

T H E A D V O C A T E

Newsletter for Military Defense Counsel

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

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EDITOR'S NOTE

The Advocate from its inception has attempted to assist field defense counsel in the defense of their clients by providing the latest developments at the appellate level. Additionally, this publication has sought, and will continue to seek to provide information on techniques in developing or framing issues --- making the appellate record --- and in the realm of trial tactics. The staff once again encourages counsel who utilize this publication to submit particular approaches or techniques which have met with success to The Advocate for use or publication. Similarly, questions or suggestions for articles on subjects which are pressing or felt needed are encouraged. All efforts will be made to provide the needed assistance.

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Attorneys in Defense Appellate are available to assist counsel in the field in the preparation of their cases. This assistance can take the form of legal research, "up dates" on new developments, and information on issues currently pending at the appellate level. Further, officers in this division with substantial trial work backgrounds are available to assist counsel in trial preparation and trial tactics, as well as, framing issues for the appellate courts.

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OBJECTING TO TRIAL COUNSEL ARGUMENT

The recent decision by the United States Court of Military Appeals in United States v. Nelson, 24 USCMA 49 , 51 CMR 143 (12 December 1975) repeats an unfortunately familiar theme of the courts with regard to improper argument by trial counsel: defense inaction constitutes waiver. The misconceived, unattributed notion that objection made during your opposition's argument is poor form is without foundation and contrary to both the law and recommended trial procedure. See Paragraph 72c, Manual for Courts-Martial, United States, 1969 (Revised edition). However, the manner in which your objection is made and the relief sought and granted are a legitimate concern. Trial defense counsel must be aware of the limits of legitimate prosecutorial argument and be ready to contest improper comments in a manner that will not further prejudice the client.

In Nelson, three aspects of final argument were urged as improper. The Court found that trial counsel's elaboration upon Nelson's failure to assert his alibi defense at his Article 32 investigation was not an impermissible comment on Nelson's right to remain silent. More pertinent here was the second contested comment, a comparison of a defense witness' testimony to a tactic used by Adolf Hitler:

That is the most preposterous story I've ever heard. I think that Durham's tactic is the same as that used by Hitler--tell the people the biggest lie you can imagine, and they'll believe it. Ms Opn at 5.

The Court held that the reference was both inflammatory, and based on a matter not in evidence. Chief Judge Fletcher, speaking for the Court, further noted that the trial counsel's action was patently erroneous, comparing to the impropriety condemned in United States v. Long, 17 USCMA 323, 38 CMR 121 (1967): association of the accused with other offensive conduct or persons without justification in the record. Another similarity to Long was the failure of the defense counsel to object. In Long, however, the Law Officer, sua sponte, explicitly condemned the remarks and forbade the members to consider them. In Nelson, the Court found the military judge's silence when faced with this argument perplexing, but not erroneous. The Court held the argument not so inflammatory as to require, sua sponte, corrective action. Defense

counsel's failure to make timely objection, therefore, constituted waiver. The following excerpts indicate the Court's current thinking on appropriate defense counsel action:

The failure to object in the trial arena where the harmful effects, if any, might be ameliorated by prompt instructions . . . normally raises the doctrine of waiver and precludes an accused from asserting a claim of error on appeal. However, that principle is not usually applied if the abuse of discretion is so flagrant as to charge the law officer with a duty to stop the discourse sua sponte. [United States v. Doctor, 7 USCMA 126, at 135, 21 CMR 252, at 261 (1956)].

More recently in United States v. Pinkney, 22 USCMA 595, 598, 48 CMR 219, 222 (1974), we stressed:

In an adversary system a rule rewarding nonfeasance would encourage a party to forego litigating the issue at trial in the expectation that he might win a rehearing on the error if the first trial went against him. No, the reason for requiring prompt objection at trial is to give the court an opportunity to correct an error then and there, and thus avoid further costly proceedings. If the objectionable matter can be rendered unobjectionable by additional explanation or evidence, or if the trial judge can neutralize the damage by cautionary instructions, the failure to object deprives the trial court of these opportunities to protect the trial from reversible error. There are, of course, times when the trial judge himself must intercede on his own motion to preserve the trial from error. . . . Ms Opn at 7-8.

The last contention in Nelson, the use of hearsay testimony that had not been offered or admitted into evidence to establish a crucial link in the Government's case, was found to be improper. The military judge was held to have erred in overruling defense counsel's timely objection. Via footnote, the Court indicated that an instruction given to the court that trial counsel's argument was not evidence, that there was no evidentiary basis for his remark, and that the remark was to be disregarded and the case considered as if it had never been made, would have cured the error. See United States v. Christoforo, 416 U.S. 637, at 641 (1974); United States v. Long, supra; but see United States v. Stegar, 16 USCMA 659, 37 CMR 189 (1967) where the Court agreed that the human mind is not a slate to be wiped clean of prejudice by a curative instruction.

The Court of Military Appeals has indicated that failure to object, while procedurally constituting waiver precluding appellate review, is also an indication of the "minimal impact" the comment must have made upon the court. United States v. Nelson, supra; United States v. Saint John, 23 USCMA 20, 48 CMR 312 (1974); United States v. Ryan, 21 USCMA 9, 44 CMR 63 (1971); United States v. Wood, 18 USCMA 29, 40 CMR 3 (1969). Furthermore, the lack of recorded legal precedent will not excuse a failure to object; counsel must evaluate legal issues at trial as they develop, according to generalized principles of law. United States v. Pinkney, 22 USCMA 595, 48 CMR 219 (1974). The Court has noted that failure to object does not exempt the military judge from independent assessment of the nature and effect of argument, especially where the circumstances indicate that an objection may reflect unfavorably upon the defense. United States v. Ryan, supra. In view of the great number of cases where failure to object has been held waiver, or at the least a bar to the finding of prejudice, reliance on the Ryan exception to the waiver standard would be foolhardy.

How to object. Paragraph 72c of the Manual cautions that argument should not be interrupted unless it becomes improper. The preceding review of the Court of Military Appeals' current attitude concerning waiver indicates that the Manual provision would be more accurate if it stated that argument must be interrupted when it becomes improper. If an objection is not interposed to an improper, inflammatory, or prejudicial remark made by the prosecutor in argument on findings or sentence, the waiver doctrine may preclude success on appeal. If upon review of the record of trial objectionable argument is first noticed, be certain to argue the impropriety and prejudicial effect in a Goode

reply or an Article 38(c) brief. See United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975); Article 38(c), Uniform Code of Military Justice.

