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# THE ADVOCATE

A Journal For  
Military Defense Counsel

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## EDITORS' NOTE

On 1 February 1977, the Court of Military Appeals decided the case of United States v. Palenius, 25 USCMA 222, 54 CMR 549. The Court reversed the decision of the Army Court of Military Review because of erroneous advice given by trial defense counsel regarding the potential benefits and detriments of requesting counsel at the appellate level. Specialist Palenius was told appellate counsel would do him no good and only delay his case. This Note does not endeavor to review in detail or summarize the opinion, but to deal with two discreet aspects of the case.

First, regarding appellate delays, it is true that at one time in cases where counsel had been requested delays in excess of one year were typical. Currently, however, when counsel is requested, briefs are filed in the average case (not exceptionally long or complex) between 90 and 150 days after it has been received. The government usually responds within 30 days, though sometimes taking up to 60 days. Once the issues have been joined, the Court of Military Review usually decides the case within 30 to 60 days. Obviously, this is not a rigid timetable, but it is a fairly reliable estimate of the processing time at the Court of Military Review level.

Second, your attention is directed to Section III of Judge Perry's opinion, which mandates much closer cooperation between trial and appellate counsel during the time between sentencing and the filing of appellate briefs. Judge Perry enumerates several duties which he feels are incumbent on the trial defense counsel after trial. But he continues, stating:

Finally, the prevailing practice among some trial defense attorneys of ceasing all activity on behalf of their clients and, in effect, terminating the relationship of attorney and client without the permission of their clients or the courts can no longer be countenanced. The trial defense attorney . . . should maintain the attorney-client relationship . . . until substitute trial counsel have been properly designated and have commenced the performance of their duties . . . . At such time, an application should be made to the judge or court then having jurisdiction of the cause to be relieved of the duty of further representation of the convicted accused.

To comply with the Court's mandate, appellate counsel at the Defense Appellate Division have begun sending to trial defense counsel a letter of introduction from the designated appellate defense counsel. This should facilitate communications between trial and appellate counsel. Defense counsel should not hesitate to contact appellate defense counsel. This would be appropriate especially with respect to post trial matters or other information not reflected in the record.

Finally, in order to effect withdrawal from a case, we suggest that the following motion be filed with the Clerk of Court, United States Army Court of Military Review, after receipt of the appellate defense counsel's letter of introduction.

IN THE UNITED STATES ARMY COURT OF MILITARY REVIEW

UNITED STATES ) MOTION TO WITHDRAW  
                  ) )  
                  v. ) Court of Military Review  
                  ) No. SPCM/CM \_\_\_\_\_  
Private First Class JOHN DOE )  
123-45-6789 )

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
ARMY COURT OF MILITARY REVIEW:

COMES NOW the undersigned trial defense counsel in the above-styled case and prays this Honorable Court's permission to withdraw as counsel for appellant. Counsel has continuously and in good faith represented the appellant from the date of his conviction until the present time. Counsel has received notification that Captain \_\_\_\_\_ has been designated and is now acting as appellate defense counsel in the instant case. Counsel further asserts that he will assist appellate defense counsel in any way necessary to insure the most effective possible representation of appellant during the appellate review of the instant case.

WHEREFORE, the undersigned respectfully requests this Honorable Court's permission to withdraw as counsel in the above-styled case.

Date

\_\_\_\_\_  
Captain, JAGC  
Trial Defense Counsel

## CHAIN OF CUSTODY IN DRUG PROSECUTIONS

### Burden of Proof

One of the most frequently encountered, but perhaps least understood, areas of evidence law involves the litigation of the chain of custody of real evidence. The common law has always viewed proffered evidence with a healthy amount of skepticism, refusing to accept anything at face value. It is the burden of the party desiring to introduce either real evidence or expert analysis of that evidence at trial to prove that the evidence offered and/or analyzed is logically relevant. The item must be identified by some witness as having a connection with the case and it must be shown that it is in substantially the same condition that it was in at the relevant point of time. DA Pam 27-22, Military Criminal Law Evidence, August 1975, 1-2a.

In a drug prosecution, logical relevance means that the prosecution must prove that the drug analyzed is the same drug taken from the accused. This is more difficult than the situation where the item is readily identifiable; i.e., serially numbered items, items with distinctive natural markings or characteristics, items on which witnesses have made distinctive markings, and other items which for various and sundry reasons courts have found distinctive. In those cases the prosecution need only call a witness who can positively identify the offered item as the item in question. Pills, tablets, and other drugs, however, are normally of such a fungible nature that they cannot positively be identified as those present at a particular place and time. Novak v. District of Columbia, 160 F. 2d 588 (D.C. Cir. 1947). As a general rule, evidence of a fungible nature must be shown to be admissible and material through proof of a continuous chain of custody. United States v. Bass, 8 USCMA 299, 24 CMR 109 (1957); United States v. Martinez, 43 CMR 434 (ACMR 1970). It should be remembered that establishing the chain of custody is an affirmative duty of the prosecution, and that, absent a stipulation of fact by the defense, it must be proved in every contested case.

### Standard of Proof

The standard which the prosecution must meet in proving the chain of custody has been stated in many ways. Perhaps the most common statement, if not the best from a defense standpoint, is that found in United States v. Martinez, *supra*. The prosecution need not exclude every remote possibility of tampering with the evidence, they need only "satisfy the trial judge that in reasonable probability the article has not been changed in any important respect." 43 CMR at 437.

Under the "reasonable probability" standard, the prosecution must prove that it is more probable than not that the item offered is the same evidence originally acquired and is in substantially the same condition it was in at the time it was acquired. The prosecution must also show that it is improbable that either substitution or tampering occurred. Taken literally, the standard implies little more than a simple preponderance of the evidence. However, the language is subject to varying interpretation, and considerable discretion is given to the trial judge in determining the admissibility. The argument should be made that because drugs are fungible and often easily alterable, the standard should be higher in drug prosecutions. This argument has prevailed in at least one marihuana prosecution. State v. Lunsford, 204 N.W. 2d 613 (Iowa 1973).

