarked, "We simply must face up to the facts in the administration of military law. Staff judge advocates act and behave in case after case as if they were attorneys for the United States, with their sole objective being the production of a legally sustainable conviction and adequate sentence." United States v. Dodge, 13 USCMA 525, 33 CMR 57 (1963) (dissenting opinion).

With these considerations in mind, the defense counsel should give serious consideration to participating more fully in the initial review process. As a judicial act, the convening authority's action may be viewed as subject to the due process requirement of an opportunity for the accused once more to be heard. This right is recognized in Article 38(c). How to utilize that right most effectively is a matter for the sound judgment of the defense counsel. Certainly it would be the rare situation in which the client's interests are not furthered by an Article 38(c) brief. While it is unlikely that a convening authority would disapprove findings of guilty against the advice of his staff judge advocate, the matter of an appropriate sentence does present an opportunity for the defense counsel to influence the action.

In some cases, however, the defense counsel may feel that he can best serve his client by a personal hearing before the convening authority. If so, he should not hesitate to request an appointment with the convening authority for the purpose of briefly and concisely presenting to him legal and other considerations for a favorable disposition of the case. Just as with any oral argument, counsel should prepare himself in advance in order to present his case in the most appealing and cogent manner.

In view of the convening authority's extensive powers in reviewing and acting upon a record of trial, the defense counsel should insure that, before taking his action, the convening authority has had the benefit of argument on both sides of the issues.

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* Readers will note that there *
* has been a change in the *
* citation of opinions from the *
* Courts of Military Review. *
* Opinions which are reported *
* will be cited thus: United *
* States v. Jacobson, 39 CMR *
* 516 (ABR 1968). Unreported *
* opinions will be cited thus: *
* United States v. Dolby, *
* No. 419804 (ACMR 19 Sep 1969). *
* A complete explanation of all *
* changes in citation will *
* appear in Volume 40 of the *
* Court-Martial Reports. See *
* also DA Pam 27-70-3, Judge *
* Advocate Legal Services 15 *
* (2 Apr 1970). *
* * * * *

RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

ASSAULT ON MILITARY POLICEMAN -- LOSS OF STATUS --
Accused was charged with assault on a person in the execution of military police duties. During the hearing on the providency of the plea of guilty to this offense, the accused testified that the guard called him vulgar names, poked him in the ribs with sticks, shoved him into a car, and threw a duffel bag on top of him. The Army Court of Military Review, citing United States v. Revels, No. 419746, CMR (ACMR 22 Sep 1969), [See THE ADVOCATE, November 1969, p. 11] held that misconduct on the part of guard personnel can divest such personnel of their "cloak of authority."

The court stated that an accused can defend against the part of the charge averring that the guard was in the execution of military police duties by showing that the "gross physical and verbal abuse heaped upon him by the guard brought on the assault." The court therefore held the accused's guilty plea to this charge to be improvident. United States v. Garretson, No. 421501 (ACMR 2 Apr 1970).

CONFESSION -- DURESS; COERCIVE ATMOSPHERE -- The defendant in a burglary case was apprehended by the police in a wooded area. One policeman pointed a sub-machine gun at the defendant and ordered him to lie face-down on the ground. His hands were then secured behind his back by means of handcuffs at which time he was advised of his rights. During the trip to the jail and after his arrival there, the defendant made several incriminating statements. The Tennessee Court of Criminal Appeals found the advice given the defendant concerning his rights to fall "far short" of the Miranda requirements. The Court also found from the factual circumstances described above, that "the force of duress and compulsion weighed heavily upon the defendant." "In the light of such palpably coercive influence," it cannot be said that the defendant intelligently, understandingly, and knowingly waived his constitutional rights to counsel and to remain silent. Sexton v. State, S.W.2d ____ (Tenn. Crim. App. 27 Feb 1970); 7 Crim. L. Rep. 2017.

CONFESSIONS -- UNDERSTANDING OF RIGHTS -- The defendant was given Miranda warnings in their entirety and signed what purported to be an express waiver. However, the United States Court of Appeals for the District of Columbia Circuit, based on the testimony of the police interrogator, found that the waiver was not understandingly made. The interrogator began to take notes as the defendant started his confession, but the defendant indicated that he did not want anything he said to be written down. The court stated that "the strong implication is that

appellant thought his confession could not be used against him so long as nothing was committed to writing." The court further indicated that if the appellant, as his avowed motive for confessing suggested, was brooding over a guilty conscience while the warnings were being given, he might have failed to absorb their message. Also, he may have been laboring under the common misapprehension that the police could not use his confession in court unless they were able to introduce a written statement. The court, therefore, found that the evidence raised a serious question of whether the appellant intelligently waived his right to remain silent, and remanded the case for an evidentiary hearing and findings of fact on the validity of the purported waiver. Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969); 5 Crim. L. Rep. 2028.

FORGERY -- FAILURE TO STATE AN OFFENSE -- The accused was charged under Article 123, Uniform Code of Military Justice, with altering a United States Treasury Check with an intent to defraud by changing the amount of the check from \$79.47 to \$579.47. However, one of the elements of the offense, that the accused falsely altered the check, was not expressly alleged in the specification. The Army Court of Military Review held the specification to be fatally defective as it failed to allege expressly or by necessary implication that the accused falsely altered the check. Alteration with intent to defraud does not necessarily imply a false alteration. The court indicated that the alleged alteration could have been the correction of an erroneous date or misspelled name appearing on the face of the check. This would constitute no more than a genuine correction of an instrument made false by someone other than the appellant. United States v. Proderut, No. 421953 (ACMR 30 Mar 1970).