The best response is made at the time of the objectionable comment. Stand and apologize to the court for the interruption. State the objection, repeating trial counsel's language and the theory under which the remark is objectionable. An apology is good courtroom decorum, but if the remark is clearly inflammatory, a strident interjection will halt its progress. In a bench trial, the need to cut off the prosecutor's comments will be less urgent. The attitude with which the objection is made will be a gauge to the judge of the prejudice you attach to the comment.

Before an empanelled court, objectionable appeals to passion and prejudice should not be emphasized by the objection. A general objection stated as simply as possible should be sufficient to put the judge on notice. If sustained, a minimum of attention will have been directed to the remark. Where a simple objection will not suffice, object and request a side-bar conference. Argue the objection out of the hearing of the jury, but be sure it is recorded.

If the military judge objects or indicates annoyance at an interruption of argument, request permission to preserve the objection until the conclusion of argument. The objection should then be entered as above. Judicial intimidation should be resisted to assure that proper objections can be made to stop prejudicial argument before it has an adverse effect.

A discussion of areas of impermissible comment can be found in People v. Petrucelli, 44 App. Div. 2d 58, 353 N.Y.S. 2d 194 (1974). Further guidance on how to object can be found in such texts as: Bailey and Rothblatt, Successful Techniques for Criminal Trials, 317-318 (1971).

The manner of making an objection will be controlled by a number of considerations, but the basic necessity is to object with immediacy and specificity. As with all objections, unless the irregularity is patent, you must specify the objectionable comment and indicate the grounds on which your objection should be sustained. If the improper argument continues and is sufficiently prejudicial to warrant further interruptions, do so.

Otherwise, a second objection to the "entire line" of improper argument as previously objected to should be entered at the conclusion of the argument. If the trial counsel enters other areas of improper comment, immediately and specifically object, stating the manner in which this new attack is unfit. Nelson brings home the fact that objection to one segment of unsupported argument will not suffice to enter an objection to another portion although it be patently erroneous. If the military judge finds your interruptions objectionable, but trial counsel is wreaking havoc upon your case with his argument without comment by the judge, object to the judge's inaction as well if he refuses curative action. The object of the exercise is to obtain as much relief from trial counsel's transgressions as possible.

The first consideration in making your objection, then, is to consider the extent of the impropriety. Conceptually, it may help to identify the types of errors trial counsel will make as improper, inflammatory or "illegal". These non-exclusive categories will aid in identifying the nature and extent of the error. The following break-down of the categories should illustrate how to construct your objection, weigh prejudice and request relief.

Improper: basic faults which may subtly undermine your case or escalate the sentence. For example:

1. Misstating evidence, arguing facts not supported by evidence or not in evidence.
2. Reading or arguing law or facts from other cases, treatises or reporters.
3. Arguing personal beliefs of trial counsel.

Inflammatory: a basic fault exaggerated by trial counsel's oratory or attitude, or appeals to passion or prejudice:

1. Appeals to national, patriotic, local, racial or religious prejudices.
2. References to jurors, their families or their duty to society and military-civilian relations.
3. Accusatory histrionics or offensive comparisons launched at the accused.

Illegal: those areas into which any prosecu-
torial comment has been forbidden:

1. Failure of the accused to testify.
2. Comment on witnesses not called.
3. Insertion of command influence.
4. Mention of a withdrawn guilty plea.

As the prejudice of the argument increases, due to its impropriety, repetition or manner of delivery, so must the tenor of the objection. There is a direct correlation between the two. If the harm is not eradicated at the trial level, the appellate courts must be convinced of the prejudice the argument has caused.

The relief you request will reflect your assessment of prejudice. As with your objection, the request should be specific and tailored to the error. Generally, merely sustaining a defense objection will be held to cure a minor impropriety, but that does not remove the harm from the minds of the panel members. Because those slates cannot be "wiped clean", seek as much relief as your objection will support, but if it is not sufficient to correct the damage done, ask for more.

The possible relief escalates in the following manner:

1. Immediate direction to disregard. This must be embellished to explicitly and emphatically nullify or counterbalance the consequences of the objectionable statement. If the argument misstated the evidence, have the military judge clarify (with your help) the actual state of the record.
2. Correction, caution, reprimand, or censure of trial counsel. The severity of the harm done will indicate what action the military judge may appropriately take. Requesting a direction that trial counsel refrain from prohibited conduct is a good start. The point is not only to have the trial counsel stop prejudicing your case, but to impress the panel with the gravity of trial counsel's impropriety.

3. Instruction on counsel's argument tailored to cure objection. If the subject was so damaging that it must be corrected, tailor the instruction to assure it is disregarded without repeating the comment in detail. See Para 2-2, DA Pam 27-9.

4. Mistrial. If the argument was "grossly prejudicial" or entered one of the "illegal" areas, or if an earlier misfeasance is repeated after notice, move for mistrial. If the error is one that has caused reversal on appeal, or indicates willful misconduct by trial counsel, the motion should be granted.

It should be obvious by now that your objection must be an argument in itself. If the facts warrant, your objection can take the problem indirectly to the panel. It is not improper to rebut adverse objectionable matters and the presentation of your objection is your first opportunity. The most likely avenue would be in correcting a misstatement of the evidence with your own recollection of the proceedings. In Nelson, trial counsel's statement of evidence created a nonexistent, but necessary link in the prosecution case. Would it not be permissible in your objection to indicate that this link had not in fact been made? Rehabilitative comments can help you assure that you get the maximum curative action at the appropriate time.

This article has developed the crescendo from the necessity for a simple, explicit objection to the tactical possibilities which the trial counsel's argument has opened. What is necessary and appropriate is a matter of sound professional judgment. Your knowledge of the judge, court and opposing counsel has already indicated to you what your style will allow you to do. The tenor of the particular proceeding in which the problem occurs will suggest the appropriate response to error. You will no less need to argue prejudice before judge alone than before a hostile court. If an outspoken objection will reflect unfavorably on the defense, then the side-bar is appropriate. Courtesy and respect are always appropriate to decorum of the court. You must calculate the effect of your objections to increase sympathy for your client, and not, inadvertently, for the prosecution.

Objection to improper argument is a yes or no proposition, unless so gross as to move the judge to action. Your duty to your client demands that you object to all prosecutorial comments that succumb to the "three I's": Improper, Inflammatory or Illegal. Lack of precedent will not excuse inaction. If argument seems improper and prejudices the accused, object!