Further, it should be argued that the "reasonable probability" standard is inappropriate in a criminal trial. In Wolley v. Hafner's Wagon Wheel, Inc., 22 Ill. 2d 413, 176 N.E. 2d 757 (1961), the court, in examining the question of an appropriate standard stated that: "The general rule is, of course, that in a criminal case the State must prove its case and each and every element there in beyond a reasonable doubt in order to obtain a conviction." Although that case was a dramshop wrongful death action and a lesser standard was appropriate, it is clear that the Illinois Supreme Court is of the opinion that a beyond a reasonable doubt standard is appropriate in a criminal case.

#### Method of Proof

The question of how the prosecution must proceed in proving a chain of custody is commonly misunderstood by practitioners. We should first clear the air of some of the widely-held misconceptions. First, the prosecution does not need to call every witness who handled the evidence if there exist other reliable indicia of safekeeping. Second, the oft-repeated "witness-skipping" or "every other link" approach cannot in itself provide an adequate foundation for the admission of the item of evidence. Similarly, a chain of custody form, DA Form 4137, does nothing more than establish the first half of the prosecution's burden--showing who handled the evidence. 1/

1/ There is some considerable question as to the admissibility of this form in the first place. The Manual proscribes the admission of documents qualifying as business entries or official records when prepared primarily for purposes of prosecution. Manual for Courts-Martial, United States, 1969 (Revised edition), paragraph 144d. But see United States v. Bowser, 33 CMR 344 (AFBR 1963). Some military judges will not accept a chain of custody form when an appropriate objection is made.

DA Pam 27-22, supra, paragraph 26-10d, states the prosecution's burden thusly:

"With respect to each link, the proponent must prove (1) his initial receipt of the article; (2) his final disposition of the article, i.e., retention until trial, transfer, or destruction; and (3) his safekeeping of the article between initial receipt and final disposition."

In other words, the prosecution must show not only who had the item at all times, but also that it was properly safeguarded by each person handling it. <sup>2/</sup> The most certain way, and in some cases the only effective way, of establishing the proper handling of the evidence is to call all persons constituting the chain of custody as witnesses and question them as their handling of the item. The presence of the witness in court, subject to cross-examination, is certainly the preferred method of showing proper handling. By so doing the prosecution has met the two-pronged requirement for establishing the requisite relevancy.

However, the prosecution can bridge the gap or gaps caused by the failure of a witness to testify by other evidence showing a strong unlikelihood of tampering or improper handling by the missing links. In United States v. Bass, 8 USCMA 299, 24 CMR 109 (1957), the only Court of Military Appeals case on chain of custody, the Court held that a showing that two urine samples had been sealed with adhesive tape and parafin and that the bottles containing the samples had been etched with the CID agent's initials, the hour, the date, and the accused's name, was sufficient to bridge the gap created by the non-appearance of a witness who handled the samples while they were sealed. Evidence that the item has been kept in a sealed container throughout one or more of the periods of possession is well recognized as an adequate showing of proper handling of the item. United States v. Picard, 464 F. 2d 215 (1st Cir. 1972); United States v. Martinez, 43 CMR 434 (ACMR 1970). Thus, if the first link in the chain were to

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<sup>2/</sup> Two notable exceptions to this requirement are the prosecution's accountability for the time while in the mails and their accountability for the drug after chemical analysis when it is the lab report and not the item itself which is critical at trial. It might be prudent, however, for the prosecution to be prepared to prove chain of custody after analysis should the court order production of the substance for independent defense analysis. United States v. Kelly, 420 F. 2d 26 (2d Cir. 1969).

place the item in a sealed container 3/ and could so testify at trial, and the analyzing chemist could testify that when he received the item it was in the identical container and that the seal was still intact, the Government probably has done all it need do, regardless of how many persons handled the item in the interim. Absent some affirmative showing of tampering by the defense, the prosecution has met its burden.

The prosecution should not be allowed to rely upon the presumption of regularity to bridge an apparent gap in the chain of custody. Taken to its logical conclusion, such an approach would release the Government from any requirement to ever show proper handling of an exhibit in a criminal case, because every link in the chain is a public officer who is presumed to perform his duties properly. Although many decided cases cite the presumption of regularity, it is never relied upon in the absence of some other indicia of reliability. See Pasadena Research Laboratories v. United States, 169 F. 2d 375 (9th Cir. 1948); United States v. West, 359 F. 2d 50 (8th Cir. 1966). Furthermore, the Court of Military Appeals, last term, invoked a higher standard of proof in applying a presumption of regularity to support a criminal conviction. The Court held that there must be not only a rational connection between the fact proved and the fact presumed, but also the evidence necessary to invoke the presumption must be sufficient for a rational juror to find the presumed fact beyond a reasonable doubt. United States v. Mahan, 24 USCMA 109, 51 CMR 299 (1976). Particularly when the presumption relied upon is the crucial evidence used to establish an essential element of proof, the Government must meet the reasonable doubt standard.