INTRODUCTION OF LSD ONTO MILITARY INSTALLATION -- FAILURE TO STATE AN OFFENSE -- The accused was charged with a violation of a lawful general regulation,

Para. 18.1, Change 2, Army Reg. 600-50, 15 May 1968, "by introducing into a military unit" the drug LSD. The paragraph of the regulation alleged to have been violated, stated: "nor shall they introduce such drugs onto an Army installation or other Government property under Army jurisdiction." The Army Court of Military Review, citing United States v. Crooks, 12 USCMA 677, 31 CMR 263 (1962), held the specification to be deficient as it failed to allege, either directly or by fair implication, the introduction of the drug "onto an Army installation." According to the court, the allegation in the specification that the accused introduced the drug "into a military unit" was "wholly consistent with the possibility that he acquired the drug in one unit and carried it into another unit on the same post." United States v. Van Valkenberg, No. 420982, CMR (ACMR 9 Mar 1970).

LINEUPS -- WARNING OF RIGHTS -- The California Supreme Court held that properly warning an accused of his rights at the time of his arrest was not sufficient to permit a valid waiver of the rights that an accused has at a lineup under the decisions of the United States Supreme Court in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967). A specific admonition as to lineup rights is held to be essential to a valid waiver of such rights. The Court reasoned that an unsophisticated defendant might well conclude that the rights available to him as to interrogations were not available in a lineup context. The defendant might conclude that since he will not be called upon to make verbal responses or commitments at a lineup, the right to counsel is not provided when he appears in a lineup. Banks v. People, P.2d (Cal. Sup. Ct. 2 Mar 1970); 7 Crim. L. Rep. 2015.

MULTIPLICITY -- HEROIN AND MARIHUANA -- The accused was charged, under Article 134, Uniform Code of Military Justice, with possession, sale, and introduction into a military unit of heroin, and with the

possession and introduction into a military unit of marihuana, all of which occurred on the same date. The facts disclosed that accused, on 3 March 1969, acquired both the heroin and marihuana simultaneously from a source in a civilian community and brought both drugs simultaneously onto his military post and into his unit. On the same date, he made the sale of heroin to an undercover agent. Immediately following the sale, he was arrested, disclosed the hiding place of the marihuana to the agent, and the marihuana was confiscated. The Army Court of Military Review held the five offenses involving the heroin and marihuana were multiplicitous for sentencing purposes as the two drugs were introduced and possessed all as part of one transaction. Further, the introduction, possession and sale of heroin resulted from the solicitation of the undercover agent. United States v. Van Valkenberg, No. 420982, ___ CMR ___ (ACMR 9 Mar 1970).

SEARCH AND SEIZURE -- EXTENT OF STOP AND FRISK SEARCH --
Police officers, during a stop and frisk of a defendant who fitted the description of an automobile theft suspect and who was making "furtive actions," discovered marihuana loosely packed in a plastic bag in his front pants pocket. The California Supreme Court ruled the marihuana inadmissible as the search of the defendant exceeded lawful bounds. Feeling a soft object in a suspect's pocket during a pat-down, absent unusual circumstances, "does not warrant an officer's intrusion into a suspect's pocket to retrieve the object." The pat-down is designed to uncover guns, knives, clubs, or other hidden instruments that could be utilized for the assault of the police officer. The Court held that an officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun or club, must be able to point to "specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down." People v. Collins, ___ P.2d ___ (Cal. Sup. Ct. 23 Jan 1970); 6 Crim. L. Rep. 2364.

WILLFUL DISOBEDIENCE -- FAILURE TO STATE AN OFFENSE --

The accused was convicted of willfully disobeying the order of an officer, but the Army Court of Military Review held the specification to be fatally defective as it omitted an essential element of the offense; that the officer allegedly disobeyed was the accused's "superior officer." The appellant's plea of guilty to this charge was therefore set aside. The Court also held that the lesser included offense of failure to obey a lawful order in violation of Article 92(2), Uniform Code of Military Justice, could not be affirmed. This offense requires that an accused have a duty to obey the order and the specification must therefore allege "not only the accused's knowledge of the order but also his duty to obey, or facts from which the latter might be implied." United States v. Baker, No. SPCM 5475, CMR (ACMR 24 Feb 1970).

WORTHLESS CHECKS -- FAILURE TO STATE AN OFFENSE --

The accused was convicted of a worthless check specification alleging that at a named time and place he did: "with intent to defraud, wrongfully and unlawfully utter a certain check for the payment of money upon the Bank of America . . . then knowing that he . . . did not or would not have sufficient funds and or credit with such bank for the payment of the said check in full upon its presentment." The Air Force Court of Military Review held that the specification did not allege a violation of Article 123(a), Uniform Code of Military Justice, as it failed to allege that the check was uttered "for the procurement of either currency or some other article of value." The Court stated that there was no language in the specification which could serve as an implied allegation of the missing ingredient. The Court found, however, that the specification alleged the lesser included offense of wrongfully and dishonorably failing to place sufficient funds in the bank for payment of the check upon presentment in violation of Article 134, Uniform Code of Military Justice. United States v. Henry, 41 CMR (AFCMR 1970). [Note: In United States v. Cordy, No. 421408, CMR (ACMR 13 Jan 1970),

the Army Court of Military Review held that the allegation of an intent to defraud, based upon the definition of such intent in Paragraph 202A, Manual for Courts-Martial, United States, 1969, embodies an allegation that the article the accused proposed to procure in exchange for the check had some value. The specification in this case, however, included the phrase, "for the procurement of an article" which was absent in the Henry case. The Court was therefore able to uphold the specification on the alternative theory that the procurement of an article fairly implied and reasonably justified the conclusion that the article to be procured had some value.]



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