CARE INQUIRIES AND PRETRIAL AGREEMENTS

We have noticed that a few counsel and trial judges have apparently misinterpreted and perhaps even overreacted to Chief Judge Fletcher's concurring opinion in United States v. Elmore, ___ USCMA ___, ___ CMR ___ (Jan. 16, 1976). Judge Ferguson stated in Elmore, inter alia that ". . . as part of the Care [18 USCMA 535, 40 CMR 247 (1969)] inquiry the trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition (of the pretrial agreement) as well as the sentence limitations imposed by any existing pretrial agreement."

Some attorney's have interpreted the Chief Judge's statement to mean that a trial judge must view the terms of the pretrial agreement prior to the acceptance of the plea and hence, before the imposititon of sentence. The judge, they argue, must conduct his providency inquiry into all matters surrounding the agreement and will therefore necessarily have to determine whether the accused comprehends and agrees to the approved sentence limitations set for in the agreement. The basic logic is correct and undisputed. The problem, however, is not whether the military judge must view the quantum portion of the agreement, but rather when the judge should view the agreement. It is felt that, in a trial by judge alone, such an inquiry should be postponed until after the imposition of sentence so that there is no possibility that the convening authority's sentence limitation will influence the military judge.

The Military Judges' Guide has provided since 1970 that:

If there is a pretrial agreement, the military judge should inquire into its terms, its legality, and the accused's understanding thereof. Such a pretrial agreement should be appended to the record as an appellate exhibit. Normally sound practice indicates that in a trial before a military judge alone, the military judge

in inquiring into the providence of the plea should defer consideration of the provisions of the agreement relating to the quantum of the agreed punishment until after announcing the sentence. For orderly presentation, the quantum provisions could be contained in a separate appendix to the agreement, signed by the parties to the agreement and referred to therein. If after considering the quantum provisions the military judge determines for any reason that the plea was improvident, he must take appropriate corrective action.

Military Judges'
Guide, DA Pamphlet 27-9
Chapter 3, note 3.

We believe that the Chief Judge's opinion and the above quote from the Judge's Guide are in strict conformity with one another.

A divided Court of Military Appeals previously ruled that the practice of postponing an inquiry of the sentencing terms of the pretrial agreement is unnecessary. The majority of the Court said that they could perceive "no reasonable risk" that the military judge would be influenced by the terms of the agreement. United States v. Villa, 19 USCMA 564, 42 CMR 166 (1970). Judge Ferguson however, rendered a strong dissent saying that "the practice is fraught with danger and should be discontinued." Both the majority and minority opinions were based upon intuitive feelings about a judge's ability to control his own human tendencies to accept or reject the immediate reviewing authority's sentence determination; neither opinion had the benefit of data to support its assumption. In an effort to determine which assumption was correct, the attorneys at Defense Appellate Division reviewed approximately 250 guilty plea cases tried by judge alone. The results of that survey indicated that an accused appearing before a judge who does not look at the quantum portion of an agreement before announcing sentence has a 28.4% chance of receiving a sentence less than that provided in the agreement. On the other hand, an accused appearing before a judge who views the agreement prior to announcing sentence has only a 12.5% chance of receiving a lesser sentence than previously agreed. In other words, an accused's chances of "beating the deal" are over twice as good if the judge does not look at the agreement. These statistics, it is felt, clearly support Judge Ferguson's position in Villa.

The Court of Military Appeals, based upon the results of these statistics, has recently granted review on the issue of whether the military judge should preview the quantum portion of a pretrial agreement. United States v. Green, Docket No. 31,443; United States v. Chaplin, Docket No. 31,486. The Court is, therefore, apparently willing to re-evaluate its Villa opinion. In the meantime, Defense Counsel should continue to vigorously advocate that the military judge must follow the directions of the Judges' Guide and postpone any inquiry into the terms of the agreement until after imposing sentence. By so doing, Defense Counsel will not only prevent the appearance of impropriety but will also increase their chances of receiving a more favorable sentence.

ANOTHER LOOK AT ARTICLE 38(c) BRIEFS

Although most trial defense counsel are familiar with the term "Article 38(c) brief", few have ever submitted one. Perhaps the reason is that the UCMJ and Manual provisions providing for submission of a post-trial brief by trial defense counsel are worded so broadly that it is difficult to discern exactly what can be included in the brief. In the broadness of the language, however, lies its utility. The Article 38(c) brief is one of the most effective weapons in the defense arsenal, and by submitting one the trial defense counsel is meeting his continuing ethical obligation to protect his client's opportunity to a meaningful appeal.

Article 38(c), Uniform Code of Military Justice and Paragraph 48k(2), Manual for Courts-Martial, United States, 1969 (Revised edition), provide that when a person is convicted by any court-martial, summary, special, or general, his trial defense counsel may "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." The United States Court of Military Appeals has recognized that the nature of the matters which may be included in the trial defense counsel's post-trial brief are not specifically delineated in either the UCMJ, or the Manual. Thus, the Court has noted that all possible information which may have a bearing on the post-trial disposition of the case may be included and that the trial defense counsel has the responsibility for doing so. United States v. Fagnan, 12 USCMA 192, 30 CMR 192 (1961); United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955).

In order for the brief to be used most effectively, it must first be filed for consideration by the convening authority. There may be some matters included in the brief that will most interest the convening authority, who has broad powers over findings and sentence and, therefore, may afford the client his best opportunity for relief. Furthermore, the Army Court of Military Review has stated that it will not consider new matter in the Article 38(c) brief unless it was first presented to the convening authority. United States v. Lancaster, 31 CMR 330 (ABR 1961). The absence of an Article 38(c) brief has been used by the Army Court 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).

The importance of the Article 38(c) brief is underscored by the fact that it becomes a part of the "entire record". In Fagnan, supra, the Court of Military Appeals ruled that the Boards of Review (now Courts of Review) are limited to consideration of the "entire record" of trial when reviewing cases under the provisions of Article 66(c), UCMJ, but added that an Article 38(c) brief was part of the "entire record". There is support for the argument that if a trial defense counsel submits an Article 38(c) brief but the brief is not attached to the record, there is reversible error. In an analogous case, where a clemency petition was not attached to the record, the United States Court of Military Appeals remanded the case for reconsideration of the sentence. The Court noted that if the petition had been included in the record which had been reviewed below, the accused might have been treated with greater leniency. United States v. Harrison, 16 USCMA 484, 37 CMR 104 (1967). Since an Article 38(c) brief may contain essentially the same information as a clemency petition, indeed, information which is even more important to the accused, the same logic applies.