#### Laboratory Report

In United States v. Evans, 21 USCMA 579, 45 CMR 353 (1972), the Court of Military Appeals rejected the defense position that the laboratory report was prepared principally for purposes of prosecution. The Court did not examine the question of a proper foundation for the introduction of the document as a business entry, i.e., proof that the lab report was in fact made as a memorandum or record in the regular course of that business. In fact, defense

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3/ In order to qualify as a sealed container, the seal must be of the type that any opening of the container would be obvious to one examining it. Zip-lock bags, staples, taped baggies and other similarly easily reclosed containers are not truly sealed.

counsel in Evans expressly waived objection to the laboratory report. In a recent Court of Military Appeals argument, Chief Judge Fletcher and Judge Perry expressed concern over this failure in a case where the chain of custody was litigated. They referred to the case of United States v. Wilson, 24 USCMA 139, 51 CMR 329 (1976), wherein Judge Ferguson wrote:

"It is clear to us that the witness through whom a party seeks to authenticate a document as a business entry must be one intimately familiar with the conduct of the firm's operation, for no one less familiar could supply the requisite assuredness that the contents of the record may be believed because it was made in the regular course of business." 51 CMR at 141.

Although a lab report may be admissible as a business record in lieu of the chemist's appearance at trial, it would appear that there will still be the need to authenticate the record by someone from the lab. The Court of Military Appeals giveth and the Court of Military Appeals taketh away.

#### Summary

Once a determination has been made to put the Government to the burden of proving the chain of custody, for whatever reason, counsel must be careful that the prosecution's evidence does in fact show that the item of evidence is the item connected with the case and that it is in substantially the same condition that it was in at the relevant point in time. In drug cases, this can only be done by proof of a chain of custody showing who had the item and how it was handled at all relevant times. If the police have had the foresight to place the item in a properly labeled and sealed container, the Government can successfully avoid the expense of calling unnecessary witnesses.

Whether or not the chain of custody is litigated, an objection to the lab report on the basis of a lack of authentication would always be appropriate in the absence of a qualified person from the lab to authenticate it.

In writing this article, the author has relied extensively on Imwinkelried, The Identification of Original, Real Evidence, 61 Mil. L. Rev. 145 (1973). The reader desiring a more thorough treatment of the subject of chain of custody should consult that source.

SECURING "BAIL" FOR A MILITARY CLIENT PENDING  
APPELLATE REVIEW OF A COURT-MARTIAL CONVICTION  
AND SENTENCE: LITIGATING UNDER ARTICLE 57(d).

The Court of Military Appeals sharpened its focus this term on the post-trial responsibilities of defense counsel, particularly counsel's duty to continue uninterrupted representation of a client's interests until he or she is judicially relieved. In United States v. Palenius, 25 USCMA 222, 231, 54 CMR 549, 558 (1977), Judge Perry commented for the Court on the importance of continued post-conviction legal representation in the following words:

...the trial defense attorney can and should remain attentive to the needs of his client by rendering him such advice and assistance as the exigencies of the particular case might require. An exhaustive review of the myriad duties in this area would be inappropriate. However, an example may be found in Article 57(d), UCMJ, 10 U.S.C. §857(d), which creates the right of deferment of sentence, upon application by the accused, in those instances in which the convening authority or the person having general court-martial jurisdiction chooses to grant such. (emphasis supplied)

This article concerns itself with Judge Perry's example, the right of sentenced military members to remain at liberty pending the outcome of appellate review, with particular emphasis on how trial defense counsel can most effectively secure that post-conviction remedy for his or her clients.

Is Deferment Functioning as Congress  
Intended in Current Military Practice?

The answer, unfortunately, is probably a resounding "no". Congress enacted Article 57(d) of the Code 1/ for the specific

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1/Article 57(d) of the Uniform Code of Military Justice, 10 U.S.C. §857(d) provides: (footnote continued on next page)

purpose of providing convicted servicepersons with an opportunity for release pending appellate review similar to release on bail pending appeal in the civilian courts. Compare Collier v. Ryan, 19 USCMA 511, 42 CMR 113 (1970), with Levy v. Resor, 17 USCMA 135, 37 CMR 399 (1966). As evidenced by the Senate Report accompanying proposed Article 57(d), Congress belatedly (1968) recognized the need for some type of post-conviction release in the military for reasons familiar to nearly all practicing military defense counsel:

...a convicted military prisoner must begin serving his sentence to confinement from the date it is adjudged, even though it ultimately may be reversed on appeal. If it is reversed by the Court of Military Appeals, the prisoner probably will have served the entire sentence by the time a decision is rendered. If reversal comes earlier, at the Court of Military Review level, he will at least have served several months of the sentence before reversal.

This amendment [57(d)] will correct this situation by authorizing a means of release from confinement during appellate review. Senate Report No. 1601, 90th Congress, 2d Session, as quoted in Collier, supra, at 42 CMR 117.

(footnote 1/ continued)

(d) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

Those potential injustices recognized by Congress in 1968 especially threaten military defendants today, when issues such as Burton 2/ - speedy trial, and McCarthy 3/ - jurisdictional defects may be raised and lost at trial, but ultimately won on appeal months and even years later. Obviously, prevailing on a speedy trial issue before the Court of Military Appeals a year or more after an adjudged prison sentence has been fully or partially served provides the accused with less than a full measure of relief.

In 1969, Article 57(d) made available a means by which such injustices and potential injustices could be avoided by empowering the convening authority "in his sole discretion" and "upon application by an accused" to defer service of any sentence to confinement until the appellate process is complete. In Collier v. Ryan, *supra*, the United States Court of Military Appeals held that one of the Act's principal purposes was to correct the long-standing defect in the military system -- that military prisoners often serve all or most of their sentences before they can be reversed on appeal. That Court further noted that Congress intended the deferment power to be used

After several years of reviewing records of trial at the appellate level, the author has never seen a case in which the appellant's sentence to confinement had been deferred pending completion of appellate review by the convening authority taking initial action on the record, nor has any such case been called to his attention. That is not to say it never happens but only that if it happens, it happens rarely. More often than not, field exercise of the deferment power is restricted to the period between trial and initial convening authority action. (Note: the convening authority exercising jurisdiction over the Disciplinary Barracks at Fort Leavenworth has occasionally deferred the remainder of sentences substantially served when convenient to obtain needed space, or where the prospect of appellate reversal appears to be certain.) That restricted, limited employment of the "military equivalent of bail pending appeal" is hardly what Congress intended. At

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2/ United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971).

3/ United States v. McCarthy, 25 USCMA 30, 54 CMR 30 (1976).

least some degree of the blame, however, belongs to those of us assigned as defense counsel, for we have infrequently raised the issue, and when we have, we have failed to enthusiastically litigate denials all the way to the Court of Military Appeals. Deferment can become a realistic option in military practice - if the right is insisted upon before the convening authority and in the courts.

"Sole Discretion" Does Not Necessarily  
Mean "Sole Discretion."

If Article 57(d) is clear on any point, it is clear in requiring the accused to apply for deferment as the first step in obtaining it. Having applied for deferment, the accused must then await the convening authority's decision, which, says the Code, will be made in his "sole discretion." Article 57(d) does not provide any hint as to the criteria the convening authority must consider, or the standards against which he must judge an applicant's eligibility for deferment, but some criteria or standards must exist, for the Court of Military Appeals has held that the exercise of his "sole discretion" is subject to judicial review "for abuse." Reed v. Ohman, 19 USCMA 110, 41 CMR 110 (1969). If "sole discretion" can be abused then, a fortiori, some test exists against which the exercise of discretion may be gauged. Hence, "sole discretion" does not necessarily mean "for any or no reason."

Where the Code is silent, the Manual is verbose. Borrowing heavily on the legislative history of Article 57(d), Paragraph 88f, Manual for Courts-Martial, United States, 1969 (Revised edition), sets out a number of criteria for the convening authority to consider in passing on a deferment application, including:

- a) all "relevant" factors;
- b) the "best interests" of the service and individual;
- c) the possibility that the offense might be repeated;
- d) the risk of danger to the community; and
- e) the risk of flight to avoid serving the sentence.

What is meant by the first two considerations is anybody's guess, which is somewhat reminiscent of Humpty Dumpty's Wonderland observation, "When I use a word it means just what I want it to mean...." Carroll, Through the Looking Glass, chapter 6. The last three criteria set out

in the Manual, however, closely parallel the standards governing admittance to civilian bail pending appeal, as set out in the Bail Reform Act of 1966. 4/

In the federal system denial of appellate release must be predicated upon a finding, by clear and convincing evidence, that one or a combination of specific factors has not been met: i.e. that if released the applicant would pose a substantial flight risk, or a substantial danger to others, or that the appeal he has taken is frivolous. Id., §3148; See generally U.S. ex rel Walker v. Twomey, 484 F.2d 874 (7th Cir. 1973). Additionally, not only is there a strong policy favoring release in the federal system, but the explicit reasons underlying a denial of bail pending appeal must be fully articulated. See United States v. Fields, 466 F.2d 119 (2d Cir. 1972); United States v. Bynum, 344 F.Supp. 647 (D.C.N.Y. 1972); Fed. R.App. P. 9(b).

Since the military deferment system was, in purpose, created in the image of the federal system, it logically and equitably follows that it ought to function in the same manner as well, at least to the extent possible. Some differences, such as the vesting of power in the convening authority rather than the trial judge 5/ to decide whether or not to release

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4/ 18 U.S.C. §3146, 3148, et. seq. Caution: do not make the mistake of arguing the direct applicability of the Bail Reform Act to the military. The definitions section (§3156) specifically exempts offenses triable by court-martial from the Act's protection. Whether the same standards set out in the Bail Reform Act should or should not govern a deferment decision made under Article 57(d) is, however, another question.

5/ Congressional wisdom in this regard may be questioned. The convening authority, removed as he is from the actual trial, is in a position far inferior to the trial judge with regard to making difficult evaluations as to risk of flight and danger. The trial judge's "observations and impressions from the trial at which he presided" render him most qualified of all those who play a part in the military justice system to make the deferment decision. In United States v. Stanley, 469 F.2d 576, 682 (D.C. Cir. 1972), the Court commented on the importance of detailed findings of fact and conclusions of law by a federal trial judge in a case involving denial of bail pending appeal as follows: (footnote continued on next page)

an applicant pending appeal have to be recognized by counsel, but those differences which are unnecessary and unjustified by the Code or its legislative history, such as the Manual's espousal of the first two criteria set out above must be challenged at every opportunity.

The validity of the "best interests of the service and applicant", and, "all relevant factors", as considerations to be weighed in ruling on a deferment application is currently under litigation in the Court of Military Appeals. Corley v. Thurman, Misc. Docket No. 77-18. The defense has taken the position that to the extent these criteria exceed the standards set out in the Bail Reform Act, which are the only appropriate standards by which appellate release has ever been judged in Anglo-American jurisprudence, they represent an illegal intrusion by the President into matters of substantive law, and, hence, are of no force or effect. Cf. United States v. Ware, 24 USCMA 102, 51 CMR 275 (1976). The Lawyer's Military Defense Committee of the American Civilian Liberties Union Foundation has entered an amicus appearance on the side of the petitioners in each of the three cases filed to date, <sup>6/</sup> taking an even broader view on the authority of the Court of Appeals to define the limits of convening authority discretion.

The argument that risk of flight and danger to the community are the only proper standards against which a deferment application may be considered is, interestingly enough, supported by the few decisions COMA has handed down in the area. While there is much dicta indicating a contrary view, nearly every deferment related case ultimately turned on whether

(footnote 5/ continued)

...the trial judge's familiarity with the case ordinarily enables ready association of the relevant facts in appropriate relationships with the criteria government release from custody. The judge's role in involving trial evidence and his observation of the accused's trial demeanor often imparts to those facts a significance not discernable from the paper record upon which bail decisions in appellate courts must be achieved. [footnote omitted].