All of the above-cited statutory provisions and cases speak of the Article 38(c) brief as being used solely after trial. While the brief can only be submitted after trial, some of the information which may need to be included in the brief can be effectively used during the trial itself. Extensive pretrial preparation and vigorous litigation of every viable issue at trial is the best technique for preparing a case for appeal. Many trial defense counsel use checklists during trial to insure that all important points are raised during the trial. Because of the very nature of the trial, with its many interruptions and surprises,

many points may not be raised as effectively as is possible. A trial defense counsel could set forth the factual and legal theories on which he will defend the case in a written brief. Using the brief during the trial may aid the trial defense counsel in developing more persuasively his legal authorities to support each element of his trial strategy. In this regard, trial defense counsel are encouraged to draw upon the legal research which has been done by appellate defense counsel in many varied areas. When the trial has concluded, the brief used at trial can be reinforced and supplemented and submitted as an Article 38(c) brief. In that way, appellate defense counsel will know the specific bases on which the trial defense counsel defended his client. Any legal or factual theories which were not completely developed at trial will be completely developed in the brief. Anything which is not clear from the record of trial will be made clear after the brief has been read. The Article 38(c) brief will immeasurably aid appellate defense counsel in their efforts to fully and thoroughly review the case in order to properly represent the client before the appellate courts.

The Article 38(c) brief is very useful in setting forth evidence which will not otherwise appear in the record of trial. There has been no definitive ruling with regard to what evidence can be included in the brief, and the area remains unclear. Thus, the trial defense counsel probably should not include evidence which the military judge held inadmissible. There may be certain evidence, however, which the trial defense counsel determined would not, or could not, be admitted into evidence at trial, and which is now appropriate to be included in the brief. There also may be situations in which evidence which would have greatly benefitted the client at trial either does not arrive in time to be used at trial, or does not become known until after the trial is completed. For example, evidence impugning the credibility of a witness who testified at trial may not become known until well after the trial is over. Submission of this evidence may greatly aid the raising of errors regarding the sufficiency of the evidence against the client. Evidence which was sought for use during the extenuation and mitigation portion of trial also might not arrive in time to be used. This evidence can be attached to the brief. For example, affidavits or letters from individuals in support of the client's rehabilitative potential can be included. Additional matters which occurred after trial which indicate that the client deserves another opportunity to prove that he can serve honorably in the Army can be

submitted. This final argument on the appropriateness of the sentence submitted by the trial defense counsel can be more important than a similar plea made by appellate defense counsel, since the trial defense counsel has a personal, as opposed to a "paper", relationship with the client.

The United States Court of Military Appeals has held that, under the broad language of Article 38(c), it is permissible for the trial defense counsel to present matters on the issue of the appropriateness of restraint of his client pending appellate review of a conviction. Since the client's freedom is involved, the Court felt that, regardless of specific statutory authority, the client should have the opportunity to submit matter favorable to himself or to oppose unfavorable material before the decision-making authority, including the probability of reversal or substantial modification of the conviction. Reed v. Ohman, 19 USCMA 110, 41 CMR 110 (1969).

In two of the areas which may be raised for the first time on appeal, sanity and personal jurisdiction, the trial defense counsel may have access to supporting information needed for a successful appeal which appellate defense counsel do not have. Affidavits from pertinent individuals, documentary evidence such as sanity board reports, and general background information can be included. Collaboration between the trial defense counsel and appellate defense counsel beyond the scope of the Article 38(c) brief will often be necessary, but the brief is an effective means of putting the information before the appellate courts as a part of the trial record.

One of the best areas in which to use an Article 38(c) brief is when there is post-trial delay in the cases. The facts pertaining to defense actions after trial, the quality and quantity of court-reporting equipment and personnel, and the normal office policies and procedures need to be developed. Moreover, the procedures followed in the particular case and any extraordinary circumstances which occurred must be included. If the trial defense counsel provides that information in the Article 38(c) brief, appellate defense counsel are aware of all the circumstances surrounding the post-trial delay, and the appellate brief can be much more knowledgeable and persuasive. If an Article 38(c) brief is not submitted, appellate defense counsel are forced to seek affidavits from the trial defense counsel and others, necessitating needless delay in the appeal.

The only matter to be included in the brief which is specifically delineated in the UCMJ and the Manual is

objections to the contents of the record of trial which the trial defense counsel deems appropriate. Thus, the brief has been used to discuss a void in the record of trial created by unrecorded conversations. United States v. Strahan, 14 USCMA 41, 33 CMR 253 (1963). Obviously, if the trial defense counsel is to note objections to the record, he must be served with the record. Paragraph 82e of the Manual provides that the trial defense counsel should be allowed to examine the record of trial, only if undue delay will not result. A recent decision from the Army Court of Military Review (United States v. Wormley, CM 431296 (ACMR 10 February 1975)) and a current case pending before the United States Court of Military Appeals (United States v. Cruz-Rijos), contend that the trial defense counsel has a right to examine the record. Thus, the trial defense counsel should demand that a copy of the authenticated record of trial be served on him.

On a related point, service of the record of trial is especially important in light of the United States Court of Military Appeal's recent decision giving the trial defense counsel the opportunity to examine the staff judge advocate's post-trial review. United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975). See The Advocate, Vol. 7, No. 3, at 12. If the trial defense counsel is to effectively rebut matter contained in the post-trial review, he must be served with a copy of the record of trial so as to refresh his recollection of exactly what occurred at trial. Goode directs that any rebuttal by the trial defense counsel must be made a part of the record. Thus, there is a viable alternative to including that rebuttal in the Article 38(c) brief. Any rebuttal or comments which are not included in the Goode reply, however, can subsequently be included in an Article 38(c) brief. If some information arises after the Goode reply has been submitted, for example, the Article 38(c) brief can be used.

The importance of the Article 38(c) brief cannot be overemphasized. A brief filed with the Army Court of Military Review subsequent to it's decision in a case caused the Court to reopen the case and reconsider it's earlier decision. United States v. Wright, 40 CMR 895 (ACMR 1969). The brief affords a starting point for the client's appeal, and appellate defense counsel can supplement and expand upon the information and legal analysis and argument contained therein.