<sup>6/</sup> See p. 15 infra; the first case was dismissed on release petitioner as moot, the second is probably moot at this writing for the same reason, and our most recent case is pending.

post-trial confinement was "necessary", and that decision always seemed to turn on a finding that the convening authority had reason to conclude that the applicant was or was not a flight risk, or a danger to the community. See Reed v. Ohman, supra; United States v. Daniels, 19 USCMA 518, 42 CMR 120 (1970); Green v. Wylie, 20 USCMA 591, 43 CMR 231 (1971); Collier v. Ryan, supra. Similarly, the argument that the Manual's exhortation to consider "all relevant factors" must be construed to mean "consider all factors relevant to deciding whether the applicant will flee or will pose a danger to the community if released," is supported by Green v. Wylie, supra. In that case the convening authority properly considered "all relevant factors" - the applicant's past juvenile record of incorrigibility, truancy, being a runaway, and drug abuse - to arrive at the dispositive conclusion ("sole discretion") that the applicant posed a substantial flight risk. The denial of deferment was upheld.

### Steps In Securing Deferment

The decision to seek deferment pending appeal is one that should be made only after careful consideration by both client and counsel. Deferment, like bail, is only a postponement. If the sentence is ultimately affirmed, the accused will have to serve it, and "later" is not necessarily better than "now". Deferment is useful primarily in those cases where there exists a legitimate chance of appellate reversal or modification of the sentence, and the accused is willing to gamble on that result by putting off commencement (and completion) of his sentence. Of course, the stronger the appellate issue, the less risk to the accused. Indeed, in clear Burton, Dunlap, or McCarthy situations the accused actually runs a greater risk of irreparable injury by serving his sentence for, once taken, the time he serves can never be returned. Deferment can also be utilized as a leg-up to future clemency action in the command. If the accused is highly successful in convincing his commanders of his rehabilitative potential during the period of deferment, he may encourage ultimate remission or suspension of the confinement before the appellate courts complete action on his case.

#### Step One - the Initial Application

The decision having been made, counsel should prepare an "application" for deferment. No set format is prescribed in either the Code or Manual, so whatever form is customary in the

local jurisdiction should prove acceptable. In the application, counsel should make as strong a case for his client as possible on three specific points:

1. the client poses no substantial flight risk;
2. the client poses no substantial danger to the community;
3. the appeal to be taken will be meritorious

Additionally, counsel should specifically note in his application that the accused considers release pending appeal to be in his "best interests" because he can contribute to his appellate effort more effectively if free, because there is a strong possibility that the appellate authorities will overturn his conviction or reduce the sentence, and because he does not wish to bear the risk of serving unnecessary time in prison. Counsel should also request that the convening authority state with particularity the grounds upon which he determines that release would not be in the "best interests" of either the accused or service, if that is to be the basis for denial of the application. And, generally, counsel should further request that the convening authority state with particularity what considerations led to his decision, if it is to be a denial. Compliance with these requests by the convening authority certainly won't be automatic, but compliance helps perfect the record for later appeal, and noncompliance looks rather arbitrary itself. Either way, your client's case is stronger on appeal if those requests are made in the initial application.

While every case is as unique as the accused, certain common factors should be considered when fashioning the argument supporting a deferment application. For example, when arguing that an accused poses no risk of flight, the lack of pretrial confinement, the accused's demonstrated reliability in keeping appointments, his good record, his family ties in the area, and the nature of the offenses, all are factors which may provide support. Absence of any danger to the community likewise can be shown by the nature of the offenses, if nonviolent, and, if violent, by demonstrating that the accused is a first time offender of otherwise good character, was drunk, was only involved as an accessory, or has demonstrated genuine remorse sufficient to indicate that he would not repeat his conduct. The merits of the appeal probably should not be a consideration in military practice since the Army Court of Review has the power to modify sentences in Article 66 cases for reasons of clemency alone. However, if strong issues exist they should be fully developed and the expected outcome detailed. Any other factors counsel can

think of that seem pertinent should be brought out and urged to be considered as relevant to the ultimate questions of whether the accused would flee or would pose a danger to the community, only.

### Administrative Appeal - Step Two

Assuming a denial from the convening authority, counsel then is faced with the task of perfecting an administrative appeal. If the accused's case qualifies for appellate review under Article 66 of the Code, that appeal must be taken to The Judge Advocate General of the Army. Paragraph 2-30b, AR 27-10 C16 (1975). (Mail to: The Judge Advocate General of the Army, HQDA (DAJA-ZA) Attn: HQDA (DAJA-CL) Washington, D.C. 20310). If the case does not qualify for Article 66 review, then the appeal must be taken to the next superior convening authority. Id. Again, since no particular format seems to be required, an appeal drafted in military letter fashion should be acceptable. The appeal ought to contain the same basic information as the initial application, as well as an allegation that the convening authority abused his discretion by denying the application in the first instance. "Abuse" for this purpose involves demonstrating by force of logic that on the evidence before the convening authority no reasonable man could have concluded that the applicant poses either a substantial flight risk or a substantial danger to the community. Success at this level doesn't come often, but once a denial of the appeal is received, the issues will be ripe for presentation to the military appellate courts in the form of a Petition for Extraordinary Relief (in the nature of a Writ of Habeas Corpus or Mandamus).

### Extraordinary Writ Petition to COMA

Experience dictates that anywhere from six weeks to four months will have passed since filing the initial application before counsel is ready to file a petition for extraordinary relief in the Court of Military Appeals. This delay, wholly unnecessary though it may be, is a fact of life under current practice. Counsel can and should build a record of resistance to this delay at every stage, including making a request for expeditious action in the COMA petition. No doubt the accused will be watching the progress of his release effort from inside the stockade fence. This delay is also one of the major reasons why field defense counsel must assume the primary responsibility for filing the initial application for deferment and following it through.