Every trial defense counsel must remember that his ethical duty to his client does not end with the clients

conviction. Many important issues occur at trial and post-trial which cannot or will not be litigated on appeal without the assistance of the trial defense counsel. The Article 38(c) brief provides the trial defense counsel with the most effective means of rendering that assistance and continuing the representation of his client when that client has his greatest need.

Consideration - Yes; Concession - No!

The Court of Military Appeals has recently held that Article 64(a) Uniform Code of Military Justice (which authorizes a convening authority to return a record of trial to the trial judge for "reconsideration") does not require that the military judge accede to the opinion of the convening authority. United States v. Ware, ___ USCMA ___, ___ CMR ___ February 6, 1975). "Rather", said Judge Ferguson, speaking for a unanimous court, "he [the military judge] is charged to re-examine his prior ruling on the motion involved and to rule thereon once again, which ruling will be the product of his own, independent legal judgment."

Ware involved a Navy appellant whose speedy trial motion had been granted by the trial judge. The convening authority subsequently returned the record of trial to the judge and, in a written memorandum, stated inter alia, that the "ruling granting the motion for dismissal based upon lack of speedy trial is reversed. The trial is directed to proceed." The trial judge then reheard the evidence on the motion and, while noting that nothing he subsequently heard caused him to change his opinion, nevertheless stated, "I must, I feel, accede to the views of the convening authority. . ."

The United States Court of Military Appeals recognized that the trial judge's accession was in conformity with both the Manual, (Paragraph 67f, Manual for Courts-Martial, United States, 1969 (Revised edition)) and the majority opinion in existing cases (see e.g., United States v. Frazier, 21 USCMA 444, 45 CMR 218 (1972)). Nonetheless, the Court - after discussing the numerous prior dissents of Senior Judge Ferguson, Judge Duncan's concurring opinions in Frazier, the "plain meaning" rule, the legislative history surrounding Article 62(a), and the traditionally disfavored nature of Government Criminal appeals - concluded that since "reconsideration" contemplates an individual re-examination and "accession" connotes an unthinking adherence, the Manual's requirement that a trial judge accede to the con-

trary views of the convening authority "is not included within and is inconsistent with the clear and plain meaning of the Code's 'reconsideration' provision." In so doing the court further stated that they were overruling their contrary decisions in United States v. Bielecki, 21 USCMA 450, 45 CMR 224 (1972); United States v. Frazier, *supra*, Lowe v. Laird, 18 USCMA 131, 39 CMR 131 (1969); and United States v. Boehm, 17 USCMA 530, 38 CMR 328 (1968).

The Court of Military Appeals then reversed the Navy Court of Military Review and dismissed the Charge without discussing the merit or possible lack thereof of the initial speedy trial ruling. Said the Court at footnote 34, "By dismissing, we simply give the necessarily required legal effect to the trial judge's initial ruling on the motion to dismiss, which ruling clearly would have been identical on proper reconsideration thereof."

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* NEXT ISSUE *

* Plea Bargaining and the Guilty Plea - A look at some techniques for negotiating pleas of guilty to best advantage. *

* Article 33 Motions - This Article, long the Code's vestigial organ, has come back to life, not only as a speedy trial motion but also along the lines of a pretrial processing motion, per Donaldson, 23 USCMA 293, 49 CMR 542 (1975). *

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EXTRAORDINARY RELIEF

Recently, a number of extraordinary writs have been filed with, and resolved by, the USCMA. This article is directed toward familiarizing trial defense counsel with extraordinary writs and their possible uses. Extraordinary relief is just what its title suggests; it is an avenue of potential relief to be resorted to when redress via normal course of appellate review is insufficient to afford any sort of meaningful relief. West v. Samuel, 21 USCMA 290, 45 CMR 64 (1972). Extraordinary relief is not to be used as a substitute for appeal and it is imperative that an accused demonstrate that the normal appellate process is inadequate. West v. Samuel, supra.

In United States v. Frischolz, 16 USCMA 150, 36 CMR 306 (1966), the USCMA made it clear that it has the power, conferred by the All Writs Act, 1/ to issue extraordinary writs. Likewise, it is now clear that the inferior courts of review have the same power. United States v. Kelly, 23 USCMA 567, 50 CMR 786 (1975); 2/ United States v. Draughon, 42 CMR 447 (ACMR 1970); United States v. Gagnon, 42 CMR 1035 (AFCMR 1970). Although the power of the military appellate courts to issue extraordinary writ now appears to be unquestioned, very few petitions for extraordinary relief are successful, for one or a number, of reasons.

Certain prerequisites to the issuance of an extraordinary writ have been developed by the military appellate courts. First, and foremost, is that the writ must be issued "in aid of" the

1/The All Writs Act provides that:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 USC §1651(a).

2/In United States v. Kelly, USCMA returned a petition for extraordinary relief to the Army Court of Military Review "in order for that court to exercise its extraordinary writ authority." 23 USCMA at 568, 50 CMR at 787.

appellate court's jurisdiction. Article 67 of the Code limits CMA's jurisdiction to all cases reviewed by a CMR which (1) affect a general or flag officer, (2) which are certified by TJAG or, (3) which are petitioned by the accused, said petition having been granted by CMA. The Courts of Military Review have jurisdiction in cases in which the sentence, as approved, affects a general or flag officer, or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement at hard labor for a year or more. Article 66, Code. Also, CMR may review the record of every general court-martial referred to them by TJAG pursuant to Article 69 of the Code. 3/

In United States v. Bevilacqua, 18 USCMA 10, 39 CMR 10 (1968), CMA said that "Article 67 does not describe the full panoply of power possessed by this Court" (37 CMR, at 11) and referred to its "supervisory power" over the military system of justice. United States v. Bevilacqua certainly indicated that CMA did not feel absolutely bound by the constraints of the All Writs Act and Article 67. The vitality of the language in United States v. Bevilacqua was shortlived however, for in United States v. Snyder, 18 USCMA 480, 40 CMR 192 (1969), CMA strictly construed its power to issue extraordinary writs and limited it "only to aid in the exercise of the authority we already have" 40 CMR, at 195. In United States v. Snyder, CMA held that it lacked authority to issue an extraordinary writ on a petition from a special court-martial in which the approved sentence extended only to reduction. In Thomas v. United States, 19 USCMA 639 (1970), CMA citing Snyder, dismissed a "Petition for Writ in the Nature of Error Coram Nobis" saying that it had no power to grant extraordinary relief on a petition from a summary court-martial. Thus, CMA's power to entertain petitions for extraordinary relief is limited to those cases which it would ultimately have the power

3/ Article 69 provides:

Every record of trial by general court-martial in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Section 866 of this title (Article 66), shall be examined in the Office of The Judge Advocate General, so directs, the record shall be reviewed by a Court of Military Review in accordance with Section 866 of this title (Article 66), but in that event there may be no further review by the Court of title (Article 67(b)(2)).

to review, pursuant to Article 67 of the Code. 4/ The Courts of Review are bound by the limitations imposed by Articles 66 and 69, but trial defense counsel should remember that, as a result of Article 69, the Courts of Review have the potential power to review any case tried by general court-martial.

A further prerequisite to extraordinary relief is the exhaustion of available administrative remedies. In Catlow v. Cooksey, 21 USCMA 106, 44 CMR 160 (1971) and Tuttle v. Commanding Officer, 21 USCMA 229, 45 CMR 3 (1972), CMA made pursuit of the remedy provided for by Article 138 a mandatory prerequisite to the granting of extraordinary relief. This judicially imposed exhaustion requirement is unfortunate as it requires an accused to pursue a protracted administrative process 5/, and effectively erases the possibility of prompt relief which is the essence of extraordinary relief. The continued vitality of the Catlow and Tuttle holdings is, however, questionable. In Kelly, supra, the petitioner challenged his continued confinement after appellate reversal and pending a convening authority's decision to rehear the case. The government argued, inter alia, that the failure of the petitioner to file an Article 138 complaint precluded any sort of extraordinary relief. Without discussing the failure to file an Article 138 complaint, CMA granted relief.

With this backdrop, the following discussion of specific types of writs and their potential uses may prove useful to field defense counsel.

Mandamus is a common law extraordinary writ issued from a higher court to a lower court or official which requires the performance of a specified act when the lower court or official is duty bound to perform said act. Trial defense counsel may pursue such a writ to compel the Convening authority to complete his required post-trial action in a particular case. Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974). Oftentimes, the mere

4/If a petition is filed prior to completion of trial, CMA will consider it if the case could be potentially reviewable under Article 67. Petty v. Moriarty, 20 USCMA 438, 43 CMR 378 (1971).

5/See Army Regulation 27-14.

filing of the petition will result in prompt action by those so charged with the duty. For example, in Vasquez v. United States, 19 USCMA 637 (1970), the petitioner filed a "Petition...for Appropriate Extraordinary Relief..." seeking action on his record of trial. CMA ordered the government to show cause why relief should not have been granted. Just subsequent to that Order, the convening authority took action, and CMA dismissed the petition as moot.

A writ of habeas corpus is also a common law writ which has as its purpose the obtaining of immediate relief from illegal confinement. This writ is a useful tool to allow trial defense counsel to challenge the legality of both pretrial and post-trial confinement. Courtney v. Williams, ___ USCMA ___, ___ CMR ___ (Mis. Docket No. 75-64, 23 January 1976); Phillips v. McLucas, ___ USCMA ___, ___ CMR ___ (Misc. Docket No. 75-36, 8 September 1975); Dale v. United States, 19 USCMA 254, 41 CMR 254 (1970). Where trial defense counsel receives a case upon appellate reversal and authorization for rehearing but no prompt decision as to rehearing or dismissal is made, this form of writ can be used (See Appendix A) (Its use should be made with an understanding that the filing alone may cause referral. Thus trial defense counsel should be prepared for trial before filing.).

In the context of excessive post-trial confinement under Dunlap, supra, the writ can be used to build a record for appellate review, as well as to seek immediate release from confinement (Appendix B). Trial defense counsel, in all writs situations, must be fully aware of the factual background of the alleged wrong to his client, since the appellate courts will usually use affidavits as their fact-finding tools.

A writ of prohibition is one which commands an inferior tribunal or officer to refrain from doing a particular act. The primary purpose of such a writ is to prevent a lower court from exercising jurisdiction over matters not within its cognizance. In Fleiner v. Koch, 19 USCMA 630 (1969) petitioner filed for a writ of Prohibition. Two of the specifications referred against the petitioner alleged indecent assault and indecent acts against a civilian in civilian premises. CMA prohibited the respondents from proceeding to trial on the aforementioned offenses as the court-martial lacked jurisdiction, citing O'Callahan v. Parker, 395 U.S. 258.

An excellent discussion of extraordinary writs, including all but the most recent cases can be found in Moyer, Justice the Military, S2-830 through S2-844.

In making the decision to file a writ, counsel should be aware that true relief for the client is very rare. Most often writs are filed pro se, and the time lag from petition to joinder of issue allows the government an opportunity to moot the underlying issue. For this reason, counsel, if he has time and facilities, should support the client's petition with a brief of law and fact. If this is not possible, counsel should use the writ itself only when a wrong is presented with extraordinary clarity, and with a full explanation to the client of the limits of the writ.

Notwithstanding these pragmatic shortcomings, the extraordinary writ allows trial defense counsel an opportunity to bring unusually chronic problems to the attention of the appellate courts. Often the writ filing alone brings relief from some problems. In other cases, the spotlighting of a particularly objectionable practice may be enough to end its use in other cases. Lastly, the presence of the writ power itself provides a weapon in reserve to protect the client by preventing extreme situations from arising.

The formats for extraordinary writs are provided as frameworks for individual counsel as a separate attachment to this issue.

Federal Cases

Collateral estoppel - previously suppressed evidence.

DiGiangiemo v. Regan, 18 Cr.L 2364 (C.A. 2 12-29-75).

Accused's first trial ended in an acquittal when the key evidence was suppressed. A second, but different action arose, involving similar evidence. Issue: does due process, unaided by the double jeopardy clause require that collateral estoppel be applied in favor of a criminal defendant. The court answers the question affirmatively citing the due process overtones of United States v. Oppenheimer, 242 U.S. 85. But relief for this accused is not required where he failed to make collateral estoppel claim at trial.

Impeachment - of own witness.

United States v. Morlang, 18 Cr.L 2367 (C.A. 4 12-30-75).

Impeaching one's own witness by prior inconsistent statement is error when employed as a subterfuge to place before the jury otherwise inadmissible evidence.

Rape - reputation of prosecutrix.

Caldwell v. State, 18 Cr.L. 2368 (Md. Ct. App. 1-8-76).