By the time an Article 66 case arrives at the appellate division, is assigned, and the client contacted, four months will have been lost. Adding that four months to the four months necessary to perfect a case for presentation to the Court of Appeals, and the deferment effort often becomes somewhat academic. By the time COMA issues a show-cause order, the Government responds, argument - even expedited argument is held, and a decision is rendered, most accused have long since been paroled or have served their sentence. Indeed, in both of the deferment related cases filed in the Court of Appeals in 1976, the petitioners were paroled before COMA could act. In DeStefano v. Thurman, Misc. Docket No. 76-76, the petitioner was released on parole on the day the Government was required to show cause why he should not be released. In Hyre v. Brady, Misc. Docket No. 76-71, petitioner was released on parole within two months of oral argument on his petition for writ of habeas corpus. Release from confinement does moot an issue of denial of deferment. Cf. Weber v. Squier, 315 U.S. 810, 62 S.Ct. 800, 86 L.Ed. 1209 (1942); Stallings v. Splain, 253 U.S. 339, 40 S.Ct. 537, 64 L.Ed. 940 (1920).

At the end of this article is a form petition for extraordinary relief in a deferment denial case. Petitions can be mailed directly to the Clerk, United States Court of Military Appeals, 450 E Street, N.W., Washington, D.C., 20001. BUT CAUTION: Court Rules require an original and four legible copies. Failure to comply results in return of the petition without so much as a docket number. Additionally, whether the appended form is used as a model or not, Rule 23A of the Court's Rules expressly requires that every petition for extraordinary relief contain:

1. Proof of service on the parties named as Respondents.  
(This can be accomplished by personal service or by attesting that a copy was mailed to each named Respondent on or before the date of mailing to the Court.)
2. A statement of facts necessary to understand the issues presented by the application for relief.
3. A statement of the issues presented.  
(In a deferment denial case this is, ultimately, whether or not the convening authority abused his discretion in denying deferment. The assertion that he did is supported by a showing that no reasonable man could conclude that the client poses either a substantial flight risk or a substantial danger to the community, and his appeal has some merit, if only clemency possibilities.)

4. A statement setting out the relief sought from the Court.  
(Release of the client pending completion of appellate review.)
5. The manner in which the relief sought is in aid of the jurisdiction of the Court.  
(Supervisory authority of the Court-McPhail v. United States, 24 USCMA 304, 52 CMR 15 (1976); and if the sentence is served before appeal is complete any error affecting the sentence could not be adequately redressed.)
6. Reasons why that relief is not available through the ordinary appellate process.  
(Every day awaiting appeal is a day of illegal confinement and of irreparable injury, extraordinary intervention is the only adequate method of redressing the ongoing deprivation of rights.)

In the normal case, assuming the Court requires the Government to respond, appellate defense counsel will be appointed to assist the field defense counsel, if necessary. (Due to the proximity of the appellate division to the Court of Appeals, local counsel can often facilitate the filing of pleadings, etc.)

#### Conclusion

Bail pending appeal, or at least something that might be close to it, does exist in military practice. Therefore, military appellants need not await appellate reversal of their conviction and sentence in jail anymore than civilian appellants. While obtaining "bail" pending appeal in the military takes much more time, and much more diligence on the part of defense attorneys, pursuing it can be interesting, challenging, and more important, of immeasurable benefit to some clients.

IN THE UNITED STATES  
COURT OF MILITARY APPEALS

Private E-1 LEM E. LOOSE, :  
000-000-000, U.S. Army, : PETITION FOR EXTRAORDINARY RELIEF  
[unit of assignment] : IN THE NATURE OF A WRIT OF HABEAS  
Petitioner : CORPUS, MANDAMUS, OR OTHER APPRO-  
: PRIATE RELIEF  
: :  
v. :  
: :  
Major General B. A. Rock, : Miscellaneous Docket No. \_\_\_\_\_  
Commander, Fort Dismal (con- :  
vening authority), and his :  
: :  
SUCCESSORS, and :  
: :  
THE UNITED STATES OF AMERICA :  
: :  
Respondents :  
: :  
:

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF  
MILITARY APPEALS:

COMES NOW your Petitioner, Private E-1 Lem E. Loose, by and  
through his undersigned counsel, and, pursuant to Rules 23A and  
44 of the Rules of Practice and Procedure of this Court, hereby  
petitions this Honorable Court for a Writ of Habeas Corpus or  
Mandamus, and other appropriate relief. His petition is based  
upon the fact that he is being wrongfully detained against his  
will in [state place of confinement], by order of the Respondents,  
in violation of Article 57(d), Uniform Code of Military Justice,  
10 U.S.C. §857(d), and Paragraph 88f, Manual for Courts-Martial,  
United States, 1969 (Revised edition).

### Statement of the Case

[Set out the following information: date of trial, type of court-martial, offenses, sentence, convening authority's action, if any, date application for deferment submitted to convening authority, date action was taken, decision, date administrative appeal was filed, date acted upon, result, petitioner's current status, and, status of appeal.]

Petitioner has thoroughly exhausted all available avenues of administrative relief, at great personal expense in terms of unwarranted and inexcusable delays, yet he remains unlawfully confined. Therefore, he now petitions this Honorable Court for the relief to which he is legally and equitably entitled: release from confinement pending appellate review of his case.