Where consent is at issue, evidence of general reputation, in the discretion of the trial court, may be drawn from "any substantial community of persons who have had opportunity regularly and for a sufficient period of time to observe her." Due to modern communication and transportation it is no longer necessary to restrict reception of reputation evidence in rape cases solely from where the prosecutrix resides.

Court of Military Appeals Opinions

Courtney v. Williams, Dizialo and Vest, Misc. Docket No. 75-64, 23 January 1976, cite as USCMA, 51 CMR (1976).

Illegal Pre-Trial Confinement - On Petition for Extraordinary Relief.

COMA gets over the jurisdictional hurdle first, stating that there is no longer any doubt they can exercise extraordinary writ power in this area. Gerstein v. Pugh, 420 U.S. 103 (1975) applies to the military, and its two elements are addressed.

The first element - a judicial determination of probable cause - is required, by a neutral and detached magistrate. Gerstein did not sanction an adversary hearing on this point. The next point involves the lack of bail in the military -- should the accused be detained once it is determined that he could be detained. Chief Judge Fletcher sets down the rule that a neutral and detached magistrate must make this determination also. In a footnote, he seems to indicate that the military magistrate program in the military will suffice to meet this requirement. (Left unanswered is whether the military judge may act in this role which Senior Judge Ferguson answers in the affirmative in his concurrence).

The petition was denied here because the accused had been tried and convicted. This area is ripe for litigation until each Army installation implements a procedure to cover both points of the Courtney opinion.

United States v. Chase, No. 30,449, ACM 21765, 30 January 1976.

Search and Seizure - Gate Search.

Air Force regulation set up procedure for random gate searches. Due to bicycle thefts on post, gate guards were instructed to search every tenth car outgoing and search all vans. Incoming vehicles were to be monitored through ID checks.

Appellant was passenger in van exiting post which was stopped by gate guard. Guard ordered driver out and requested ID, the van was opened and an unlicensed motorcycle found. "Consent" was never given to the opening of the van - it was acquiescence to authority as COMA points out.

COMA holds that the guards did not comply with the regulation. The inspection of all vans was an impermissible dragnet police tactic. Charge dismissed.

Court of Military Review Opinions

United States v. Goins, 11526, 11 December 1975

Improvident Guilty Plea.

Accused was charged with dishonorable failure to maintain sufficient funds to cover written checks. Accused only admitted that he was unable to keep adequate records. This nonfeasance was not characterized by "deceit, evasion, false promises or other distinctly culpable circumstances, indicating a grossly indifferent attitude towards one's just obligations."

United States v. Dozier, 11179, 11 December 1975.

Article 31 Warnings.

Held: Chain of custody form signed by accused is an admission, and if accused's signature is used to form chain of custody at trial, rather than a witness, then it is error for government not to produce evidence of Article 31 warnings being given.

United States v. Piggee, 432601, 15 December 1975

Counsel - Conflict of Interest.

Appellant was represented by civilian counsel who clearly had a conflict of interest as he had previously represented the co-accused and implicated appellant. The military judge fully

explained this to appellant who persisted in his desire to retain this counsel. However, the military judge disqualified this counsel from serving. Held on appeal: The military judge erred. The Court grounded their decision on a Fifth Circuit case, United States v. Garcia, 517 F.2d 272. "If defendants may dispense with the right to be represented by counsel altogether... it would seem that they may waive the right to have their retained counsel free from conflicts of interest."

United States v. Arthur, 10137, 30 December 1975.

Jurisdiction - Induction Irregularities.

The appellant was subject to priority induction for failure to serve satisfactorily in the Ready Reserve. Title 32, Code of Federal Regulations, Section 1631.8. After induction, appellant was AWOL for over 4 years. The Army failed to follow Paragraph 7, AR 135-90, which sets out investigative procedures to be followed before priority induction can take place. Appellant did not waive these irregularities by accepting the emoluments of active duty, because he protested vigorously that he should not have been inducted. Dismissal.

United States v. Hewitt, 11434, 13 January 1976.

Military Judge - Exceeding Sentence Limits of Code.

The military judge imposed a sentence which included mandatory attendance at one weekly meeting of alcoholics anonymous. This punishment exceeds the limits set by the President. Articles 19, 57 and Paragraph 15b, Code and Manual respectively. Reassessment required.

United States v. Philpott, 432620, 13 January 1976

Dunlap Violation.

195 day post-trial delay. Government's lone explanation for delay was a shortage of available court reporters. Not meeting the diligence/extraordinary circumstances test, the charges were dismissed.

United States v. Carpenter, 433200, 31 December 1975.

SJA Review Error.

In a contested case, where self-defense was vigorously litigated, the SJA erred in failing to provide the convening authority the test for self-defense as well as the fact that one claiming self-defense is not objectively limited to the use of reasonable force. New review and action.

United States v. Newell, 433044, 31 December 1975.

(a) Search and Seizure.

Accused suspected of stealing a van. Told to empty his pockets and search for key, marijuana found. Charge of possession dismissed - no consent here, mere submission.

(b) Confessions.

Rehearing authorized where accused accompanied two sergeants picking up his van, and made unwarned statements. Appellant was subordinate to them, and their official responsibility in regards to the van rendered any unwarned admissions inadmissible.

United States v. Pinter, 432421, 15 January 1976.

Impeachment by Prior Conviction.

During cross-examination on the merits, trial counsel elicited from the appellant evidence of a prior conviction which did not amount to a felony and was not otherwise within the ambit of paragraph 153b(2)(b) of the Manual. This was error. A rehearing was ordered because the case turned on credibility.

IN DUNLAP SITUATIONS:

UNITED STATES COURT OF MILITARY APPEALS

(Petitioner's Name))	Miscellaneous Docket
(SSAN))	No. (d)
(Unit of Detention with)	
address),)	<u>Petition for Extraordinary</u>
Petitioner)	<u>Relief</u>
)	
v.)	
)	
(a) , Commandant,)	
U.S. Disciplinary Barracks,)	
Fort Leavenworth, Kansas)	
66027;)	
(b) , Convening)	
Authority;)	
(c) , and the)	
UNITED STATES,)	
Respondent)	

1. I, (e) , am currently confined at the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas 66027.

2. On (f) , I was tried by (g) court-martial on (h) . On (i) I was found guilty of (j) and was sentenced to (k) on (l) .

3. Pursuant to the adjudged sentence I was transferred to the U.S. Disciplinary Barracks on or about (m) .

Alt A= 4. On (n) , I received a copy of the record of trial in my case. As of this date there has been no action of which I am aware taken in my case. My record of trial is (o) pages long and contains (p) exhibits.
(q).