### Jurisdictional Basis

That this Court possesses the power under the All Writs Act to entertain a petition for, and issue, a Writ of Habeus Corpus, Mandamus, or any other appropriate writ that is "in aid of [its] jurisdiction and agreeable to the usages and principles of law" is now beyond question. 28 U.S.C. §1651(a) (1970); United States v. Frischholz, 16 USCMA 150, 36 CMR 306 (1966); See Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969). That this Honorable Court has the power to exercise supervisory authority over the administration of the military justice system, particularly as it relates to the incarceration of military service persons in contravention of the Code, whether pre- or post-trial, is also beyond question. Fletcher,

et al., v. Commanding Officer, \_\_\_ USCMA \_\_\_, \_\_\_ CMR \_\_\_ (1977),  
McPhail v. United States, 24 USCMA 304, 52 CMR 15 (1976); Kelly  
v. United States, 23 USCMA 570, 50 CMR 789 (1975); Collier v. Ryan,  
19 USCMA 511, 42 CMR 113 (1970). [IF APPLICABLE: Petitioner's  
case is currently pending appeal in the United States Army Court  
of Military Review and, depending on the result there, may well  
come before this Honorable Court pursuant to its ordinary juris-  
diction. Article 67, Uniform Code of Military Justice, 10 U.S.C.  
§867.]

#### Basis for Relief

It is respectfully submitted that in view of the purpose  
behind and the express provisions of Article 57(d) of the Code,  
the Commanding General, Fort Dismal, arbitrarily and capriciously  
denied Petitioner's application for deferment of sentence, and  
Petitioner is being unlawfully confined. That conclusion is com-  
pelled by the following:

- A. Petitioner is not likely to flee to avoid serving  
his sentence to confinement if released.

[State the reasons compelling such a  
conclusion by all reasonable men.]

- B. If released, Petitioner would pose no substantial  
danger to the community.

[State the reasons compelling such a  
conclusion by all reasonable men.]

C. Petitioner's appeal is not frivolous

[Briefly set out contemplated issues in the case, and, if none can be thought of, point out the clemency powers enjoyed by the Courts of Review and/or TJAG, as appropriate.]

D. The Respondent convening authority abused his discretion in that he arbitrarily denied Petitioner's application based upon improper considerations.

[This is useful as a catch-all. Set out here any complaints pertaining to the advice of the SJA on the application, the fact that the Manual is overbroad and inapplicable to the extent Paragraph 88f suggests that any criteria other than risk of flight and danger to the community can be used as a basis for denying an application for deferment, and stress that Petitioner has no idea what is meant by "best interests of the service", but does know it is not in his best interest to remain in confinement pending appeal.]

Plea for Expeditious Consideration

In the interests of fairness, and in order to avoid Petitioner's continued subjection to illegal confinement and the consequent irreparable injury he is suffering, Petitioner respectfully prays that Your Honors consider this matter forthwith.

Relief Requested

Having exhausted all available means of administrative relief without success, Petitioner hereby requests that this Honorable Court order Respondents to release him from confinement forthwith

until such time as the appellate review process is complete, or his sentence is served, whichever first occurs, and for any and all other relief which to this Court seems just and appropriate.

WHEREFORE, Petitioner respectfully prays that the relief sought be granted.

HARRY D. DILIGENT  
Captain, JAGC  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Extraordinary Relief was delivered [mailed] to each named Respondent on the \_\_\_\_ day of \_\_\_\_\_, 1977.

\_\_\_\_\_  
HARRY D. DILIGENT  
Captain, JAGC

[Prepare on 8 x 12-1/2, legal size paper].

RECENT OPINIONS OF INTEREST

COMA OPINIONS

EFFECTIVE ASSISTANCE OF COUNSEL

United States v. Palenius, 24 USCMA 222, 54 CMR 549  
(February 1, 1977) (Interim)

Appellant's trial defense counsel advised him to waive counsel on appeal to speed the review of the case. The counsel took no post-trial action, evidently to assure speedy review.

Judge Perry, writing for the Court, condemned the advice: it did not fully and properly advise the accused of his right to counsel on appeal. The accused must be advised of the powers of the Court of Military Review and appellate defense counsel's role in "causing those powers to be exerted." The Government failed to meet its "heavy burden" to show a waiver of appellate representation. Additionally, the trial defense counsel's representation during the post-trial stages was deemed inadequate.

In the second portion of the opinion, Judge Perry expressed concern about the fragmentation of representation of clients between trial and appeal. Joined by Chief Judge Fletcher, Judge Perry posited four sets of post-trial duties to remedy the problem:

- (1) The trial attorney must advise his client fully concerning the appeal process, to include intermediate reviews prior to review by the Court of Military Review, and must take the required action on behalf of his client during these reviews.
- (2) The trial attorney must assess the issues to be presented on appeal and relay them to both the client and the appellate attorney.
- (3) The trial attorney must render such advice and assistance as are required by the "exigencies." Deferment of sentence was cited as an example.
- (4) The trial attorney can only be relieved from representation by the court or judge having current jurisdiction and the request for withdrawal should only be submitted when a new trial defense counsel or the appellate attorney has assumed responsibility.

## JURISDICTION

United States v. Sims, 25 USCMA 290, 54 CMR 806  
(February 2, 1977) (Interim)

The appellant purchased what he knew to be stolen money orders from a fellow soldier on-post, and cashed them off-post using his military identification card. The Court dismissed the two forgery offenses as not service-connected, adhering to the Relford analysis. In the process, three bases for jurisdiction argued by the Government were rejected: 1) the "preponderant elements of the total criminal enterprise" test; 2) that the victim of the forgeries was a fellow serviceman and 3) that appellant's abuse of his military status was the "moving force" in the crime. Independently, these theories are not sufficient to establish service-connection.

## PUBLIC TRIAL - INSTRUCTIONS

United States v. Grunden, \_\_\_ USCMA \_\_\_, \_\_\_ CMR \_\_\_ (1977)

The majority held first, that the defense counsel's specific request of the military judge not to instruct on acts of uncharged misconduct did not relieve the military judge of the sua sponte duty to instruct on those matters.

The majority also held that the appellant was denied his Sixth Amendment right to a public trial because the military judge's exclusion of the public for forty per cent of the trial was not "narrowly and carefully drawn." The right to a public trial is not absolute, which requires the utilization of balance tests.

When the Government requests exclusion of the public, the judge must conduct a preliminary hearing to determine "whether the perceived need for the exclusion of the public is of sufficient magnitude as to outweigh 'the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.'" The Government must demonstrate the classified nature of the materials in question and delineate the portions of its case which are involved.

Special deference should be accorded matters of "national security." In this area, the judge may not exclude the public unless he is "satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged." It must be determined that the material was classified by the proper authorities in accordance with the appropriate regulations, but

upon timely motion the judge may rule on whether the classification was accomplished in an arbitrary and capricious manner. It is for the jury to decide the ultimate question whether the materials related to national defense could be used to injure the United States or aid a foreign country, but the defense may argue that even properly classified materials may have a "public nature" which prohibits exclusion of the public from trial.

Once an exclusion is granted, its scope must be properly limited in the sound discretion of the judge to only the affected portions of the witness's testimony and the military judge has a sua sponte duty to instruct the court on the reasons for such a bifurcated process.

#### PRETRIAL CONFINEMENT

United States v. Heard, USCMA, CMR  
(March 28, 1977) (Interim)

Twenty-two days of pretrial confinement imposed as a "matter of convenience" because the accused was a "pain in the neck" was held to be illegal. There was no threat to the safety of the community. No prejudice was found after sentence readjustment.

The Court's analysis of pertinent UCMJ provisions is significant. Article 9(d) of the Code controls whether an accused can be confined. Article 10 covers whether he should be confined and Article 13 controls the conditions of confinement.

The seriousness of the offense is not enough to justify pretrial confinement, rather, the confinement must be "compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom."

Two levels of inquiry are required before pretrial confinement may be imposed. First, the basis for ordering the detention; assuring presence at trial and the avoidance of future serious criminal misconduct, i.e. preventive detention. Second, whether there is the need for confinement to meet the exigency; i.e. only when less severe actions will not assure presence.

#### CMR OPINIONS

##### COURT MEMBER'S PRIOR KNOWLEDGE OF CASE - MILITARY JUDGE'S DUTIES

United States v. Lawrence, SPCM 12026, (ACMR 28 February 1977).

A court member orally posed a question which revealed prior knowledge of a search of appellant's room, which had been the

subject of a previously successful suppression motion. Upon trial counsel's motion, the judge struck the question, and instructed the court to disregard it, but made no inquiry of the court member.

The judge's error was twofold. Court members should submit their questions in writing. If this procedure had been followed, the judge could have sua sponte conducted an out-of-court hearing on the subject member's prior knowledge. As the judge failed on both counts, the Court of Military Review reversed because it could not ascertain whether the other members could render a fair and impartial verdict.

#### SEARCH AND SEIZURE - INFORMANTS

United States v. Wright, SPCM 12275 (ACMR 28 February 1977).

A unit drug informant who had provided information of questionable reliability in the past, told his first sergeant that the appellant had been seen attempting to sell drugs. When this information was relayed to the battalion commander, neither the informant's name nor the name of the person who had seen the attempted sale was divulged. Because the commander never determined whether the information was truthful or reliable, there was insufficient probable cause to search.

#### UNCHARGED MISCONDUCT

United States v. Woolery, CM 434673 (ACMR 25 March 1977).

With consent the only issue in this rape case, it was error for the military judge to instruct the court members that they could consider evidence of appellant's alleged sexual attacks on two other women to rebut the claim of consent. See, Lovely v. United States, 169 F.2d 386 (4th Cir. 1948). The court affirmed on other "overwhelming" evidence.

#### FEDERAL OPINIONS

##### IMPEACHMENT

United States v. Shoupe, 20 Cr. L. 2460 (6th Cir., 1/28/77).

The prosecutor impeached the witness with his prior and disavowed, unsworn oral statements through leading questions. These prior statements inculcated the defendant. The prior statements were reduced to memorandum form six days following their taking by the investigator, but the witness never verified them or otherwise attested to their contents.

While the trial judge conducted a limited voir dire to determine the reliability of the statements, he made no effort to procure the original notes from which the memoranda were transcribed, which is error when dealing with documents prepared by law enforcement personnel. Under the circumstances, the judge abused his discretion and abridged the defendant's right to a fair trial when he permitted the prosecutor to use leading questions to spread before the jury the entire substance of disavowed unsworn prior statements which, if believed, would be sufficient to sustain defendant's conviction.

PRETRIAL PUBLICITY

Commonwealth v. Brado, 20 Cr.L. 2468 (Pa. Supr. Ct., 1/28/77).

A manslaughter defendant raised intoxication as a defense at trial. On the morning of jury selection, a local newspaper editorial criticized a prior Pennsylvania Supreme Court decision allowing intoxication as a defense to certain crimes. The editorial did not refer to the defendant's trial. The defendant's motion for a continuance was erroneously denied. This editorial was "inherently prejudicial," thus there was no need to show a nexus between the publicity and actual jury prejudice. In fact, the defendant does not even have the burden to demonstrate that the publicity is inherently prejudicial.

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\* Commencing with Volume 9, Number 3, THE ADVOCATE will briefly \*  
\* note any new significant issues pending at the Court of \*  
\* Military Appeals. To bring field defense counsel up to date, \*  
\* a list of currently pending issues and recently decided cases \*  
\* is included with this mailing. \*

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NEXT ISSUE

VACATION OF SUSPENSION

UPDATE ON REQUESTING DEFENSE WITNESSES

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