Alt B= 4. As of this date I have received neither the record of trial in my case nor a copy of the convening authority's action.
(r).

5. This post-trial delay has caused me specific prejudice because I am classified as a detained prisoner at the Disciplinary Barracks and as such am precluded from appearing before or being considered by the

Disposition Board. Said Board is unable to take any action with respect to a case wherein the convening authority has not taken final action. Said Board governs such matters as clemency, parole, and restoration to duty. (See Petitioner's Exhibit A, (s)).

6. Further prejudice flows from this delay in that the failure of the convening authority to take action denies me the right to appellate review of my case. (t)

7. I have experienced only mental anguish, frustration, and uncertainty due to the unjustifiably long post-trial delay in this case.

WHEREFORE, petitioner prays this Honorable Court:

1. Order the dismissal of all charges and specifications in my case; or

2. Order that the convening authority take immediate action in my case; or

3. Take such other action as this Honorable Court deems proper.

Respectfully submitted,

(u)

(v)

(NOTARIZATION)

.....

Key to Blanks:

a. Rank and name of Commandant (Name all caps).
Used when accused is at DB; otherwise use the confinement facility's commander.

b. Rank and name of convening authority (Name all caps) before whom petitioner's case is pending.

- c. Name of the Command wherein petitioner's case is being processed.
- d. Leave blank for COMA use.
- e. Petitioner's name, rank, "U.S. Army", SSAN.
- f. Date(s) of trial.
- g. "General" or "Special".
- h. State number of specifications of which offenses in violation of which Articles of the UCMJ; e.g., "two specifications of possession of mariuana in violation of Article 92, U.C.M.J., and one specification or murder in violation of Article 118, U.C.M.J.'
- i. Date of findings.
- j. State "all charges and specifications", or "one specification of possession of marijuana." (If acquitted of some charges and/or specifications).
- k. Give entire sentence as adjudged.
- l. Date of sentencing (if different from findings).
- m. Date of petitioner's transferral to confinement facility.
- n. Alternative A is usable where petitioner has received a copy of his ROT but no action has as yet been taken. Give date ROT was received.
- o. Page length of ROT.
- p. Number of exhibits, admitted or not.
- q. Any attempts to accelerate the post-trial processing; e.g., TWX's to C/A, phone calls to SJA; should here be briefly and factually described, with dates where possible.
- r. Alternative B is usable where the petitioner has not as yet received his ROT. Describe briefly and factually the steps taken to accelerate the post-trial processing. (See q. above).

5. To date I have not been released from confinement nor have I been brought before an impartial magistrate or military judge for a hearing on whether continued confinement is necessary pending a decision on referral of the charges against me to trial.
6. My continuing confinement is contrary to law, causes me great uncertainty and mental anguish and violates my fundamental right to due process of law.

WHEREFORE, Petitioner respectfully prays this Honorable Court:

- (1) Dismiss the Charges and specifications in my case;
or
- (2) Order my immediate release from confinement; or
- (3) Order that an immediate hearing before a neutral magistrate or military judge be held to determine whether or not my continued confinement is proper;
or
- (4) Grant such other relief as this Honorable Court may deem warranted.

Respectfully submitted,
(q)

(r)

NOTARY PUBLIC

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Key to Blanks:

a. Name (all caps), w/rank, of the convening authority before whom petitioner's case is pending.

NB: If different from the Commandant of the Disciplinary Barracks, then the Commandant of the DB should also be included as a Respondent if Petitioner is at DB.

- b. Convening authority in a., supra: title and address.
- c. Leave blank for COMA use.
- d. Petitioner's name, rank, SSAN, and "U.S. Army".
- e. "General" or "Special".
- f. Date(s) of Trial.
- g. State number of specifications of which offenses in violation of which Articles of the UCMJ; e.g., "two specifications of possession of marijuana in violation of Article 92, U.C.M.J. and one specification of murder in violation of Article 118, U.C.M.J."
- h. State "all Charges and specifications" or delineate the findings as described in "g.", supra, if acquitted of some Charges and/or specifications.
- i. Give entire sentence as adjudged.
- j. Date of C/A action.
- k. Unit of C/A who took original action (e.g. Second Infantry Division).
- l. Give approved sentence.
- m. If reviewed due to approved punitive discharge or confinement of one year or more: state "Article 66"; if reviewed through Examination and New Trials Branch state "Article 69".
- n. State place of post-trial confinement.
- o. Date of reversal by appellate Court.
- p. If reversed by the Army CMR state: "the United States Army Court of Military Review"; if reversed by COMA state: "this Honorable Court".
- q. Signature of Petitioner.
- r. Type name, rank and SSAN of Petitioner.

- (2) Order an immediate hearing before a neutral magistrate or military judge be held to determine whether or not my continued confinement is necessary; or
- (3) Grant such other relief as this Honorable Court may deem warranted.

Respectfully submitted,

(p)

(q)

NOTARY PUBLIC

.....

Key to Blanks:

- a. Name (all caps), w/rank, of the convening authority before whom petitioner's case is pending.
NB: If different from the Commandant of the Disciplinary Barracks, then the Commandant of the DB should also be included as a Respondent if Petitioner is at DB.
- b. Convening authority in a., supra: title and address.
- c. Leave blank for COMA use.
- d. Petitioner's name, rank, SSAN, and "U.S. Army".
- e. "General" or "Special".
- f. Date(s) of Trial.
- g. State number of specifications of which offenses in violation of which Articles of the UCMJ; e.g., "two specifications of possession of marijuana in violation of Article 92, U.C.M.J. and one specification of murder in violation of Article 118, U.C.M.J."
- h. State "all Charges and specifications" or delineate the findings as described in "g.", supra, if acquitted of some Charges and/or specifications.
- i. Give entire sentence as adjudged.

- j. Date of C/A action.
- k. Unit of C/A who took original action (e.g. Second Infantry Division).
- l. Give approved sentence.
- m. If reviewed due to approved punitive discharge or confinement of one year or more: state "Article 66"; if reviewed through Examinations and New Trials Branch state "Article 69".
- n. State place of post-trial confinement.
- o. Date of reversal by appellant Court.
- p. Signature of Petitioner.
- q. Typed name, rank and SSAN of Petitioner.